IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
C.A. NO. 2317/2011

IN THE MATTER OF :

THE STATE OF PUNJAB AND ORS. .... PETITIONERS

Versus

DAVINDER SINGH AND ORS. ...
RESPONDENTS

Summary of Submissions

On behalf of Tushar Mehta, Solicitor General of India

EQUALITY IS A DYNAMIC CONCEPT – EVOLUTION TILL INDRA SAWHNEY

1. At the outset it is submitted that the Central Government is committed to the declared policy of reservation for backward classes as a measure of affirmative action to bring equality to those who have suffered hundreds of years of discrimination.

These submissions are limited only to the question referred to this Hon'ble Bench i.e. permissibility of sub classification and may not be treated as any dilution of the reservation policy of the Central Government and the Government continues to subscribe to its obligations of granting reservation as a means of achieving equality by such affirmative actions.

2. As an idea – "equality" and "non-arbitrariness" lie at the core of modern human society and any rule-based order. It is something uniquely innate to humans. The meaning of these twin concepts, grounded in Article 14, 15, 16 and other articles of the Constitution has gone through a long process of evolution. The provisions for equality in the Constitution, comprising of Article 15(1), 15(2), 16(1), 16(2) and Article 14 prohibit discrimination of grounds of religion, race, sex, caste or place of birth, equality of opportunity and non-arbitrariness respectively. Together, these provisions have been referred to as the '*equality code*' of the Constitution. Article 14 providing for equality of opportunity/protection and right against arbitrariness serves as the genus, while examining the critical issues concerning affirmative action.

3. It is submitted that the concept of "equality" and "equal treatment" under the Constitution are not static. Over the years, the concept and understanding of equality as envisaged under the Constitution has also evolved. The said process is continuous and dynamic and often responds to the changing forces of society and times. The development of the principle of equality starts from the judgment in ***State of Madras v. Srimathi Champakam Dorairajan*****, [1951]) S.C.R. 525** – wherein this Hon'ble Court expounded an

understanding of equality which rejected the "communal GO" which divided the entirety of the services into caskets for all. This Hon'ble Court further held, as per then prevailing understanding, that the Directive Principles – especially Article 46, would not come to the aid of the State while justifying reservations.

4. This Hon'ble Court thereafter, in ***MR Balaji v. State of Mysore,* 1963 Supp (1) SCR 439,** propounded an understanding of equality which was "formalistic" in nature and treated the provisions for reservations to be an exception to the Article 15 and Article 16.

5. This understanding went through an evolution through the 1970's and 1980's, which is best represented in the judgment in ***State of Kerala v. NM Thomas,* (1976) 2 SCC 310,** which for the first time propounded that the provisions of reservation are not an exception but an aspect of equality itself. Therefore, the idea behind affirmative action, was engrained in the equality code. Krishna Iyer, J., in ***N.M. Thomas* supra** notes that *constitutional law, can no longer "go it alone" but must be illumined in the interpretative process by sociology and allied fields of knowledge*. J. Iyer further notes that '*the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy*. J. Iyer further notes the caution of Friedmann - *"It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. [Law in a Changing Society — W Friedmann, p. 503] "*. In order to depict the evolutionary nature, J. Iyer notes that the assumptions which Friedmann makes are - "*First, the law is, in Holmes' phrase, not a 'brooding omnipotence in the sky', but a flexible instrument of social order, dependent on the political values of the society which it purports to regulate . . . . [Ibid, p. xiii [40 and 41 quoted in the Foreword by PB Gajendragadkar to Legal Education in India —Problems and Perspectives : by SK Agarwala, NM Tripathi, Bombay (1970)]]*"

6. The said understanding has been adopted and affirmed subsequently in ***Indra Sawhney & Ors. v. Union of India & Ors.*, 1992 Supp.(3) SCC 217,** stating that affirmative action provisions are a '*reinstatement of equality*'. The ***Indra Sawhney*** case also laid the jurisprudential basis to rationalise the overall SEBC quota scheme by reading in quantitative limitations and qualitative exclusions. The said evolution establishes that the understanding of equality and reservations within the equality code is not an unchanging one.

RATIONALISING FACTORS OF M NAGARAJ AND JARNAIL CASES

7. After the above-stated judgments, the constitutional text was amended by the Parliament in the exercise of its constituent power. Once the underlying text was changed, the interplay between provisions depicting "formalistic equality" viz. provisions depicting "substantive equality" underwent a gradual change. This has led to a "balancing" of forces between the varying forces within the *equality code*.

8. The ***Indra Sawhney*** case held that affirmative action in promotions of government employees, would be ultra vires the Constitution. Thereafter, through successive constitutional amendments, an enabling power was provided for *reservation in promotions*. Through the 90s, this Hon'ble Court developed service law doctrines of the '*pigeon hole rule*' and '*catch up principle*' to balance the effects of the constitution amendments. [See ***R K Sabharwal Vs St of Punjab*** **AIR 1995 SC 1371,** ***Union of India Vs Varpal Singh*** **AIR 1996 SC 448,** ***Ajitsingh Januja & Ors Vs State of Punjab*** **AIR 1996 SC 1189,** ***Ajitsingh Januja & Ors Vs State of Punjab & Ors*** **AIR 1999 SC 3471**]

9. The Parliament thereafter enacted the 77th, 81st, 82nd, 85th amendments, to reservation in promotions *with consequential seniority*.

The said constitution amendments came to be challenged and tested at anvil of the basic structure doctrine in ***M Nagaraj v. Union of India*****, (2006) 8 SCC 212**, which upheld the amendments but imposed restrictions on enabling power of the State under Article 16(4A) and 16(4B). The Court stated that a fresh objective exercise of collecting '*quantifiable data*' justifying reservation in promotions in terms of parameters of efficiency, backwardness [later overruled on this limited point] and inadequacy of representation in particular class or classes of posts, is necessary to extend reservation in promotions with consequential seniority. These perquisites added by this Hon'ble Court, were the limitations attached to the enabling power providing that the "*opinion of the State*" would have to be formed on objective, identifiable and quantifiable factors. The ***M Nagaraj*** case uses of the word 'compelling' in the context of the data numerous times, heightening the requirement for the quality, the relevance and the applicability of the data.

10. Thereafter, the judgment in ***M Nagaraj*** [**supra**] was referred to a five judge bench to examine its correctness on two counts:

A. First, being whether the controlling factor of the requirement of quantifiable data to establish backwardness of Scheduled Castes and Scheduled Tribes as a precursor to the exercise of power to provide for reservations in promotions is correct law; and

B. Second, being whether the concept of 'creamy layer' can be made applicable to the Scheduled Castes and Scheduled Tribes.

11. The said questions were examined in ***Jarnail Singh v. Lachhmi Narain Gupta*****, (2018) 10 SCC 396.** The bench in ***Jarnail*** [**supra**], answered the question by placing heavily relied on a passage in the ***N M Thomas*** case where J. Iyer states that he has three major apprehensions with reservations in general –

A. first being the danger of the benefits being snatched away by the creamy layer amongst the backward classes excluding the weaker sections;

B. second, being the claim to self-identification as backward being overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened but wish to wear the cloak of a weaker section as a means to compete with people in the general category; and

C. third, being the ignoring of the larger solution, which could come only from improvement of social environment, added educational facilities and cross-fertilisation of castes.

12. The judgment in ***Jarnail*** *Singh* [**supra**] refers to the broader object of amelioration of backward classes and clarifies that this cannot be achieved "*if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were.*" This, in essence, becomes the rationale to exclude the creamy layer within the Scheduled Castes and Scheduled Tribes from the benefit of reservation in promotions. Therefore, the Court in the ***Jarnail*** [**supra**], affirmed the validity of the application of the qualitative exclusion by way of creamy layer standard to reservations in promotions. This conclusion was grounded in the constitutional obligation of substantive judicial review and manifest arbitrariness.

13. The judgment in ***Jarnail*** [**supra**] highlights the apprehensions of ***NM Thomas*** [**supra**] almost half a century back in order to justify the rationalising attempt. The application of the qualitative check of "creamy layer" is nothing but a judicially imposed rationalising measure. Therefore, the developing trend of the Court has been to not see reservations as antithetical to equality but attempting to ensure that the benefits flow to the ones needing it and is not blocked by the few at the top within the backward classes.

14. In ***Jaishri Laxmanrao Patil v. State of Maharashtra,*** **(2021) 8 SCC 1**, the evolutionary aspect has been highlighted as under:

> *"27. Constitutional adjudication involves making choices, which necessarily means that lines have to be drawn, and at times redrawn* ***— depending on "the cauldron of change"*** *[A phrase used in Raghubir Singh, (1989) 2 SCC 754] . 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." [Legislative Purpose, Rationality, and Equal Protection, 82 Yale LJ 123 (1972). Cf. C. Perelman, the Idea of Justice and the Problem of Argument 1-60 (1963).]*
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> *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 : [Aharon Barak, The Judge in a Democracy, p. 132.]*
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> > *"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 [See generally Antonin Scalia, "Originalism : The Lesser Evil", 57 U Cin L Rev 849, 862-863 (1989).] . 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****."*

15. The constitutional vision of equality and equal opportunity is dynamic and evolving – not in substance but surely in form.

16. Post the judgment in ***Indra Sawhney*** [**supra**], there has been a rationalising and balancing the various aspects of reservations. The issue of sub-classification amongst SC/STs is also in essence, an issue of rationalising the affirmative action regime in the country. The enabling of sub-classification will enable targeted policy making by the State which will rationalise affirmative actions and enable its implementation for desired results. This shall have to be done without compromising the need for reservations and by merely changing the focus towards more backward amongst backwards and without changing the constitutional method even while carrying out sub classification.

FINALITY OF ARTICLE 341 IS UNAFFECTED

17. It is submitted that before adverting any further the enabling of sub-classification of SC/STs, it is necessary to clarify that sub-classification would not tinker with the finality of determination under Article 341 and Article 342. It is submitted that there is a fundamental difference in the exercise of identification vs. the exercise of extending reservations to the said identified class. The said two exercises are sequential in nature and the process of identification, as encapsulated in Article 341/342, precedes the process of actual extension of reservations at the Central level or the State level. It is submitted that therefore, the argument that sub-classification hinders the finality encapsulated in Article 341 is misplaced as the said exercises are separate.

18. It may be noted that Article 341(1) empowers the President of India to specify, in consultation with the Governor of the State, with respect to the State or Union Territory, or for a part of the State, District or region by public notification specify castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be "Scheduled Castes" in relation to the State or Union Territory as the case may be. Clause (2) of Article 341 empowers Parliament by law to include in or exclude from the list of Scheduled Castes specified in the notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. In other words, the constitutional mandate is that it is the President who is empowered, in consultation with the Governor of the State, to specify by a public notification the caste, race or tribe or parts or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. Similar provisions exist for Scheduled Tribes.

19. It is humbly submitted that State Government or even the Hon'ble Courts, in their constitutional jurisdiction, have no power except to give effect to the notification issued by the President under Article 341. It is settled law that the Court would look into the public notification under Article 341(1) or Article 342(1) for a limited purpose. The notification issued by the President and the Act of Parliament under Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and the Schedules appended thereto can be looked into for the purpose to find whether the castes, races or tribes are parts of or groups within castes, races or tribes shall be Scheduled Castes for the purposes of the Constitution. The power of the President and the Parliament in this regard is conclusive to the exclusion of all other bodies. In ***B. Basavalingappa Vs D. Munichinnappa,*** **(1965) 1 SCR 316** [5 judges], held as under :

> *"5. Clause (1) provides that the President may with respect to any 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 the Constitution be deemed to be scheduled castes in relation to that State. The object of this provision obviously is to avoid all disputes as to whether a particular caste is a scheduled caste or not and only those castes can be scheduled castes which are notified in the order made by the President under Art. 341 after consultation with the Governor where it relates to such castes in a State. Clause (2) then provides that Parliament may by law include in or exclude from the list of scheduled castes specified in a notification issued under cl. (1) any caste, race or tribe or part of or group within any caste, race or tribe. The power was thus given to Parliament to modify the notification made by the President under cl. (1). Further cl. (2) goes on to provide that a notification issued under cl. (1) shall not be varied by any subsequent notification, thus making the notification by the President final for all times except for modification by law as provided by cl. (2).* ***Clearly, therefore, Article 341 provides for a notification and for its finality except when altered by Parliament by law.*** *The argument on behalf of the appellant is based on the provisions of Art. 341 and it is urged that a notification once made is final and cannot even be revised by the President and can only be modified by inclusion or exclusion by law by Parliament.* ***Therefore, in view of this stringent provision of the Constitution with respect to a notification issued under cl. (1) it is not open to anyone to include any caste as coming within the notification on the basis of evidence-oral or documentary- if the caste in question does not find specific mention in the terms of the notification.*** *It is, therefore, urged that the Tribunal was wrong in allowing evidence to show that Voddar caste was the same as the Bhovi caste mentioned in the Order and that the High Court was in error when it held on the basis of such evidence that Voddar caste was the same as the Bhovi caste specified in the Order and therefore, respondent No. 1 was entitled to stand for election because he belonged to Voddar caste which was the same as the Bhovi caste."*

20. In ***State of Maharashtra v. Milind,*** **(2001) 1 SCC 4 [5 judges]**, it was held as under :

> *"**10.** Articles 341 and 342 of the Constitution of India read as under:*

"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.

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."

11. *By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.*

12. *Plain language and clear terms of these articles show (1) the President under clause (1) of the said articles may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union*

Territory as the case may be; (2) under clause (2) of the said articles, a notification issued under clause (1) cannot be varied by any subsequent notification except by law made by Parliament. ***In other words, Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under clause (1) of the said articles. In including castes and tribes in Presidential Orders, the President is authorised to limit the notification to parts or groups within the caste or tribe depending on the educational and social backwardness. It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness.*** *The States had opportunity to present their views through Governors when consulted by the President in relation to castes or tribes, parts or groups within them either in relation to the entire State or parts of State. It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules.* ***In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament.*** *Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to modify or vary the said Orders. If that be so, no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful.*

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15. *Thus it is clear that States have no power to amend Presidential Orders. Consequently, a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. Number of persons in order to gain advantage in securing admissions in educational institutions and employment in*

State services have been claiming as belonging to either Scheduled Castes or Scheduled Tribes depriving genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. ***Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular caste or tribe was to be included in the Presidential Order. If the said Orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems.*** *In order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart, when no other authority other than Parliament, that too by law alone can amend the Presidential Orders, neither the State Governments nor the courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included.* ***A court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be let in, in relation to a particular caste or tribe to say whether it is included within Presidential Orders when it is not so expressly included.***

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35. *In order to protect and promote the less fortunate or unfortunate people who have been suffering from social handicap, educational backwardness besides other disadvantages, certain provisions are made in the Constitution with a view to see that they also have the opportunity to be on par with the others in the society. Certain privileges and benefits are conferred on such people belonging to Scheduled Tribes by way of reservations in admission to educational institutions (professional colleges) and in appointments in services of State. The object behind these provisions is noble and laudable besides being vital in bringing a meaningful social change. But, unfortunately, even some better-placed persons by producing false certificates as belonging to Scheduled Tribes have been*

capturing or cornering seats or vacancies reserved for Scheduled Tribes defeating the very purpose for which the provisions are made in the Constitution. ***The Presidential Orders are issued under Articles 341 and 342 of the Constitution recognising and identifying the needy and deserving people belonging to Scheduled Castes and Scheduled Tribes mentioned therein for the constitutional purpose of availing benefits of reservation in the matters of admissions and employment. If these benefits are taken away by those for whom they are not meant, the people for whom they are really meant or intended will be deprived of the same and their sufferings will continue. Allowing the candidates not belonging to Scheduled Tribes to have the benefit or advantage of reservation either in admissions or appointments leads to making mockery of the very reservation against the mandate and the scheme of the Constitution.***

36. *In the light of what is stated above, the following positions emerge:*

1. It is not at all permissible to hold any inquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the entry concerned in the Constitution (Scheduled Tribes) Order, 1950.

2. The Scheduled Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.

3. A notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by Parliament. In other words, any tribe or tribal community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under clause (1) of Article 342 only by Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunals or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under clause (1) of Article 342.

5. Decisions of the Division Benches of this Court in Bhaiya Ram Munda v. Anirudh Patar [(1970) 2 SCC 825 : (1971) 1 SCR 804] and Dina v. Narain Singh [38 ELR 212 : (1968) 8 DEC 329] did not lay down law correctly in stating that the inquiry was permissible and the evidence was admissible within the limitations indicated for the purpose of showing what an entry in the Presidential Order was intended to be. As stated in Position (1) above no inquiry at all is permissible and no evidence can be let in, in the matter."

21. The said proposition has been affirmed in ***Bir Singh v. Delhi Jal Board*, (2018) 10 SCC 312 [5 judges]; *Nityanand Sharma v. State of Bihar*, (1996) 3 SCC 576 ; *State of Maharashtra v. Mana Adim Jamat Mandal*, (2006) 4 SCC ; *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar*, (2008) 9 SCC 54 ; *Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala*, (1994) 1 SCC 359 ; *Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India*, (2007) 5 SCC 360 ; *S. Swvigaradoss v. Zonal Manager, F.C.I.*, (1996) 3 SCC 100.**

THE PURPOSE BEHIND RESERVATIONS

22. It is submitted that the sub-classification furthers the actual purpose behind reservations. It is submitted that the *legitimate state aim* behind reservations is to support the backward classes who have had a history of discrimination of centuries and aiming to provide equality of opportunity. In ***Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1**, it was held as under :

> *"**Para 6 and 9:** **Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution.** In the context of education, any measure that promotes the sharing of knowledge, information ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university education, without ever being able to realise it. This advantage is necessary. However, the fact remains that any reservation or preference shall not lead to reverse discrimination.*
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> ***Para 280:** The necessary ingredients of equality essentially involve equalisation of unequals. Linked with this question the problem posed by the petitioners is whether reservation is the only way to equalise unequals? There are several methods and modes. If reservation really does not work as contended by the petitioners, then the alternative methods can be adopted. It is the stand of the respondents that not only reservations but other incentives like free lodging and boarding facilities have been provided in some States."*

23. Similarly in ***M. Nagaraj and Others v. Union of India and Others*, [(2006) 8 SCC 212]**, it was held as under :

> *"**Para 39:** Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti- poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.*
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> ***Para 40:** Our Constitution has, however, incorporated the word "reservation" in Article 16(4) which word is not there in Article 15(4). Therefore, the word "reservation" as a subject of Article 16(4) is different from the word "reservation" as a general concept."*
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> **Para 48:** *It is the equality "in fact" which has to be decided looking at the ground*

reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination."

24. Therefore, if the aim of the State and the Constitution is to provide parity, equality of opportunity and social and economic mobility of the backward classes/castes in need, enabling of sub-classification would ensure that benefits are extended to persons more in need of the said benefits by carefully apportioning the reserved quota within the reserved class. The unit of social and economic mobility is family – nuclear or joint. The rationalizing of reservation through enabling of sub-classification of quota for SC/STs would further the guarantee of social justice and further enable the State to penetrate into the lower segments within the backward classes.

25. It is submitted that this Hon'ble Court, has on numerous occasions, noted the need to allow the State to frame appropriate policy which enables the rationalizing and re-distribution of reservation benefits. In ***State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310**, it was noted as under:

"124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).] , the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time,

"test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one."

26. Similarly in ***Chebrolu Leela Prasad Rao v. State of A.P.*, (2021) 11 SCC 401**, a bench of 5 judges, held as under :

"165. In our opinion, it was rightly urged by Dr Rajeev Dhavan that the Government is required to revise the lists ***. It can be done presently without disturbing the percentage of reservation so that benefits trickle down to the needy and are not usurped by those classes who have come up after obtaining the benefits for the last 70 years or after their inclusion in the list.*** *The Government is duty-bound to undertake such an exercise as observed in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and as constitutionally envisaged. The Government to take appropriate steps in this regard."*

27. Previously in ***R. Chitralekha v. State of Mysore*, 1964 SCC OnLine SC 88**, it has been held as under :

"20. ***This interpretation will carry out the intention of the Constitution expressed in the aforesaid articles. It helps the really Backward Classes instead of promoting the interests of individuals or groups who, they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced.*** *To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, and effective minority may be socially and educationally for more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate producer laid down by the Constitution***."*

28. In ***K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714**, it was held as under:

"25. A few other aspects for rejecting caste as the basis for identifying social and educational backwardness may be briefly noted. If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. The assumption that all members of same caste are equally socially and educationally backward is not well-founded. Such an approach provides an over-simplification of a complex problem of identifying the social and educational

backwardness. The Chairman of the Backward Classes Commission, set up in 1953, after having finalised the report, concluded that "it would have been better if we could determine the criteria of backwardness on principles other than caste". [***Backward Classes Commission Report, Vol. I, Ch. XIV]*** ***Lastly it is recognised without dissent that the caste based reservation has been usurped by the economically well-placed section in the same caste. To illustrate, it may be pointed that some years ago, I came across a petition for special leave against the decision of the Punjab and Haryana High Court in which the reservation of 21/2 per cent for admission to medical and engineering colleges in favour of Majhabi Sikhs was challenged by none other than the upper crust of the members of the Scheduled Castes amongst Sikhs in Punjab, proving that the labelled weak exploits the really weaker****. Add to this, the findings of the Research Planning Scheme of sociologists assisting the Mandal Commission when it observed: "while determining the criteria of socially and educationally backward classes, social backwardness should be considered to be the critical element and educational backwardness to be the linked element though not necessarily derived from the former". [Part 3, Appendix XIII, p. 99 of the Report of the Team] The team ultimately concluded that "social backwardness refers to ascribed status, and it considered social backwardness as the critical element and educational backwardness to be the linked though not derived element". The attempt is to identify socially and educationally backward classes of citizens. The caste, as is understood in Hindu Society, is unknown to Muslims, Christians, Parsis, Jews etc. Caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the aforementioned communities though economic backwardness would."*

29. In ***Indra Sawhney v. Union of India*****, 1992 Supp (3) SCC 217**, it was held as under :

"608. After applying these tests the economic criteria or the means-test should be applied. Poverty is the prime cause of all backwardness. It generates social and educational backwardness. But wealth or economic affluence cuts across all. ***A wealthy man irrespective of caste or community needs no crutches****. Not in 1990 when money more than social status and education have become the index****. Therefore, even if a group or collectivity is not educated or even socially backward but otherwise rich and affluent then it cannot be considered backward. There is no dearth of class or group who by the nature of the occupation they have been pursuing are economically well off. Including such groups would be doing injustice to others****. Thus occupation should furnish the starting point of determination of backward class. And if in ultimate analysis any Hindu caste is found to be occupationally, socially, educationally and economically backward it should be regarded as eligible for benefit under Article 16(4) because it would be within constitutional sanction."*

30. In light of the above, it is submitted that the enabling of sub-classification of SC/ST and other backward classes, would provide the Central Government and the State Government, with the appropriate free-play in joints, to frame appropriate policy in furtherance of the high constitutional ideal of social justice, which seeks to achieve de-facto equality of opportunity.

PROPOSITION FOR THE PRESENT PURPOSE

31. After discussing the broad jurisprudential basis for the enabling of sub-classification of quota for SC/STs, the following propositions emerge :

A. The concept of **EQUALITY OF OPPORTUNITY OPERATES AT A DUAL LEVEL** – between open category and backward classes – and secondly, it has to operate even within the backward classes *interse*.

This bundling together of SC/STs by ***E.V. Chinnaiah Vs. State of A.P.*** **(2005 (1) SCC 394)** which disempowers the State to frame appropriate policy by sub-classifying the zone of reservation appropriately, diminishes the constitutional guarantee of equality of opportunity. It is stated that the lack of sub-classification perpetuates the zone of inequality within the reserved category and estops the State from framing appropriate policy in this regard.

B. It is also relevant to notice the nature of reservations. The Constitution permits reservations at the level of higher education, entry-level in the government service sector and promotion in the government services. The persons who would most likely be capable to take benefit of this earmarking of seats/posts would be persons who are relatively "forward" within the backward class.

C. It may also be noted that the reservation benefits available are limited in nature. The State can only provide for a limited number of seats in government higher education institutions and posts in the government services which are reserved.

The said seats and the posts are even otherwise a *scare commodity* [See ***M Nagaraj*** **(supra)**] and therefore required to be re-distributed rationally. Considering the scarce nature, it is important that the community is **DISTRIBUTED EFFICIENTLY AND FOR THE ACTUAL PURPOSE IT SEEKS TO ACHIEVE**.

D. In order to achieve the actual objective behind reservations, the rationalisation is key [while maintaining the levels and extent of reservations] and **PROLIFERATION AND DEEPENING OF THE RESERVATION BENEFITS IS NECESSARY**. The sub-classification of the said benefits is a key measure which goes a long way to achieve the said objective. This ensures that there is a trickle-down effect of reservations.