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

IN THE MATTER OF:

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

Versus

Davinder Singh & Ors. **… Respondents**

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WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT STATE OF PUNJAB

"I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of ***the poorest and the weakest man/woman*** *whom you may have seen, and ask yourself,* ***if the step you contemplate is going to be of any use to him/her****. Will he/she gain anything by it? Will it restore him/her to a control over his/her own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and yourself melt away."*

- Mahatma Gandhi - The Last Phase, Vol. II (1958), p.65

A. INTRODUCTION

A brief history of affirmative action in India: Articles 15(4) and 16(4)

1. The present batch of appeals is concerned with the constitutionality of various legislations/measures taken by State Governments/Legislatures to earmark a portion of their quota specified for the Scheduled Caste category for certain castes *within* the Scheduled Caste category, on a preferential basis.

2. The drafters of the Constitution were acutely aware of the inherent inequality ingrained in the Indian society. As such, the need for positive discrimination in public spaces for historically and socially oppressed groups, including members of the Scheduled Castes, remained an important consideration for the Constituent Assembly as well as the provisional Parliament. The bare text of the original Constitution and the first amendment thereto in 1951 solidified an understanding that equality and non-

discrimination must be read so as not to preclude affirmative action, or in other words, reservation in favor of the marginalized.

3. Article 16(4) formed a part of the original Constitution and Article 15(4) was inserted by way of the Constitution (First Amendment) Act, 1951. Articles 15(4) and 16(4) collectively oblige the State to (i) make special provisions for the advancement of, *inter alia*, the Scheduled Castes; and (ii) take affirmative action for citizens of backward class who are inadequately represented in the State services.

4. Article 15(4) was introduced through the Constitution (First Amendment) Act, 1951. This was prompted by the Supreme Court's decision in ***State of Madras v. Champakam Dorairajan (AIR 1951 SC 226*)**, where it allowed a challenge to the reservation policy of the Madras State in higher education. The Court rejected the submission that the State was enjoined to make special provisions for educational and economic interests of weaker sections, on the ground that Fundamental Rights under Part III of the Constitution could not be abridged by any State action, except to the extent provided in Part III itself.

5. The Court found that the reservation policy discriminated on the basis of religion and caste. The object behind the introduction of Article 15(4) was to empower the State to make such special provisions for the advancement of socially and educationally backward classes of citizens despite Articles 15(1) and 29(2).

6. Dr. B.R. Ambedkar, during the debate in Parliament, captured the necessity of the amendment in the following words: "*Now the point has to be borne in mind that in Article 46 of the Directive Principles an obligation has been laid upon the Government to do everything possible in order to promote the welfare and the interest of what are called the weaker sections of the public by which I understand to mean the backward classes or such other classes who are for the moment not able to stand on their legs – the scheduled castes*

and the scheduled tribes. It is therefore incumbent not merely on the Government but upon this Parliament to do everything in its hands to see that Article 46 is fulfilled and if that fulfillment is to come. I cannot see how one can escape an amendment so as to prevent Article 29 Clause (2) and Article 16 Clause (4) being interpreted in the way in which it has been interpreted and being made to block the advancement of the people who are spoken of as the weaker class. That is the necessity for amending Article 15."

7. In the words of Prime Minister Nehru, the reference to "socially and educationally backward classes" was made since the phrase "occurred in Article 340". He noted further that "*We have to deal with the situation where for a variety of causes for which the present generation is not to blame, the past has responsibility, there are groups, classes, individuals, communities… who are backward. They are backward in many ways – economically, socially, educationally – sometimes they are backward in one of these respects and yet backward in another. The fact is therefore that we wish to encourage them… we had to do something special for them*." As to what constituted such classes, Dr. B.R. Ambedkar, then Law Minister, and also a part of the Select Committee where the Bill was debated, observed that the amendment was required because "*what are called backward classes … are nothing else but a collection of certain castes*."

8. Article 16 (Draft Article 10), on the other hand, was debated and adopted by the Constituent Assembly on 30 November 1948. Dr. Ambedkar gave a detailed defence of the normative justification behind the provision:

"*I should like to begin by making some general observations so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by*

all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative–and it ought to be operative in their judgment to its fullest extent–there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that, although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a `proper look-in' so to say into the administration. If honourable Members will bear these facts in mind–the three principles, we had to reconcile,–they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now–for historical reasons–been controlled by one community

or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services." (Emphasis supplied).

9. While Part XVI of the Constitution makes it incumbent upon the State to make special provisions for certain classes in the Lok Sabha and the elected State legislatures, it is the fundamental right of equality guaranteed under Articles 15(4) and 16(4) which have been at the forefront of securing reservation for the marginalized in avenues of public education and employment. However, the original intent behind securing reservation- that is, achievement of an equitable society- cannot be achieved unless the effect of reservation deepens and actually reaches the most needy

Chinnaiah: A Brief Background

10. ***E.V. Chinnaiah v. State of A.P. and Ors. (2005) 1 SCC 394*** (***Chinnaiah***) involved a challenge to the validity of the Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000, which was previously upheld by a Full Bench (majority of 4:1) of the Andhra Pradesh High Court. The Act was in pursuit of the findings of the J. Ramachandra Raju Commission. It divided 57 castes from the Presidential List into 4 groups on inter se backwardness and fixed separate quotas in reservation for each of the groups. This was then applied to the 15% reservation for backward classes in educational institutions under Article 15(4), and for the Scheduled Castes in State services.

11. The Majority opinion was given by N. Santosh Hegde, J. (for himself, S.N. Variava, and B.P. Singh, JJ.). Concurring opinions were delivered by S.B. Sinha, J and H.K. Sema, J. Three main issues were framed in *Chinnaiah*: (i) whether the impugned Act violated Article 341(2); (ii) whether the State lacked competence to enact the impugned Act; and (iii) whether the sub-classification violated Article 14 (**¶12**).

12. *Chinnaiah* struck down the impugned Act for the following reasons:

(a) *Violation of Article 341(2)* – Only the Parliament can include/exclude from the Presidential List as per Article 341(2). There is no other provision allowing the State to sub-classify. Thus, Constitutional intent was to treat all castes in the List as part of one group (**¶13, 19, 87**). Further, Scheduled Castes under the List have nothing in common except that the President has found them to be "*the lowliest and in need of massive State aid*." (**¶24, 26**).

(b) *Lack of legislative competence* – Pith and substance analysis shows that the Impugned Act is only meant to redistribute benefits of reservation. Once the State has already made reservations, it cannot subclassify a class already recognized in the Constitution. There is no legislative power to do so under Entry 41 List II or Entry 25 List III (**¶31, 96**).

(c) *Violation of Article 14* – Principle of *Indra Sawhney* – where sub-classification into 'backward' and 'more backward' was permitted, would be inapplicable here as the judgment confines its own application solely to OBCs. SCs and STs are separate classes where interference is not permitted by State Governments (**¶38, 76**). The State's duty is only to decide the extent to which reservation is to be made, and *not* to subclassify in order to give preference to a miniscule proportion of SCs over other members of the same class (**¶39**). The SCs are already the most backward of the backward classes, and it is already presumed that they are inadequately represented under Article 16(4) (**¶43**).

The judgment in Chinnaiah needs a Relook

13. The Constitution prescribes a method to centrally identify a list of Scheduled Castes for each of the States. Thereafter, once the list of Scheduled Castes (or any changes

thereto) has been notified by the President/approved by the Parliament, Articles 15(4) and 16(4) spring into action to secure State intervention for the collective social upliftment of this block.

14. What is of significance, and the crux of the present litigation, is that this State-specific list of Scheduled Castes is not an indistinguishable monolith: it is a diverse conglomeration of castes with historically and socially imposed hierarchy *inter-se.* While it is not in dispute that the Scheduled Castes have been discriminated against historically, it does not obliterate the fact that there exists disparity and discrimination *within and amongst* the castes specified in the list of Scheduled Castes. However, *Chinnaiah* does not permit the Union or the States to probe into this list: In other words, the Executive and the Legislature are not permitted to examine, and consequently remedy, the graded inequality *within* and *amongst* the specified list of Scheduled Castes.

15. Philosopher Amartya Sen conceptualizes justice as a continuous struggle against real life situations of injustice in order to promote equity. Thus, in order to address questions of justice, there needs to be active engagement with the lived realities of people and the inadequacies of one set of lives can be demonstrated by comparing them with other lives. If justice were to be understood and sought in this material sense, any interpretation of the Constitution which defeats the possibility of social and political justice is *prima facie* perverse to its basic structure.

16. It is our considered submission, therefore, that as we approach the 75th year of the adoption of our Constitution, constitutional provisions securing reservations for the marginalized require an institutional imagination which deepens the impact of reservations and *de facto* benefits all those who are sought to be benefited. Needless to

say, the constitutional logic of *Chinnaiah* which treats the State-specific list of Scheduled Castes as an indivisible block warrants a relook, and setting aside. Only a reading which offers the highest possible benefits to the least advantaged members of society can help the Constitution truly realize its transformative nature and extend the material benefits of affirmative actions to the proverbial last citizen.

B. BRIEF BACKGROUND OF THE PUNJAB SCHEDULED CASTES AND BACKWARD CLASSES (RESERVATION IN SERVICES) ACT, 2006

Scheduled Castes under the Constitution

17. Scheduled Castes were first mentioned in British India's Government of India Act 1935 and were provided benefits by the British colonial government and some princely states. Article 366 (24) defined "Scheduled Castes" as meaning 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.

18. In the Indian Constitution, Scheduled Castes and Scheduled Tribes are explicitly mentioned in twelve separate Articles. (Arts 15, 16, 46, 164, 330, 332, 334, 335, 338, 341, 342, and 366.) Scheduled Castes number 16.6 per cent of the population, and include 1,206 main castes that were considered untouchable within the stratified Hindu caste system.

Social Survey and the 1975 Letter

19. The history of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 ("**2006 Act**") is about the State's efforts towards realizing the unfolding vision of the Constitution, by providing equality of opportunity and economic justice to the suppressed classes listed in the Constitution (Scheduled Castes) Order, 1950.

20. Prior to the Punjab Vidhan Sabha and Vidhan Parishad Sessions in 1964-65, there was a growing demand for an exercise to be undertaken to evaluate the implementation of schemes implemented to benefit members of the SCs, backward classes, and *vimukta jatis*. This demand was a reiteration of earlier proposals - for instance, the Estimates Committee of the Parliament, in 1959, had advised that there ought to be an evaluation cell for this purpose. Similar suggestions were made by the Public Accounts Committee of the Punjab Legislature in its 15th Report on the Appropriation Accounts of the Punjab Government, 1959-60, and in the 1961-62 Annual Report of the Commissioner, Scheduled Castes and Scheduled Tribes, Government of India.

21. In view of these demands, the Punjab Government issued Government Notification No. 11079-WGI-ASO2-65/35291 on 07.12.1965, appointing the Evaluation Committee on Welfare of Scheduled Castes, Backward Classes and Vimukta Jatis (hereinafter referred to as the "**Brish Bhan Committee**") under the leadership of Shri Brish Bhan, M.L.A. The 15-member Committee comprised distinguished M.P.s, M.L.As, and M.L.C.s. Its terms of reference included critically appreciating the "*various instructions issued by the Government, from time to time, for reservations in educational institutions and services (both at the time of recruitment and in promotion) and assess as to how far these have been successfully implemented.*"

22. The Brish Bhan Committee released its report on 31.08.1966 (hereinafter referred to as the "**Brish Bhan Committee Report**"). One of the findings of the Report was that the position of scavengers and sweepers remained downtrodden despite concessionary schemes of the State. These communities were found to be in a self-perpetuating cycle, as economic scarcity forced the children of scavengers and sweepers to forego their education and earn money by engaging in their hereditary occupations from a young

age. The Brish Bhan Committee Report recommended a slew of measures to alleviate their position: including grant of stipends for children, regular medical tests for persons engaging in scavenging and sweeping, organising labour co-operatives and credit societies in every colony etc. For the purposes of the present appeal, the Brish Bhan Committee Report also recommended that "*5 per cent reservation out of 21 per cent should be exclusively earmarked for scavengers. The facts prove that scavengers are the main losers in availing of the concessions given by the Government.*"

23. The Brish Bhan Committee Report led the Secretary to the Government of Punjab, Welfare of Scheduled Castes and Backward Classes Department to issue a letter dated 05.07.1975 (hereinafter referred to as the "**1975 Letter**"). It directed that 50% of the vacancies in the quota reserved for members of the SCs would be offered to *Balmikis* and *Mazhabi Sikhs*, if available, as a first preference from amongst the SC candidates. *Balmikis* and *Mazhabi Sikhs* are groups that have been associated with the traditional occupation of sweeping and scavenging.

24. The 1975 Letter was subject to several challenges in writ petitions before the Punjab and Haryana High Court. As there were conflicting decisions, the matter was taken up by the Full Bench of the Court, which ultimately upheld the 1975 Letter in ***Kanwaljit Singh Sidhu v. State of Punjab, (1980) 3 SLR 34 (2)(FB)***. The High Court found that there were two conditionalities attached to the State's power under Article 16(4) of the Constitution. First, the citizens must belong to a 'backward class', and second, the share of this class in the Services is so meagre that it requires weightage. The Court noted that various castes which fall under the umbrella of SCs are backward classes, but they would not all qualify for preferential treatment under Article 16(4) either *qua* non-backward classes or *inter se*. In a situation where a 'scheduled caste' comprises

five groups, three of them having three times as much representation individually as the remaining two, it would be open for the State to give preferential treatment to the underrepresented sections whose presence is grossly inadequate.

25. The Court further rejected contentions that the preference amounted to differentiation on the basis of caste, noting that the dominant criteria for grant of preference was the social and educational backwardness of persons belonging to *Balmiki* or *Mazhabi Sikh* caste. They also had to satisfy the additional objective and 'secular' requirement of inadequacy of representation in Government services.

Position Post Chinnaiah

26. In 2005, a Constitution Bench of this Court rendered its decision in *Chinnaiah,* striking down an Andhra Pradesh legislation which sub-classified members of the SCs into four groups based on *inter se* backwardness and fixed separate quotas in reservation for each of the groups. On the basis of this decision, the legality of the 1975 Letter was reagitated through writ petitions filed before the Punjab and Haryana High Court. These were decided in ***Attar Singh Dhoor v. State of Punjab (CWP N. 15302 of 2005 (O&M))***, where the High Court struck down the 1975 Letter on the principle that the issue of preferences in reservations was fully covered by this Court's pronouncement in *E.V. Chinnaiah*.

27. After the High Court's decision in *Attar Singh Dhoor*, the then Chief Minister of Punjab chaired a meeting on 10.08.2006, and a unanimous decision was taken to enact the 2006 Act and provide a preference to *Balmikis* and *Mazhabi Sikhs* amongst vacancies for SCs. The Statement of Objects and Reasons of the 2006 Act reiterated the finding of the Brish Bhan Committee Report that the representation of the aforesaid

castes in Class I, II, III, and IV services had been found to be inadequate. The 2006 Act was thus notified on 05.10.2006.

28. The 2006 Act was subsequently challenged in writ petitions before the Punjab and Haryana High Court, which led to the judgment in ***Devinder Singh v. State of Punjab and Anr.*** **CWP No. 18290 of 2009 (O&M)**, in which the High Court reiterated that the 2006 Act was contrary to this Court's findings in *E.V. Chinnaiah*, and struck down Section 4(5) of the same as unconstitutional.

Before this Hon'ble Court

29. In the present batch of appeals, a three-judge Bench of this Court, *vide* its order dated 20.08.2014, found that *Chinnaiah* needed to be revisited in light of the nine-judge Bench decision in ***Indra Sawhney v. Union of India, 1992 Suppl. (3) SCC 217*** (***Indra Sawhney***) and referred the matter to a larger Bench of this Court.

30. Thereafter, on 27.08.2020, the Reference Order, *inter alia,* found the following reasons to refer the question to a Seven-Judge Bench:

    (i) This Court in *Indra Sawhney* had found that it was permissible to make sub-classifications within Socially and Educationally Backward Classes. The logic behind such sub-classification should extend to members of the SCs, Scheduled Tribes, and Other Backward Classes as well, since they all stood on a similar footing. This inference was further fortified by insertion of Article 342A, which was *pari materia* to Articles 341 and 342.

    (ii) This Court in ***Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors. (2018) 10 SCC 396*** had found that the concept of the 'creamy layer' could be applied to members of the SCs, and the same would not amount to tinkering with the

Presidential List under Article 341 of the Constitution as the said castes would remain in the list.

(iii) There was material to show that benefits were not being distributed equally and the State could not be deprived of the power to take these differences into account.

(iv) Considering members of the SCs as a homogenous class would lead to *de facto* inequality for castes such as *Balmikis*, whose deprivation had remained constant despite measures taken for their upliftment; and

(v) States were best placed to find disparities in different areas and devise equitable methods to allocate the benefits of reservation.

C. CONSTITUTIONAL REFERENCE

31. By its judgment dated 27.08.2020, a 5-Judge Bench of this Court in ***State of Punjab v. Davinder Singh (2020) 8 SCC 1*** (**Reference Order)** held that the decision in *Chinnaiah* is required to be revisited by a larger Bench.

32. The Appellant submits that the constitutional issues in *Chinnaiah* which require adjudication by this 7-Judge Bench are three-fold:

(i) Whether sub-classification of the SC List to earmark a portion of the quota for the Scheduled Castes for certain specific castes within the SC List on a preferential basis is constitutionally permissible;

(ii) Whether States have the power to create these sub-classifications; and

(iii) Whether Article 335 limits the scope of interpretation of Article 16(4).

33. In this regard, Appellant submits that the judgment in *Chinnaiah* is erroneous and contrary to the existing jurisprudence on reservations. In other words, Sub-classification of the SC List to earmark a portion of the quota for the Scheduled Castes

for certain specific castes within the SC List on a preferential basis is constitutionally permissible on four counts:

(i) Preferential treatment of marginalized groups within the SC List furthers substantive equality over formal equality, as only sub-classification of the SC List will reconcile the *inter-se* social realities of the Scheduled Castes with the constitutional position;

(ii) Sub-classification does not fall foul of the scope of Article 341;

(iii) States have an obligation as well as the legislative competence to provide preferential treatment within the SC List; and

(iv) Article 16(4) has to be given a broad interpretation, especially in view of Article 335.

D. PREFERENTIAL TREATMENT OF MARGINALIZED GROUPS WITHIN THE SC LIST FURTHERS SUBSTANTIVE EQUALITY OVER FORMAL EQUALITY

Chinnaiah itself recognises the inter-se disparities within the SC List

34. The judgment in Chinnaiah makes the same judicial fallacy as the ill-fated verdict in *State of Madras v. Champakam Dorairajan 1951 SCC 351 (**Champakam**)*. In *Champakam*, the non-discrimination and equality provisions of the Constitution were simplistically interpreted to strike down reservations in higher education. The Court erred in understanding the real import of Articles 15(1) as well as 29(2), which collectively intended to secure non-discrimination- and by extension, equality of opportunity in favour of marginalised groups. Not only did *Champakam* consider these provisions in isolation, it also took a facile view of equality and non-discrimination so as to preclude affirmative action reservation.

35. In fact, the legal logic propounded in *Chinnaiah* is antithetical to the logic of reservations, which mandates protective discrimination in favour of marginalised groups to realise the ideal of equitable justice. Any interpretation of the Constitution consistent with the aforesaid idea would warrant a meticulous examination of the relative backwardness of the different castes comprised *within* the list of Scheduled Castes.

36. One of the primary contradictions in Justice S.B. Sinha's separate but concurring judgment in *Chinnaiah* is that while it recognises the *inter-se* disparity within the Scheduled Castes, it declares the State's (in that particular case, Andhra Pradesh) attempt to remedy it as unconstitutional:

> *"**114**. There is one practical aspect of the matter which may not also be lost sight of. The chart produced before us clearly: shows that the members belonging to Relli and Adi-Andhra are hardly educated. What was necessary in the situation was to provide to them scholarships, hostel facilities, special coaching, etc., so that they may be brought on the same platform with the member of other Scheduled Tribes, viz., Madiga and Mala, if not with the other backward classes. It is not in dispute that members belonging to Relli are hardly educated. Only 2% of the members of the said community have studied in secondary school. No one has ever been admitted in any engineering discipline or other professional disciplines. The said facts clearly go to show that providing reservation for them in engineering or medical discipline or in public service would not solve their problem. Without such basic education, the members belonging to the said community would not be getting admission either in the engineering or medical colleges or other professional courses and as such the question of their joining public service may not arise at all. Now, even for the post of Class IV employees, qualification of passing matriculation examination is provided. Unless children of the said community are educated, the provision for both for education as also public service would be a myth for them and ultimately in view of the impugned legislation for all intent and purport, the benefit thereof would go to other categories. The State, in our opinion, should take positive steps in this behalf."*

37. In holding that sub-classification of the SC List would violate Article 14, while simultaneously recognising the *inter-se* comparative backwardness within and

amongst the SC List(***Para 41***), *Chinnaiah* adopts a formalistic understanding of equality which does not take into account the inherent disparities between similarly placed groups.

38. On the other hand, once the plurality and relative backwardness within and amongst the SC List has been factually established, sub-classification of the reservation quota for the SC List would be an exercise in securing substantive equality to the Scheduled Castes for the following reasons:

    (i) It fits within the substantive equality framework as propounded by this Court;

    (ii) It will reconcile the *inter-se* social realities of the scheduled castes with the constitutional position;

    (iii) It is based on the principle of qualitative inclusion and embodies the Rawlsian doctrine of 'justice as fairness'; and

    (iv) It secures transcendental as well as comparative justice for the members of the Scheduled Castes.

Sub-classification fits within the substantive equality framework as propounded by this Court

39. Equality in law, or formal equality, advocates that equality of opportunity only requires elimination of legal obstacles towards ensuring a level-playing field. On the other hand, equality in fact, or substantive equality, requires the additional elimination of all relevant differences directly attributable to inequalities in social conditions. The substantive equality framework, takes into account a much broader range of influencing factors, looking beyond the basics to recognise differences between groups of people.

40. This Court's verdict in ***State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 (NM Thomas)*** exemplifies the application of formal vis-a-vis substantive equality in the context of affirmative action in India:

> *"**53**. Formal equality is achieved by treating all persons equally: "Each man to count for one and no one to count for more than one." But men are not equal in all respects. The claim for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallised privileges. Although the decision to grant equality is motivated prima facie by the alleged reason that all men are equal yet, as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, we realise that the opposite is the truth; for, we think that it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. We, therefore, have to resort to some sort of proportionate equality in many spheres to achieve justice.*
>
> *...*
>
> ***62**. It is clear that one is not really offering equality of opportunity to X and Y if one contents oneself with applying the same criteria to X and Y. What one is doing there is to apply the same criteria to X as affected by favourable conditions and to Y as affected by unfavourable but curable conditions. Here there is a necessary pressure to equal up the conditions. To give X and Y equality of opportunity involves regarding their conditions, where curable, as themselves part of what is done to X and Y and not part of X and Y themselves. Their identity for this purpose does not include their curable environment, which is itself unequal and a contributor of inequality. (see Williams, The Idea of Equality)*
>
> *...*
>
> ***65**. Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains in so far as, and only in so far as, each member of a community, whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence.*
>
> ***66**. The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims…"*

41. In *Indra Sawhney*, this Court again observed that the principle of substantive equality underlines the policy of reservation:

> *"**146**. The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of societal discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally."*

42. While upholding the constitutional validity of Articles 16-4A and 16-4B in ***M. Nagaraj v. Union of India, (2006) 8 SCC 212 (Nagaraj)***, which brought in sub-classification in favour of Scheduled Castes and Scheduled Tribes, this Court relied on the principle of substantive equality:

> ***114**. In Indra Sawhney, the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-`-vis the rights of BC en bloc consisting of OBC, SC and ST. On the other hand, in the present case the question which we are required to answer is: whether within the egalitarian equality, indicated by Article 16(4), the sub-classification in favour of SC and ST is in principle constitutionally valid. Article 16(4A) is inspired by the observations in Indra Sawhney vide para 802 and 803 in which this Court has unequivocally observed that in order to avoid lumping of OBC, SC and ST which would make OBC take away all the vacancies leaving SC and ST high and dry, the concerned State was entitled to categorise and sub- classify SCs and STs on one hand vis-`-vis OBC on the other hand…*
>
> ***115.** Therefore, while judging the width and the ambit of Article 16(4A) we must ascertain whether such sub- classification is permissible under the Constitution. The sub-classification between "OBC" on one hand and "SC and ST" on the other hand is held to be constitutionally permissible in Indra Sawhney. In the said judgment it has been held that the State could make such sub- classification between SCs and STs vis-`-vis OBC. It refers to sub-classification within the egalitarian equality (vide paras 802 and 803). Therefore, Article 16(4A) follows the line suggested by this Court in Indra Sawhney . In Indra Sawhney on the other hand vide para 829 this*

Court has struck a balance between formal equality and egalitarian equality by laying down the rule of 50% (ceiling-limit) for the entire BC as "a class apart" vis-`-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4A) which is carved out of Article 16(4).

116. *As stated above, Article 14 enables classification. A classification must be founded on intelligible differential which distinguishes those that are grouped together from others. The differential must have a rational relation to the object sought to be achieved by the law under challenge. In Indra Sawhney5 an opinion was expressed by this Court vide para 802 that there is no constitutional or legal bar to making of classification. Article 16(4B) is also an enabling provision. It seeks to make classification on the basis of the differential between current vacancies and carry-forward vacancies. In the case of Article 16(4B) we must keep in mind that following the judgment in R.K. Sabharwal the concept of post-based roster is introduced. Consequently, specific slots for OBC, SC and ST as well as GC have to be maintained in the roster. For want of candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. Therefore, by Article 16(4B) a classification is made between current vacancies on one hand and carry-forward/backlog vacancies on the other hand. Article 16(4B) is a direct consequence of the judgment of this court in R.K. Sabharwal by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4A) and 16(4B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4A) and 16(4B) together form part of the same scheme. As stated above, Articles 16(4A) and 16(4B) are both inspired by observations of the Supreme Court in Indra Sawhney and R.K. Sabharwal. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4A) and 16(4B). The impugned constitutional amendments, therefore, do not obliterate equality."*

43. In *Nagraj*, this Court again distinguished between formal equality and substantive equality and held that Article 16(4) illustrates equality in fact rather than in law:

*"**120**. At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity…"*

44. This Court has, therefore, consistently held that there is no reason to curb a practice that adopts a standard of proportional equality which takes into account the differing and regressive conditions and circumstances of a class of citizens which have hampered their equal access to the enjoyment of basic rights or claims. The guarantee of equality in the constitutional paradigm whether before the law or in matters of employment is greater than what is required by formal equality. It requires differential treatment of persons who are unequals. As an exercise of egalitarian principles, the government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims.

45. Hence, it is seen that formal equality of opportunity tolerates significant inequalities that are caused by differences in social conditions and natural talents due to its advocacy of a non-interventionist, minimal State. However, an approach rooted in substantive equality would not tolerate these inequalities and instead, would only deem equal opportunity to be given if social inequalities were also checked by an interventionist, proactive State.

46. The concept of substantive equality embodied in Articles 15 and 16 would expect that States take affirmative action in favour of the disadvantaged sections of the society within the framework of a liberal democracy. Equality in fact or egalitarian equality would justify steps taken to give preferential treatment to a class of society such as reservation by way of sub-classification to those castes within the SC List which are relatively backward and/or inadequately represented when compared to other castes within the SC List.

47. In view of the aforesaid principles, a material assessment of 'backwardness' and 'inadequate representation' for the purposes of Articles 15(4) and 16(4) would invariably require an individualised and distinctive assessment of representation of each of the Scheduled Castes enumerated in the SC List. Only a sub-categorisation of inadequately represented Scheduled Castes within the SC List can help the State ascertain specific information regarding their religion, social and educational status, occupation, household assets and life expectancy.

48. This factual determination of the extent of marginalisation of each of the Scheduled Castes within the SC List is central to targeted welfare/developmental programs, measures of resource redistribution and increasing representation of historically marginalised groups in State services. A sub-classification within the SC List would meet the requirement of substantive equality over mere *prima facie* equality, as it would not take a simple formalistic view of marginalisation but a more meaningful view which accounts for marginalisation of groups *within* the SC category.

49. Article 14 permits classification which is based on real and substantial distinction, that is, 'reasonable'. This Court has consistently held that classification is allowed as long as there are (i) substantial differences which distinguish persons grouped together from those left out of the group; and (ii) such differential attributes bear a just and rational relation to the object sought to be achieved.

50. It is submitted that sub-classification within the SC List which is based on substantial differences with an object to emancipate the *most* backward groups within and amongst the SC List would only further the mandate of Article 14, which endeavours to provide material equality and not just superficial equality. It is a fundamental canon of our equality jurisprudence that like should be treated alike and unlike should not

be treated alike. Articles 15(4) and 16(4) are also informed by the aforesaid precept. This is also the fundamental constitutional logic behind reservations, which dictates that treating unequals alike furthers discrimination instead of leading to equality.

51. Thus, once there is substantial data to prove that certain castes comprised *within and amongst* the SC List are 'unlike' the others on account of their relative backwardness, a further classification of these castes with an object to alleviate their marginalisation shall be well within the contours of Article 14.

Sub-classification will reconcile the inter-se social realities of the scheduled castes with the constitutional position

52. Studies across the country have recognised the *de facto* inequality within the SC List. Various Commission reports from different states, after collecting and scrutinising exhaustive empirical data, also highlight the local hierarchy within the Scheduled Castes based on social status, worth, value and in some instances, even *inter-se* untouchability within the Scheduled Castes. Commissions established by various other States have also come to the conclusion that within the SC groups in those states, there exist grave disparities on various aspects. An illustrative list of such commission reports is provided below:

(i) **Haryana**: In 1990, the Government of Haryana appointed a 'Backward Classes Commission' headed by Justice Gurnam Singh. The Commission found that reservation benefits had been majorly availed by one particular Scheduled Caste and the overall benefits were not percolating down to rest of the other 36 Scheduled Castes. Consequently, on the basis of its recommendations, the 'reservation list' in Haryana came to be divided into Block 'A' and Block 'B', eventually putting the

aforesaid 36 Scheduled Castes in Block 'A' and the one other Scheduled Caste (and its sub-groups) in Block 'B'.

(ii) **Tamil Nadu**: Justice Thiru MS Janarthanam Committee in 2008 concluded that the term does not constitute any homogenous group – as evidenced by the fact that the castes listed under Article 341(1) have wide variations in cultural, social and traditional aspects. In fact, the Arunthathiyar community are considered to be untouchables even by other Scheduled Castes. The Committee accordingly recommended that the Arunthathiyars need and deserve differential treatment in the reservation of posts and admission/appointment in educational institutions – having a material nexus with the objective of bringing them to a level playing field with other Scheduled Castes.

(iii) **Andhra Pradesh**: In 1996, the Andhra Pradesh Government had appointed the Justice P.Ramachandra Raju commission to inquire into whether a disproportionately large number of benefits have gone to a particular castes within the Scheduled Castes. If so, the commission was to indicate all such steps as are necessary and required to be taken to ensure that the above benefits are equally distributed amongst the various castes within SCs. The Commission recommended steps to distribute the benefits equitably amongst the SCs, by dividing the 15 percent reservation proportionately according to the population amongst them. Accordingly, the state government categorised them broadly into Relli, Madiga, Mala, and Adi Andhra group of communities.

(iv) **Karnataka**: The Sadashiva Commission constituted in 2005 to look into the need for and means of sub-classifying Scheduled Caste reservations in Karnataka recommended the division of the 101 castes in the Scheduled Castes list into four

categories. Based on this categorisation, the then 15% reservation for Scheduled Castes in state employment was to be divided according to each group's proportion in the population. The commission's press release implied that the non-Holeya, non-Madiga 'untouchable' castes were the most underprivileged of all the castes on the list.

(v) **Bihar**: In 2007, the Bihar Government set up the State Mahadalit Commission to identify the castes within Scheduled Castes who lagged behind in the development process and to study educational and social status and to suggest measures for their upliftment. The Commission recommended inclusion of 18 castes as the extremely weaker castes amongst the list of Scheduled Castes.

(vi) **Uttar Pradesh**: In the year 2001, the State of Uttar Pradesh appointed a committee headed by Sri Hukam Singh which factually found that the benefits of reservation was not percolating down to the most depressed classes. Thereafter, the committee recommended that sub-categorization of the list of Scheduled Castes.

(vii) **Maharashtra**: In 2003, the Government of Maharashtra appointed the commission of Lahuji Salve to study the socio-economic condition of the Mang caste, one of the major castes within the SC List. The Mangs, being the lowest in the hierarchy of the caste system, are also lowest within Dalits in Maharashtra. The Lahuji Salve Commission recommended, *inter alia*, the sub-classification of the reservation quota for the Scheduled Castes.

(viii) **Justice Usha Mehra Commission Report**: After the decision of the Supreme Court in *Chinnaiah*, Government of India appointed one member commission – 'National Commission To Examine The Issue Of Sub -Categorization of Scheduled Castes in Andhra Pradesh' headed by Justice Usha Mehra vide resolution dated 15th

November, 2006 by the Ministry of Social Justice and Empowerment. The Usha Mehra Commission filed its report in May 2008 and endorsed the need for the reclassification of Scheduled Caste reservation.

This Court has recognized de facto inequality within the SC List

53. In ***M.R. Balaji v. State of Mysore (AIR 1963 SC 649)***, a Constitution Bench of this Court held that any class ought to be as backward as SCs and STs to be included within the ambit of a backward class *qua* Article 16(4). However, the majority in *Indra Sawhney* (opinion authored by Jeevan Reddy, J. for Kania, C.J., Venkatchaliah, J, Ahmadi, J. and himself, judgments of Sawant, J, and Thommen, J.) rejected the conditionality proposed by *M.R. Balaji*, i.e. that a class necessarily ought to be as backward as SCs and STs in order to qualify as a backward class *qua* Article 16(4).

54. In particular, Reddy, J.'s opinion noted that the backwardness of SCs and STs could not be a relevant yardstick or an index of comparison as SCs and STs were not monolithic or consistent entities themselves. This was for the reason that "*neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes were similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated*" (¶795) (*emphasis supplied*). In other words, this Court in *Indra Sawhney* recognised that the SC category itself was an internally diverse category and the different castes comprising SCs were not equally placed *inter se*.

55. Notably, *Chinnaiah*, on the basis of the material placed before the Court, also recognized *de facto* inequality amongst SCs. In light of the findings of the Justice Ramchandra Raju (Retd.) Report, the Court noted that the members of *Relli* and *Adi Andhra* communities amongst SCs in Andhra Pradesh were 'hardly educated', with only a miniscule number having attended secondary school. These communities had

also been unable to secure any public employment as the basic qualification for public service was matriculation (*S.B. Sinha, J.*, ¶*114*). Despite noting this disparity, *E.V. Chinnaiah* held that SCs constitute a homogenous category unto themselves. Not only is this conclusion internally contradictory, it is contrary to *Indra Sawhney's* dictum that SCs are an internally diverse category.

This Court has recognized the logic of sub-classification and providing preferences in reservation

56. The State has the prerogative to provide additional classification and preferential treatment to chosen sub-classes within a broader class of beneficiaries. In fact, providing such preferential treatment would be constitutionally necessary if the aforementioned sub-classes are lagging behind or are not placed equally with their counterparts from within the same class.

57. As a prelude, it is necessary to note that a majority in *Indra Sawhney* (judgment authored by Jeevan Reddy, J., ¶743 for himself and three others, and opinion authored by Sawant, J., ¶447 for himself), recognized that Article 16(4) was <u>not</u> exhaustive of the concept of reservations in favour of backward classes. The Court found that the "larger concept of reservations" under Article 16(4) also included within its sweep other supplemental types of provisions such as "<u>preferences</u>, concessions and exemptions" (emphasis supplied), with a view to make the main provision of reservation effective, i.e. to ensure that the members of the reserved classes fully avail of the provision for reservation in their favour (¶*743*).

58. In the context of sub-classification, the majority in *Indra Sawhney* held that the macro class, i.e. 'backward classes' under Article 16(4), could be sub-categorised into smaller micro-classes, i.e. 'backward' and 'more backward' (Kania, Venkatchaliah,

Ahmadi, Reddy, Sawant, Thommen, JJ.). To support this conclusion, the judgment authored by Jeevan Reddy, J. in *Indra Sawhney* granted its *imprimatur* to the following observations of Chinappa Reddy, J. in ***K.C. Vasanth Kumar v. State of Karnataka*** **(1985 Supp SCC 714) (Vasanth Kumar)**: "***55.*** *... we do not see why on principle there cannot be a classification into backward classes and more backward classes, if both classes are not merely a little behind, but far far behind the most advanced classes. In fact such a classification would be necessary to help the more backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes might walk away with all the seats, just as, if reservation was confined to the more backward classes and no reservation was made to the slightly more advanced backward classes, the most advanced classes would walk away with all the seats available for the general category leaving none for the backward classes. All that we can say is that sub-classification may be permissible if there are classes of people who are definitely far behind the advanced classes but ahead of the very backward classes*." (emphasis supplied)

59. Building upon Chinnappa Reddy, J.'s observations, Jeevan Reddy, J's plurality opinion in *Indra Sawhney* suggests two reasons to sub-classify amongst backward classes. *First,* the term 'backward classes' *qua* Article 16(4) comprised SCs, STs, and OBCs, even as the three groups were seemingly aggregated within a single grouping. If reservations were made without considering the sub-composition of the group 'backward classes'; it was likely that the OBCs would avail of a majority of the reservation opportunities, thereby depriving the SCs and STs of their share. *Second*, and most importantly, there were internal differences between castes as they were being included within a sub-category. To illustrate - the Mandal Commission adopted

a points-based criteria whereby any caste which scored eleven or more points was considered a backward class. However, castes would have scored a <u>different</u> number of points, and it could not be claimed that a caste which scored 22 points was equal to a caste which scored 12 (¶*802*).

60. While *Indra Sawhney* explicitly permitted sub-classification amongst backward classes, i.e. into 'backward' and 'more backward', the Court's reasoning has wider implications. The Court's use of the Mandal Commission example illustrates that there are compelling reasons to sub-categorise or provide preferences <u>within castes comprising a micro-class,</u> i.e. castes enumerated in the Presidential Order under Article 341. This would comport with the Court's broader justification for sub-classification - to ensure equitable distribution amongst backward classes so that one or two of such classes do not eat away the entire quota (¶*803*).

61. The logic of sub-classification within a micro-class also comports with the reasoning of Mathew, J. in ***State of Kerala v. N.M. Thomas, (1976) 2 SCC 310***: "**83.** *A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. <u>It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is</u>*

to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons." (Emphasis supplied)

62. Additionally, while the second reason behind permitting sub-classification - pertaining to internal differences within castes in a sub-category - was recorded in the context of backward classes, the same inference can also be readily extended to castes in another sub-category, i.e. SCs. Pertinently, the plurality in *Indra Sawhney* expressed no reservations in this regard.

63. The massive anthropological and empirical data across States points to anything but homogeneity within the SC List. It is clear from the above then, that sub-classification within the SC List would take into account social realities of the SC category to ensure that the benefit of reservations trickle down to those castes within the SC List which have faced maximum discrimination and have hitherto been excluded from educational institutions and State services owing to their acute backwardness.

Sub-classification within the SC List is based on the principle of qualitative inclusion which embodies the Rawlsian doctrine of 'justice as fairness'

64. John Rawls, the legal philosopher, has based his idea of 'justice as fairness' on two fundamental principles: while the first principle would require equality in the assignment of basic rights, liberties and duties, the second principle would state that social and economic inequalities would only be just if they result in compensating benefits for everyone, and in particular for the *least advantaged* members of the society.

65. Hence, the second principle incorporates the iconic idea of the 'difference principle', that inequality would be permissible if used to serve the interests of the least advantaged members of society. This 'difference principle' has been used to invoke

and justify and endorse systems of affirmative action, in particular, race-based affirmative action in educational institutions.

66. According to the 'difference principle', a marginal benefit for a single worst-off person should be preferred to an enormous gain in well-being that would be enjoyed by many better-off persons. This policy of prioritising the truly disadvantaged or the worst-off is termed as the 'priority view' in Rawlsian scholarship. Hence, affirmative action policies, as well as other policies that are required to achieve equality, under the 'difference principle', are required by justice when, but only when, they can be expected to work effectively to benefit the truly disadvantaged, the worst-off whose interests should be assigned special priority according to the priority view. Thus, affirmative action can only be justified under the 'difference principle' when it is structured to benefit those members of communities that are the *most disadvantaged*.

67. Sub-classification of the most disadvantaged within the SC List, therefore, is an exercise in qualitative inclusion which endeavours to locate where the actual social and economic inequalities reside. It is imperative to note that while doing so, the aforesaid sub-classification takes a departure from the application of the creamy layer principle. This is on four counts:

(i) *Firstly*, economic mobility used in creamy layer criteria does not really offset the social discrimination that the Scheduled Castes suffer;

(ii) *Secondly*, the creamy layer principle was applied in *Indra Sawhney* (*¶847 Reddy, ¶522, Sawant, ¶629 Sahai*) and ***Jarnail Singh and Ors. vs. Lachhmi Narain Gupta and Ors. (2018)10 SCC 396 (Jarnail Singh)*** *(¶26*) to exclude 'socially advanced persons' so that the class, i.e., 'backward class' can be accurately framed. On the other hand, sub-classification seeks to provide the

benefits of affirmative action to a class *within* the SC List which faces the maximum degree of social discrimination;

(iii) *Thirdly*, once the creamy layer principle is applied, it leads to exclusion of socially advanced members from the benefits of reservation under Article 16(4) (*Jarnail Singh*, ¶*26*). This stands on a different footing in comparison to providing preferences within the SC List, which is driven by the necessity of mainstreaming the most deprived castes within the SC List. In other words, the system of providing preferences proceeds on the logic of qualitative inclusion instead of exclusion;

(iv) *Fourthly*, preferential treatment within the SC List cannot be equated to creamy layer exclusion as the latter was conceived to apply only to individual members. On the contrary, preferential treatment is meant to identify castes within the SC List which have hitherto not benefited from affirmative action.

68. Thus, preferential treatment within the SC List seeks to target the 'worst-off', which in the Rawlsian framework is rooted in the idea that if a system of affirmative action is structured to cater to those who are discriminated against, but not those that are clearly worst-off, the system loses its moral and political justification.

Preferential treatment within the SC List secures comparative justice as well as transcendental justice for the members of the Scheduled Castes

69. In his book 'The Idea of Justice', Professor Amartya Sen, the Indian economist and philosopher, has advocated for a 'comparative approach' to justice, as opposed to a 'transcendental approach'.

70. 'Transcendental Justice', as per Sen focuses on distinguishing between the just and the unjust and creating institutions that would ensure a just society. 'Comparative

Justice', on the other hand, focuses on the actual realization of justice in society by evaluating social injustices in a comparative setting. The primary concern of the "transcendental approach is the creation of institutions that would ensure a perfectly just society, whereas that of the comparative approach is to ensure improvements in society by removing specific injustices.

71. Comparative justice, which rests on a positive commitment connected with an egalitarian morality, informs every aspect of Articles 15 and 16. This is an adequate theory of justice, Sen argues, as it takes a broader view and looks at the whole of human life as it emerges from institutional arrangements operating under specific social, economic and cultural conditions.

72. The idea of justice as espoused by affirmative action policies is not about achieving a perfectly just society, but to produce as just a society as is possible given the circumstances. Justice has to focus on the process as well as the outcome. Thus, while the transcendental approach to justice ensures that we have the institution of reservations to uplift and emancipate the SC List *en bloc*, only a preferential treatment of the most disadvantaged within the SC List will take into account the incomplete problems of social justice and address manifest injustice prevailing within the SC List.

E. SUB-CLASSIFICATION DOES NOT FALL FOUL OF THE SCOPE OF ARTICLE 341

Article 341 bars modification of and not internal classification within the Presidential Notification

73. Article 341 (1) of the Constitution vests exclusive powers in the President to specify by way of public notification 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 a particular State. Such specification is required to be done after consultation with the Governor of the concerned State.

74. Article 341(2) states that once the public notification under Article 341(1) has been issued by the President**, inclusion** or **exclusion** in the list of Scheduled Castes specified in such public notification can only be done by a Parliamentary law.

75. A combined reading of Articles 341(1) and 341(2) makes it clear that it is only the President followed by the Parliament who/which enjoys the constitutional mandate to identify a caste which may be specified/designated as a Scheduled Caste. This Court has settled that the Presidential Notification issued under Article 341 is to be construed strictly. If a caste has not been **explicitly** and **exactly** mentioned in the SL List for a particular state in the Presidential Notification, then no consequent benefit of recognition can be conferred upon it.

76. In the debates of Constituent Assembly (Official Report, Vol. 9) while moving to add new Articles 300-A and 300-B after Article 300 (corresponding to Articles 341 and 342 of the Constitution), Dr B.R. Ambedkar explained as follows:

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

77. In ***State of Maharashtra v Milind & Ors. (2001) 1 SCC 4***, a Constitution Bench of this Court has held as follows:

> *"**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."

78. *Chinnaiah* erroneously holds that sub-classification (further classification and/or regrouping the homogenous groups by the State legislatures) *within* the SC List would amount to a tinkering with the Presidential Notification issued under Article 341 (***Paras 26 and 50)***. This expansive reading of Article 341 is extra-constitutional, as this Article only provides specific powers to the President and the Parliament

regarding the list of Scheduled Castes, and bars amending/modification of those lists by State legislatures – it does nothing more.

79. In the *Davinder Singh Reference Order***,** this Court therefore clarified that sub-classification does not amend the specified list of SCs in any way and can be done within the Presidential List without attracting Article 341(2):

> ***"45****. The Scheduled Castes as per Presidential List are not frozen for all the time, and neither they are a homogenous group as evident from the vast anthropological and statistical data collected by various Commissions. The State law of preferential treatment to a limited extent, does not amend the list. It adopts the list as it is. The State law intends to provide reservation for all Scheduled Castes in a pragmatic manner based on statistical data. It distributes the benefits of reservations based on the needs of each Scheduled Caste.*
>
> *…*
>
> ***49****. In the federal structure, the State, as well as the Parliament, have a constitutional directive for the upliftment of Scheduled Castes, Scheduled Tribes, and socially and backward classes. Only inclusion or exclusion in the Presidential notification is by the Parliament. The State Government has the right to provide reservation in the fields of employment and education. There is no constitutional bar to take further affirmative action as taken by the State Government in the cases to achieve the goal. By allotting a specific percentage out of reserved seats and to provide preferential treatment to a particular class, cannot be said to be violative of the list under Articles 341, 342, and 342A as no enlisted caste is denied the benefit of reservation."*

80. Thus, in treating all the Scheduled Castes in the Presidential Notification as a homogenous group, *Chinnaiah* conflates the inclusion/exclusion of a caste from the list of SCs (in other words, identification of a caste as a SC) with sub-classification *within* the already enumerated list of SCs.

The SC List under Article 341 is not homogeneous

81. There is no constitutional prescription to treat the SC List specified with respect to a State as an indivisible, homogenous monolith. Article 341 is not a melting pot where identities are lost and something 'new' is created. Instead, it is akin to a tropical rainforest where multiple organisms co-exist and retain their own identities. As such,

Article 341 envisages accommodation and not assimilation. Caste is a sociological fact; no caste becomes 'underprivileged' on account of inclusion in the SC List- inclusion is only a *de jure* recognition of the *de facto* marginalisation of such caste. The phrase 'scheduled caste', therefore, is only a legal fiction and an administrative nomenclature for the purpose of the Constitution, and birthmarks of a caste are not obliterated on account of inclusion/exclusion from the SC List.

82. In fact, the bare language of Article 341(2) makes it clear that (i) races and tribes within a caste can be notified as 'scheduled caste'; (ii) one particular caste may or may not be a 'scheduled caste' in different areas of the same State or in different States; (iii) one whole caste may not even be included in the SC List and only parts of or groups within such caste may be included in the SC List. Thus, Article 341 does not even treat one particular caste as 'homogenous', so the question of the entire list being homogeneous does not even arise.

Chinnaiah defeats the scheme of emancipation under Article 341

83. Article 341 envisages inclusion as well as exclusion from the SC List. This would mean that under the constitutional scheme, castes which have overcome social and educational backwardness, may be removed from the SC List of a State at the behest of the Parliament.

84. Herein lies an implicit recognition that there will be a continuous mobility *within* the SC List, owing to the fact that the castes comprised in the SC List are dissimilarly placed. It therefore emerges that the scheme of emancipation under Article 341 is gradual and caste specific; the Constitution aims to achieve substantive equality one caste at a time, which would not be the case if the SC List were to be treated as an indivisible monolith.

85. To what is more, the very language of Article 341 also implies that reservation by the States cannot be a one-time exercise, as has been wrongly asserted in *Chinnaiah* ***(Paras 28, 31)***. Denotification/exclusion of a caste from the SC List can only happen once such caste has achieved substantive equality, which would warrant positive interventions by the States under Articles 15(4) and 16(4) with respect to such caste. To this extent, there is a seamless interplay between Articles 15(4)/16(4) and 341 as they facilitate each other: Article 341 provides recognition of the caste by the Union, Articles 15(4) and 16(4) ensure substantive equality by various measures of the States as well as the Union, and then Article 341 again envisages exclusion/denotification once the goal of substantive equality has been achieved.

86. Therefore, in *Chinnaiah*, the aspect of tinkering with the SC List under Article 341 has weighed so much with the Court that it has put the goal of achieving substantive equality at the backburner.

Article 341 is not a limitation on the enabling provisions under Articles 15 and 16

87. The extrapolation of sub-classification with inclusion/exclusion in *Chinnaiah* leads to a re-writing of a plain-worded provision. Article 341(2) only deals with inclusion and exclusion from the list rather than *inter se* sub-classification of the enlisted groups. Such a reading of Article 341(2) is also erroneous as it defeats *bona fide* claims of disadvantaged groups within the enlisted groups under Part III of the Constitution. For instance, in *Chinnaiah*, the Court ignored the factual findings of internal social, educational and economic divisions between SCs in Andhra Pradesh, even though it acknowledged that on the ground those divisions may exist.

88. *Chinnaiah* errs by reading Article 341 as a limitation on the State's power to provide preferential treatment within the SC List. *First*, preferential treatment by way of sub-

classification is vastly different from inclusion/exclusion. *Second*, Article 341 cannot be interpreted as a limitation on the source of power under Articles 15(4) and 16(4) because there is no apparent conflict between the two provisions. In fact, the extent of reservation under Articles 15(4) and 16(4), in so far as State services and educational avenues are concerned, falls within the exclusive domain of the State Legislature/Executive, and Chinnaiah's expansive reading of Article 341 impinges upon such discretion of the State Legislature/Executive.

89. In ***Maharaj Umeg Singh v. State of Bombay (1955) 2 SCR 164***, a Constitution Bench of this Court has held as follows:

> *"**13.** ... The legislative competence of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter or limitation on the plenary powers which the State Legislature enjoys to legislate on the topics enumerated in the Lists 2 and 3 of the Seventh Schedule to the Constitution.*

90. Thus, *Chinnaiah* artificially creates a conflict between Articles 341 and 15/16 by holding that the SC List is a homogenous class/unit unto themselves which cannot be subdivided. Not only is this interpretation not obvious from Article 341, but it also fails to take into account that the Presidential List is merely a collection of castes, races, and tribes deemed to be SCs - without any comment on their *inter se* status or *de facto* positions in society. In other words, the homogeneity of the SC List is only from an external perspective and does not in any way imply that all castes *within* the SC List are equal.

F. STATES HAVE AN OBLIGATION AS WELL AS THE LEGISLATIVE COMPETENCE TO PROVIDE PREFERENTIAL TREATMENT WITHIN THE SC LIST

91. By virtue of Articles 246(2) and 246(3), State legislatures have the legislative competence to make preferences in laws promulgated in relation to Entry 41 in List II, which pertains to State Public Services and State Public Service Commission, and Entry 25 in List III, which pertains to Education. Under Article 162, subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the legislature of that State has power to make laws.

92. *Chinnaiah* recognises that the power of State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute (***Para 113***). However, it errs in holding the following:

> *"**31**…Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to re-distribute the reservation already made by sub-classifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if they so desire, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to sub-classify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the List of Scheduled Castes. From the discussion herein above, it is clear that the primary object of the impugned enactment is to create groups of sub-castes in the List of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this sub-classification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled*

> *Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in pith and substance the enactment is not a law governing the field of education or the field of State Public Services.*
>
> *…*
>
> ***113**. The power of State Legislature to decide as regard grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regard extent of reservation to be made for different members of the backward classes including Scheduled Caste. But it cannot take away the said benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. The impugned legislation, thus, must be held to be unconstitutional."*

93. It is respectfully submitted that the aforesaid reading of constitutional provisions guaranteeing protective discrimination goes against the mandate prescribed under Articles 15 and 16 for the following reasons:

    (i) Under Article 15(4), States have an obligation to trace degrees of social discrimination within the SC List; and

    (ii) Article 16(4) has a twin-requirement of ascertaining backwardness as well as qualitative representation;

94. The aforesaid reasons are discussed in detail hereinbelow.

This Court has recognised that the lived realities of castes within the SC List has been different

95. In our caste jurisprudence, there are three judicial standards on the use of caste in defining 'backward classes'. All the standards, in one way or the other, mandate the State to consider caste as a factor in determining backwardness.

96. The first judicial standard, exemplified by ***M.R. Balaji and Ors. v State of Mysore and Ors. 1962 SCC OnLine SC 147 (Balaji)***, has been to hold that caste could not be

the sole or dominant criterion, but that caste could be a 'relevant' factor in determining backwardness (***Paras 22 and 23***).

97. The second judicial standard in *NM Thomas* held that caste could be used as the sole criterion to identify a backward class. Justice Krishna Iyer, in his concurring judgment, opined that 'weaker sections' under Article 46 would not mean every 'backward class' but those dismally depressed categories which are comparable economically and educationally to Scheduled Castes and Scheduled Tribes (***Para 126)***.

98. The third standard is typified by the majority judgment in *Indra* Sawhney. This standard is that while caste cannot be the sole criterion in determining backward classes, it can be used as the dominant criterion. As the majority judgment in *Indra Sawhney* put it, 'a caste can be and often is a social class in India' (**Para 859 3 (a)**). The Constitution Bench in ***Ashoka Kumar Thakur v Union of India (2008) 6 SCC 1*** also agreed with the logic of *Indra Sawhney* to hold that caste is an important starting point for determination of backwardness (***Paras 650 and 664***).

99. It is clear, therefore, that this Court has implicitly as well as explicitly recognised that the lived realities of different castes in India have been different. This would also be true for the castes comprised in the SC List, as the degree of social discrimination to which they have been subjected is also be different.

Treatment of the SC List as a homogeneous monolith amounts to an erasure of inter-se discrimination on account of distinct practices

100. The *inter-se* classification within the SC List is not between individuals but between clearly demarcated groups. These are separate castes, have separate names,

sometimes separate traditional occupations and separate cultural practices. They do not intermarry, and the higher among them do not normally inter-dine with the lower.

101. In states like Gujarat, territorial jurisdictional connotations in the form of *parganas* also exist amongst the Dalit castes. Each of the parganas is an administrative unit with its own unique and distinct cultural practices on account of marriage, divorce, mortuary rituals and punishment for violation of rules etc. Endogamy is also a strong mechanism for defining differentiation and boundary maintenance amongst the Dalit communities. As such, it would be a fallacy to assume that all Dalit communities exist and interact with each other in the same social milieu.

102. Further, other than the question of frequency and intensity of interaction between the Dalit castes, there is the important question of hierarchy among them. Many observers have commented that there is untouchability among the untouchables. Studies have also cautioned against making general statements on the oppression of Dalits, for such discrimination is usually caste-specific. Atrocities against them are also selective, not indiscriminate. There are various degrees of discrimination and oppression against the Dalit castes, and there is discrimination and oppression among castes within the Dalit category.

103. Thus, the logic of *Chinnaiah* which treats the SC List as an indivisible, homogenous monolith paints all the castes comprised *within* the SC List with broad brushstrokes and erroneously assumes that they are *inter-se* similarly placed and face the same degree of social discrimination. Not only is this antithetical to the social and anthropological studies available on the Scheduled Castes, but also amounts to a denial of the right to equality of opportunity to the members of each of the castes comprised *within* the SC List.

Under Article 15(4), States have an obligation to trace degrees of social discrimination within the SC List

104. The aforesaid logic of *Chinnaiah* is also incorrect as it fails to take into account the fact that right to equality of opportunity is an individual right. The Constitution takes into account groups, as membership of certain groups can be a source of discrimination for certain individuals in India. However, that does not mean that internal differences amongst the castes comprised in the SC List cannot be accounted for. If the SC List is continued to be treated as a homogenous group and efforts of States to equitably grant reservations based on degree of social discrimination are throttled, benefits of reservations may not trickle down to those who need them the most.

105. Thus, to ensure equitable apportionment of benefits of reservation, a further sub-classification which is sensitive to disadvantages *within* the SC List becomes imperative. Further, the judicially mandated requirement of considering 'caste' as a factor in determining backwardness makes it imperative upon the State to trace degrees of social discrimination *within* the SC List while making special provisions under Article 15.

106. This view has now received the stamp of authority of a Constitution Bench of this Court in ***Chebrolu Leela Prasad Rao vs State Of A.P (2021) 11 SCC 401***:

> *"162. In Indra Sawhney (supra), it was held that the State Lists adopted to provide reservations by the Government are not meant to be sacrosanct and unalterable. There may be cases where Commissions appointed by the State may have, in their reports, recommended modification of such lists by deletion or addition of certain castes, communities, and classes. Where such reports are available, the State Government is bound to act on that basis with reasonable promptitude. If the State Government effects any modification or alteration by way of deletions or additions, the same shall be intimated to the Government of India forthwith. This Court opined*

concerning the modifications and rectification of such list thus: (SCC p. 763, para 853)

"853. At the same time, we think it necessary to make the following clarification: It is true that the Government of India has adopted the State lists obtaining as on August 13, 1990 for its own purposes but that does not mean that those lists are meant to be sacrosanct and unalterable. There may be cases where commissions appointed by the State Government may have, in their reports, recommended modification of such lists by deletion or addition of certain castes, communities and classes. Wherever such commission reports are available, the State Government is bound to look into them and take action on that basis with reasonable promptitude. If the State Government effects any modification or alteration by way of deletions or additions, the same shall be intimated to the Government of India forthwith which shall take appropriate action on that basis and make necessary changes in its own list relating to that State. Further, it shall be equally open to, indeed the duty of, the Government of India — since it has adopted the existing States lists — to look into the reports of such commission, if any, and pass its own orders, independent of any action by the State Government, thereon with reasonable promptitude by way of modification or alternation. It shall be open to the Government of India to make such modification/alteration in the lists adopted by way of additions or deletions, as it thinks appropriate on the basis of the Reports of the Commission(s). This direction, in our opinion, safeguards against perpetuation of any errors in the State lists and ensures rectification of those lists with reasonable promptitude on the basis of the Reports of the Commissions already submitted, if any. This course may be adopted de hors the reference to or advice of the permanent mechanism (by way of Commission) which we have directed to be created at both Central and State level and with respect to which we have made appropriate directions elsewhere."

163. The Court in Rakesh Kumar (supra) emphasised need of periodical review and held: (SCC pp. 72-73, para 37)

"37. It is a well-accepted premise in our legal system that ideas such as "substantive equality" and "distributive justice" are at the heart of our understanding of the guarantee of "equal protection before the law". The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres. The question is whether "reasonable classification" has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. When examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of "strict scrutiny". Of course, these affirmative action measures should be periodically reviewed and various measures modified or adapted from time to time in keeping with the changing social and economic conditions. Reservation of

seats in panchayats is one such affirmative action measure enabled by Part IX of the Constitution." (emphasis supplied by us)

164. Now there is a cry within the reserved classes. By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes. There is voice by deprived persons of social upliftment of some of the Scheduled Castes/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of scheduled castes and scheduled tribes and other backward classes.

165. In our opinion, it was rightly urged by Dr. Rajeev Dhawan 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 (supra) and as constitutionally envisaged. The Government to take appropriate steps in this regard."

107. In view of the aforesaid ruling, Article 15(4), a facet of Article 15(1) which prohibits discrimination on the ground of, *inter alia*, caste, has to be read in conjunction with Articles 29(2), which prohibits caste-based discrimination in the form of denial of admission to State sponsored educational institutions, and Article 46, which casts a duty upon the State to endeavour to promote educational and economic interests of, *inter alia*, the Scheduled Castes.

108. The bar against discrimination contained in Articles 15(1) and 29(2) applies to each of the castes contained *within* the SC List. Accordingly, the benefit of laws/policies made in furtherance of Article 46 must accrue to the benefit of each of the castes *within* the SC List in an egalitarian sense. Thus, a caste-based assessment of the degrees of social discrimination *within* the SC List and its redressal by the States becomes imperative.

Article 16(4) has a twin-requirement of ascertaining backwardness as well as qualitative representation

109. Article 16(1) guarantees the fundamental right of equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. However, Article 16 does not limit this guarantee of equal opportunity to a negative covenant; Article 16(4) goes a step ahead and casts a positive obligation upon the State Governments to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

110. In light of *Indra Sawhney*, it is no longer *res integra* that any provision under Article 16(4) can be made not only by the Parliament, but also by the State Legislatures, and the executive in respect of Central/State services and by authorities contemplated under Article 12 (¶*736, Jeevan Reddy, J.*, ¶*392, Kuldip Singh, J.*). Thus, Article 16(4) confers power upon the States to provide preferential treatment on a rational basis by fixing a reasonable quota out of reserved seats to ensure adequate representation in services.

111. From a plain reading of Article 16(4), it is apparent that it has two requirements. The group for whom the State is required to make provisions for reservations of appointments or posts have to be (i) a backward class of citizens; and (ii) not adequately represented in the services under the State.

112. While the first level of ascertainment of backwardness is made by the President (and subsequently, the Parliament) under Article 341, the second level of enquiry regarding ‘inadequate representation’ is an obligation as well as the mandate of the State Government. *Indra Sawhney* lays down quite clearly that the adequacy of

representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government (**Para 859**):

> "***174***. *The expression "in the opinion of the State" would mean the formation of opinion by the State which is purely a subjective process. It cannot be challenged in a Court on the grounds of propriety, reasonableness and sufficiency though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the Services under the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a sine quo non. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material then that opinion is challengeable.*
> …
> ***798****…The language of Clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board , which need not be repeated here. Sufficed it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive."*
> (Emphasis supplied)

113. *Nagaraj* has reiterated this view:

> **"*49.*** *… Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the*

> *parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist State- wise.*"

114. Furthermore, the 'adequate representation' envisaged under Article 16(4) is not just quantitative but also qualitative representation. Hence, the objective of the provision is not to fill the reservation quotas indiscriminately with any and all members of the SC List, but with those members *within* the SC List who require immediate representation in view of their relative inadequacy of representation. In ***Dr Jaishri Laxmanrao Patil vs. Chief Minister and Ors. (2021) 8 SCC 1***, a Constitution Bench of this Court has held:

> *"520. The word "adequate" is a relative term used in relation to representation of different caste and communities in public employment. The objective of Article 16(4) is that backward class should also be put in mainstream and they are to be enabled to share power of the State by affirmative action. To be part of public service, as accepted by the society of today, is to attain social status and play a role in governance. The governance of the State is through service personnel who play a key role in implementing government policies, its obligation and duties. The State for exercising its enabling power to grant reservation under Article 16(4) has to identify inadequacy in representation of backward class who is not adequately represented. For finding out adequate representation, the representation of backward class has to be contrasted with representation of other classes including forward classes. It is a relative term made in reference to representation of backward class, other caste and communities in public services."*

115. Thus, representation of castes even *within and amongst* the SC List will have to be examined by the State Governments so as to ascertain their real standing in State services. *Chinnaiah's* interpretation of the list of specified Scheduled Castes as a "homogenous" group incapable of any further sub-division defeats this additional requirement of ascertaining 'inadequate representation', as it (i) perversely limits the scope of enquiry with respect to Article 16(4) only to ascertaining 'backwardness'

and not even *inter-se* relative backwardness; thereby (ii) taking away the State Government's mandate of ascertaining 'inadequate representation'.

116. If the SC List were to be treated as a monolith, as is endorsed by *Chinnaiah*, it would have the effect of rendering the second part of Article 16(4) as otiose. It would then amount to the State Government mechanically making provisions of reservations for the specified SCs in the State, without establishing whether such SC is also inadequately represented. It would also make the role of the State Government in so far as Article 16(4) is concerned redundant, when the State Government is required to independently ascertain which of the SCs are inadequately represented, and then take steps to increase their representation in the State services.

G. ARTICLE 16(4) HAS TO BE GIVEN A BROAD INTERPRETATION, ESPECIALLY IN VIEW OF ARTICLE 335

117. *Chinnaiah* undertakes a combined reading of Articles 16(4) and 335 to hold that the mandate of 'efficiency of administration' contained under Article 335 cannot be sacrificed to favour some castes out of the homogeneous class of Scheduled Castes. (**Para 105**) This is a perverse reading of Article 335 and falls foul of the original intent of Article 335 as well as judicial precedents and subsequent legislative developments.

The Constituent Assembly specifically rejected the notion of faux-efficiency under Article 335

118. Dr. B.R. Ambedkar has consistently distinguished the colonial construct of 'efficiency of administration' with that of 'good administration'. He asserted that a good administration or government is one which is truly representative. In one of the

articles, he had noted (*Dr. Babasaheb Ambedkar, Writings and Speeches, Vol 12, pp 723-24*):

> *"[The] view that good government was better than efficient government … must also be made applicable to the field of administration. It was through administration that the State came directly in contact with the masses. No administration could do any good unless it was sympathetic … As against this the Brahmins have been taking their stand on efficiency pure and simple. They know that this is the only card they can play successfully by reason of their advanced position in education. But they forget that if efficiency was the only criterion then in all probability there would be very little chance for them to monopolise state service in the way and to the extent they have done. For if efficiency was made the only criterion there would be nothing wrong in employing Englishmen, Frenchmen, Germans and Turks instead of the Brahmins of India."*

119. Ambedkar clarified the difference in the scope of draft Articles 10(3) (which corresponds to Article 16(4) of the Constitution) and 296 (which corresponds to Article 335 of the Constitution). He explained that the purpose of draft Article 10(3) is to provide 'reservations in favour of certain communities which have not so far had a 'proper look-in,' so to say, into the administration'. The claims of minorities for reservation, Ambedkar said, were provided a 'special reference' in draft Article 296, so that the constitutional scheme does not omit the 'minorities from consideration.'

120. Draft Article 10(3) was then passed in its tabled version and was not made subject to draft Article 296. As a result, the case for representation of the Scheduled Castes was to be specifically addressed under draft Article 10(3), while draft Article 296 made a reference for the consideration of the claims of minorities for reservations. Both the draft articles had different purposes.

121. Brajeshwar Prasad, a member of the constituent assembly, moved an amendment to substitute Ambedkar's version of draft Article 296 (with a new language which provided that 'the maintenance of efficiency of administration shall be the only consideration' in relation to "appointment to services and posts in connection with

the affairs of the union or of a state'. Prasad's argument was that only 'a handful of people, constituting the cream of the Harijan society' clamoured for reservation. His amendment and contention on efficiency were rejected by the Constituent Assembly.

122. The Constituent Assembly eventually adopted Ambedkar's version of draft Article 296, which used the words "SCs and STs." With this, draft Article 296 became a directive or agreement with the future governments that the claims of the Scheduled Castes and the Scheduled Tribes would be taken into consideration for appointments in services. This directive seemed independent of the mandatory right of representation prescribed by draft Article 10(3). Furthermore, by rejecting Prasad's amendment, the Constituent Assembly did not allow the notion of efficiency to have an overriding effect on the claims of Scheduled Castes and Scheduled Tribes.

Article 16(4) has a broad scope and cannot be curtailed by Article 335

123. It may further be noted that Article 335 is neither a fundamental right nor a directive principle. In fact, under Article 16(4), it is not necessary for the Central Government or the State Government to consult the Public Service Commissions with regard to the reservation of posts for any or all of the backward classes, including the Scheduled Castes. The discussion in the Constituent Assembly shows that it was only Article 16(4) which mandated and empowered the State to make reservations for backward classes of citizens, including the Scheduled Castes. Article 320, which delineates the functions of Public Service Commissions, was consequential to Article 16(4).

124. The Constituent Assembly never made Article 16(4) subject to Article 335 or 320, rather accepted it as a stand-alone and overriding provision. While Article 335 lays down that the State has the power to reserve posts for the Scheduled Castes, it is in Article 16(4) that a power is provided to the State in clear and express terms to make reservations

in appointments or posts in favour of any backward class of citizens. Article 320(4) is in accord with the power given to the States by Article 16.

125. More recently, Article 335 was also modified by the Constitution (Eighty Second Amendment) Act, 2000 to specifically provide that nothing in the Article would prohibit any provision in favour of reservations in promotions conferred upon the Scheduled Castes and Scheduled Tribes. Thus, the legislative intent with respect to Articles 16(4), 320 and 335 has been consistent and clear: Both Articles 320 and 335 are subject to Article 16(4). Reservation, as provided under Article 16(4), was thus not subjected to notion of efficiency mentioned in Article 335.

Efficiency has to be defined in an inclusive sense

126. In ***B K Pavitra and Ors. (II) v Union of India and Ors. (2019) 16 SCC 129***, this Court has held that efficiency of administration in the affairs of the union or of a state must be defined in an inclusive sense, where diverse segments of society find representation as a true aspiration of governance by and for the people:

> *"**126.** The Constitution does not define what the framers meant by the phrase ―efficiency of administration‖. Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the SCs and STs are not efficient or that efficiency is reduced by appointing them. This is stereotypical because it masks deep rooted social prejudice. The benchmark for the efficiency of administration is not some disembodied, abstract ideal measured by the performance of a qualified open category candidate. Efficiency of administration in the affairs of the Union or of a State must be defined in an inclusive sense, where diverse segments of society find representation as a true aspiration of governance by and for the people. If, as we hold, the Constitution mandates realisation of substantive equality in the engagement of the fundamental rights with the directive principles, inclusion together with the recognition of the plurality and diversity of the nation constitutes a valid constitutional basis for defining efficiency. Our benchmarks will define our outcomes. If this benchmark of efficiency is grounded in exclusion, it will produce a pattern of governance which is skewed against the marginalised. If this benchmark of efficiency is grounded in equal access, our outcomes will reflect the commitment of the Constitution to produce a just social order. Otherwise,*

our past will haunt the inability of our society to move away from being deeply unequal to one which is founded on liberty and fraternity. Hence, while interpreting Article 335, it is necessary to liberate the concept of efficiency from a one sided approach which ignores the need for and the positive effects of the inclusion of diverse segments of society on the efficiency of administration of the Union or of a State. Establishing the position of the SCs and STs as worthy participants in affairs of governance is intrinsic to an equal citizenship. Equal citizenship recognizes governance which is inclusive but also ensures that those segments of our society which have suffered a history of prejudice, discrimination and oppression have a real voice in governance. Since inclusion is inseparable from a well governed society, there is, in our view, no antithesis between maintaining the efficiency of administration and considering the claims of the SCs and STs to appointments to services and posts in connection with the affairs of the Union or of a State.

...

***128.** The substantive right to equality is for all segments of society. Articles 15 (4) and 16 (4) represent the constitutional aspiration to ameliorate the conditions of the SCs and STs. While, we are conscious of the fact that the decision in Indra Sawhney did not accept K C Vasanth Kumar144 on certain aspects, the observations have been cited by us to explain the substantive relationship between equal opportunity and merit. It embodies the fundamental philosophy of the Constitution towards advancing substantive equality.*

***129.** An assumption implicit in the critique of reservations is that awarding opportunities in government services based on "merit" results in an increase in administrative efficiency. Firstly, it must be noted that administrative efficiency is an outcome of the actions taken by officials after they have been appointed or promoted and is not tied to the selection method itself. The argument that one selection method produces officials capable of taking better actions than a second method must be empirically proven based on an evaluation of the outcomes produced by officials selected through both methods. Secondly, arguments that attack reservations on the grounds of efficiency equate ―merit‖ with candidates who perform better than other candidates on seemingly ―neutral‖ criteria, e.g. standardised examinations. Thus, candidates who score beyond a particular ―cut-off point‖ are considered ―meritorious‖ and others are ―non-meritorious‖. However, this is a distorted understanding of the function "merit" plays in society."*

H. CONSTITUTIONAL SAFEGUARDS DURING SUB-CLASSIFICATION OF SC LIST

127. It goes without saying that any preferential treatment within the SC List has to be proportionate with their population figures. Further, even as the preferential

treatment of the *most disadvantaged* within the SC List intends to improve their representation in educational institutions and State services , it should not come at the cost of other groups comprised in the SC List. Hence, the limit of 50% reservation under ordinary circumstances as laid down in *Indra Sawhney* which is now an integral part of the trinity of Article 14, 15 and 16 of the Constitution has to be applied in the case of sub-classification within the SC List also.

128. The 50% reservation rule was recently endorsed by a Constitution Bench of this Court in ***Dr Jaishri Laxmanrao Patil vs. Chief Minister and Ors. (2021) 8 SCC 1 (Jaishri Patil)***:

> *"To change the 50% limit is to have a society which is not founded on equality but based on caste rule. The democracy is an essential feature of our Constitution and part of our basic structure. If the reservation goes above 50% limit which is a reasonable, it will be slippery slope, the political pressure, make it hardly to reduce the same. Thus, answer to the question posed is that the percentage of 50% has been arrived at on the principle of reasonability and achieves equality as enshrined by Article 14 of which Articles 15 and 16 are facets."*

129. Thus, the 50% reservation rule in *intra-group* preferential treatment will balance the need to provide preferential treatment to the weakest groups and the interests of other castes enumerated in the SC List. In other words, the position of other SCs enumerated in the SC List shall not be disturbed by providing a limited preference to some groups in view of their more disadvantageous position and preferential treatment will not happen at the cost of the other groups. This will eliminate any apprehension regarding reverse discrimination by obliterating certain groups out of the SC List by not according them any affirmative action at all.

130. A State action can be deemed violative of the Constitution only when it is unequal both according to political logic as well as constitutional law. The proposed standard of preferential treatment is valid on both counts. Hence, by incorporating

this constitutional safeguard, the question of any kind of arbitrariness or misuse will not arise.

I. CONCLUSIONS

131. The following conclusions emerge from the discussion in the preceding paragraphs:

(i) Where there is quantifiable data available to show that the benefits of reservations have not reached certain castes *within* the SC List, sub-classification of the SC List to earmark a portion of the quota for the Scheduled Castes for certain specific castes *within* the SC List on a preferential basis is constitutionally permissible, as preferential treatment of such marginalized groups within the SC List furthers substantive equality over formal equality;

(ii) In such cases, State Legislatures and Executives have an obligation as well as the legislative competence to provide preferential treatment within the SC List;

(iii) Article 16(4) has to be given a broad interpretation, especially in view of Article 335; and

(iv) As a constitutional safeguard, the 50% rule endorsed in *Indra Sawhney* will ordinarily have to be adhered to even in case of sub-classification within the SC List.

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