2024 INSC 562

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE / ORIGINAL JURISDICTION

Civil Appeal No. 2317 of 2011

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

Versus

Davinder Singh & Ors. **…Respondents**

With
C.A. No.6936 of 2015

With
C.A. No.5597 of 2010

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

With
C.A. No.5593 of 2010

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

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

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

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

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

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

With
C.A. No.5586 of 2010

With
C.A. No.5598 of 2010

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

With
C.A. No.2324 of 2011

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

With
C.A. No.5589 of 2010

With
C.A. No.5600 of 2010

With
C.A. No.5587 of 2010

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

With
C.A. No.2318 of 2011

With
C.A. No.289 of 2014

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

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

PART A

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

A. Background

i. Relevant constitutional provisions

2. Article 14 of the Constitution stipulates that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 15(1) states that the State should not discriminate against any citizen on grounds only of religion, race, **caste**, sex, place of birth or any of them. Article 15(4) stipulates that nothing in Article 15 shall prevent the State from making any **special provision** for the advancement of **any** socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[1]

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

[1] Article 15 (4) "Nothing in this article or in clause (2) of Article 29 shall prevent the State form making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

of the provision states that nothing in Article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State[2].

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

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

[2] Article 16 (4) "Nothing in this article shall prevent the State from making any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State."

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

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

ii. The genesis of the reference to the Constitution Bench

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

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

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

[5] "Punjab Act"

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

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

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

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

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

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

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

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[9] "Tamil Nadu Act"

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

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

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

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

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

iii. The judgment in Chinnaiah

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. <u>The reference</u>

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

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

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

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

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

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

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

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

B. Submissions

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

i. Submissions of Petitioners

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Submissions of Respondents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Issues

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

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

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

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

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

D. Analysis

i. The jurisprudence on reservation

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

a. Reservation as an exposition of substantive equality

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

I. The competing visions of equality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The “efficiency” of reservation

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

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

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

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

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

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

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

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[71] (1962) 2 SCR 586

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

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

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

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

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

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

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

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

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

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

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

[83] (1964) 4 SCR 680

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

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

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

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

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

III. The interplay of Article 16 and Article 335

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Permissibility of sub-classification under Article 14

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

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

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

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

a. The contours of Article 14

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

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

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

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

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

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

b. Sub-classification as a facet of equality

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

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

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

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

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

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

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

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

[125] 1974 1 SCC 19.

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

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

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

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

[128] (1968) 1 SCR 185

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[146] Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [802]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. The import of the deeming fiction in Article 341

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

a. Chinnaiah on the deeming fiction in Article 341

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

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

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

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

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

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

b. Scope of deeming fiction

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

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

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

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

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

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

[159] LR 1952 AC 109.

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

c. Article 341 does not create a deeming fiction

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

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

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

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

[163] ibid [Justice Sinha, 25].

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

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

[164] ibid, [35]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART D

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Identification of the depressed classes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[187] Hutton Censes Report (1931) 471

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

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

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

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

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

[188] Ibid, 472

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

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

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

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

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

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

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

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

[191] Ibid, 499

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

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

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

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

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

b. Empirical evidence of heterogeneity

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

[195] Galanter, *supra*, 130

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vii. Criteria for sub-classification

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

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

[203] See NM Thomas (supra)

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

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

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

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

a. The meaning of "Backward Class"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Inadequacy of representation in services of the State

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

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

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

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

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

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

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

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

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

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[222] Shiva Rao, *supra,* 109

[223] BR Ambedkar: "I am omitting the words "not adequately represented". If we have the words "not adequately represented", any reservation made by the State may be open to be challenged in a court. The court may say that reservation is made for a class although it is adequately represented."

[224] KM Panikkar: "I was responsible for the change from the word 'minorities'. The reason which I gave was that minorities in India have come to have a specific meaning, that is to say, religious or political minorities, Muslims, Sikhs etc. Sikh, Muslim, Depressed Classes, either a political or religious minority. The meaning

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

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

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

[225] CAD Vol 7. P. 701

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

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

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

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

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

c. The requirement of "effective" representation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Yardstick for sub-classification

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

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

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

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

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

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

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

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

viii. The limits of sub-classification

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

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

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

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

a. Model of special provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The caste-class conundrum

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

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

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

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

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

PART D

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

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

ix. Scope for judicial review

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

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

a. Inter-se backwardness

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

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

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

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

b. Adequacy of representation

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

.....J
[Manoj Misra]

New Delhi;
August 01, 2024