REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.3123 of 2020

DR. JAISHRI LAXMANRAO PATIL ...APPELLANT(S)

VERSUS

THE CHIEF MINISTER & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3124 of 2020

SANJEET SHUKLA.....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA.....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3133 of 2020

KRISHNAJI DATTATRAYA MORE .....APPELLANT(S)

VERSUS

DR. JAISHRI LAXMANRAO & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3134 of 2020

MADHUSHRI NANDKISHOR JETHLIYA & ORS.....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS.....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3131 of 2020

DEVENDRA ROOPCHAND JAIN & ORS.……APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ANR. ……RESPONDENT(S)

WITH

CIVIL APPEAL NO.3129 of 2020

KAMALAKAR SUKHDEO DARODE @ DARWADE……APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS. ……RESPONDENT(S)

WITH

WRIT PETITION (C) NO.915 of 2020

DESHMUKH ESHA GIRISH……APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS.……RESPONDENT(S)

WITH

WRIT PETITION (C) NO.504 of 2020

ADITYA BIMAL SHASTRI & ORS.……APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS.……RESPONDENT(S)

WITH

WRIT PETITION (C) NO.914 of 2020

DR. AMITA LALIT GUGALE & ORS. .....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3127 of 2020

SAGAR DAMODAR SARDA & ORS. .....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3126 of 2020

MOHAMMAD SAYEED NOORI
SHAFI AHMED & ORS. .....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3125 of 2020

DR. UDAY GOVINDRAJ DHOPLE & ANR. .....APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA & ANR. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO.3128 of 2020

VISHNUJI P. MISHRA ...APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA ...RESPONDENT(S)

WITH

CIVIL APPEAL NO.3130 of 2020

RUCHITA JITEN KULKARNI & ORS. .....APPELLANT(S)

VERSUS

THE CHIEF MINISTER & ANR. .....RESPONDENT(S)

WITH

WRIT PETITION (C) NO.938 of 2020

SHIV SANGRAM & ANR. .....APPELLANT(S)

VERSUS

UNION OF INDIA & ANR. .....RESPONDENT(S)

J U D G M E N T

Ashok Bhushan,J.(for himself and S. Abdul Nazeer, J.), L.Nageswara Rao,J. Hemant Gupta,J. and S. Ravindra Bhat have also concurred on Question Nos. 1, 2 and 3.

This Constitution Bench has been constituted to consider questions of seminal importance relating to

contours and extent of special provisions for the advancement of socially and educationally backward class (SEBC) of citizens as contemplated under Article 15(4) and contours and extent of provisions of reservation in favour of the backward class citizens under Article 16(4) of the Constitution of India. The challenge/interpretation of the Constitution (102nd Amendment) Act, 2018 is also up for consideration.

2. All the above appeals have been filed challenging the common judgment of the High Court dated 27.06.2019 by which judgment several batches of writ petitions have been decided by the High Court. Different writ petitions were filed before the High Court between the years 2014 to 2019, apart from other challenges following were under challenge:

The Ordinance No. XIII of 2014 dated 09.07.2014 providing 16% reservation to Maratha. The Ordinance No.XIV of 2014 dated 09.07.2014 providing for 5% reservation to 52 Muslim

Communities. The Maharashtra State Reservation (of seats for appointment in educational institutions in the State and for appointment or posts for public services under the State) for educationally and socially backward category (ESBC) Act, 2014 and Maharashtra State Socially and Educationally Backward Class (SEBC) (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018 (hereinafter referred to as the "Act, 2018").

3. The High Court by the impugned judgment upheld Act, 2018, except to the extent of quantum of reservation provided under Section 4(1)(a), 4(1)(b) over and above 12% and 13% respectively as recommended by Maharashtra State Backward Class Commission. The writ petitions challenging the Ordinance XIII and XIV of 2014 as well as Act, 2014 were dismissed as having become infructuous. Few writ petitions were also allowed and few detagged and other writ petitions have been disposed of.

4. Writ petition under Article 32 of the Constitution of India, namely, Writ Petition(C) No. 938 of 2020 (**Shiv Sangram & Anr. vs. Union of India & Anr.)** has been filed questioning the Constitution (102nd Amendment) Act, 2018.

5. While issuing notice on 12.07.2019, a three-Judge Bench of this Court directed that the action taken pursuant to the impugned judgment of the High Court shall be subject to the result of the SLP. It was made clear that the judgment of the High Court and the reservation in question shall not have any retrospective effect. The three-Judge Bench after hearing the parties, on 09.09.2020, while granting leave passed following order:

> "17. In view of the foregoing, we pass the following orders: -
>
> (A) As the interpretation of the provisions inserted by the Constitution (102nd Amendment) Act, 2018 is a substantial question of law as to the interpretation of the Constitution of India, these Appeals are referred to a larger Bench. These matters shall be placed before Hon'ble The Chief Justice of India for suitable orders.

> (B) Admissions to educational institutions for the academic year 2020-21 shall be made without reference to the reservations provided in the Act. We make it clear that the Admissions made to Post-Graduate Medical Courses shall not be altered.
>
> (C) Appointments to public services and posts under the Government shall be made without implementing the reservation as provided in the Act.
>
> Liberty to mention for early hearing. "

6. A Three-Judge Bench referring the matter to Constitution Bench has referred all the appeals and the order contemplated that the matter shall be placed before the Chief Justice for the suitable orders. Referring order although mention that the interpretation of Constitution (One Hundred and Second Amendment) Act, 2018 is substantial question of law as to the interpretation of the Constitution but the reference was not confined to the above question. The learned counsel for the parties have made elaborate submissions in all the appeals as well as the writ petitions filed under Article 32. Elaborate submissions were addressed on the impugned judgment of the High Court. We thus have proceeded

to hear the parties and decide all the appeals and writ petitions finally.

7. After appeals being referred to a larger Bench by order dated 09.09.2020, Hon'ble the Chief Justice of India has constituted this Constitution Bench before whom these appeals and writ petitions are listed. This Constitution Bench after hearing learned counsel for the parties passed an order on 08.03.2021 issuing notice to all the States. The Bench by order further directed the States to file brief notes of their submissions.

8. The hearing commenced on 15.03.2021 and concluded on 26.03.2021. At this stage, we may indicate the headings in which we have divided to comprehensively understand the issues, submissions, our consideration, our conclusion and operative part of the judgment. The following are the heads of subjects under which we have treated the entire batch of cases:

(1) Questions Framed.

(2) Background Facts.

(3) Points for consideration before the High Court.

(4) Submissions of the parties.

(5) The 10 grounds urged for referring Indra Sawhney judgment to a larger Bench.

(6) The status of Reservation at the time of Enactment of Act, 2018.

(7) Consideration of 10 grounds urged for revisiting and referring the judgment of Indra Sawhney to a larger Bench.

(8) Principle of Stare Decisis.

(9) Whether Gaikwad Commission Report has made out a case of extra-ordinary situation for grant of separate reservation to Maratha community exceeding 50% limit ?

(10) Whether the Act, 2018 as amended in 2019 granting separate reservation for Maratha community by exceeding the ceiling limit of 50% makes out exceptional circumstances as per the judgment of Indra Sawhney ?

(11) Gaikwad Commission Report – a scrutiny.

(12) Whether the data of Marathas in public employment as found out by Gaikwad Commission makes out cases for grant of reservation under Article 16(4) of the Constitution of India to Maratha community ?

(13) Social and Educational Backwardness of Maratha Community.

(14) The Constitution (102nd Amendment) Act, 2018.

(15) Conclusions.

(16) Order.

9. On 08.03.2021 the six questions which were proposed to be considered were enumerated in the following manner:

(1) <u>Questions Framed</u>.

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

exception carved out in the judgment of ***Indra Sawhney***?

4. Whether the Constitution One Hundred and Second Amendment deprives the State Legislature of its power to enact a legislation determining the socially and economically backward classes and conferring the benefits on the said community under its enabling power?

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

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

(2) Background Facts.

10. We need to first notice certain background facts relevant for the present case and details of various writ petitions filed in the High Court. The "Maratha" is a Hindu community which mainly resides in the State of Maharashtra. After the enforcement of the Constitution of India, the President of India in exercise of power under Article 240 appointed a

Commission to investigate the conditions of all such socially and educationally backward classes, known as Kaka Kalelkar Commission, the first National Commission for backward classes. The Kaka Kalelkar Commission submitted its report on 30.03.1955 where it observed - Vol.I "In Maharashtra, besides the Brahman it is the Maratha who claimed to be the ruling community in the villages, and the Prabhu, that dominated all other communities". Thus, the first Backward Classes Commission did not find Maratha as other backward class community in the State of Bombay.

11. On 01.11.1956, a bilingual State of Bombay under the State Re-organisation Act was formed with the addition of 8 districts of Vidharbha (Madhya Bharat) and 5 districts of Marathwada (Hyderabad State). On 14.08.1961 through Ministry of Home Affairs while declining to act on the Kaka Kalelkar Commission Report informed all the State Governments that they had discretion to choose their own criteria in defining backward classes and it would be open for

State Governments to draw its own list of other backward classes. On 14.11.1961 acting on the directives of the Government of India, the Government of Maharashtra appointed B.D.Deshmukh Committee for defining OBC and to take steps for their developments. The B.D. Deshmukh Committee submitted its report on OBC to the Government of Maharashtra on 11.01.1964. It did not find Maratha as backward class. On 13.08.1967, the State of Maharashtra issued unified list of OBC consisting of 180 castes for the entire State which did not include Maratha. At serial No.87, Kunbi was shown. The President of India on 31.12.1979 appointed the second National Backward Classes Commission within the meaning of Article 340 of the Constitution popularly known as Mandal Commission. In the report of second National Backward Classes Commission with regard to the State of Maharashtra while distributing percentage of Indian population by castes and religious groups, estimated other backward classes as 43.70 per cent, whereas in the category of forward Hindu castes and communities the

Marathas were included with 2.2 per cent. The population of other backward classes of remaining Hindu Castes groups was estimated as 43.7% and backward non-Hindu classes as 8.40 per cent and total approximate backward class of Hindu including non-Hindu castes was estimated as 52%. At page 56 of volume of report under heading percentage of the castes and religious groups under sub-heading forward Hindu castes and communities following table given:

III. Forward Hindu Castes & Communities

S.NO.	Group Name	Percentage of total population
C-1	Brahmins (including Bhumihars	5.52
C-2	Rajputs	3.90
C-3	Marathas	2.21
C-4	Jats	1.00
C-5	Vaishyas-Bania, etc.	1.88
C-6	Kayasthas	1.07
C-7	Other forward Hindu castes/groups	2.00
	Total of 'C'	17.58

12. The Maratha, thus, was included in forward Hindu caste, by the second National Backward Classes Commission.

13. A request was received by the National Commission for Backward Classes for inclusion of "Maratha" in the Central List of Backward Classes for Maharashtra along with Kunbi as backward class of Maharashtra. The National Commission for Backward Classes conducted public hearing at Mumbai and after hearing Government officials, Chairman of the Maharashtra State Backward Classes Commission submitted a detailed report dated 25.02.1980 holding that Maratha is not a socially and educationally backward class community but a socially advanced and prestigious community. It is useful to refer to paragraph 22 of the report (last paragraph) which is to the following effect:

> "22. In view of the above facts and position, the Bench finds that Maratha is not a socially backward community but is a socially advanced and prestigious community and therefore the Request for Inclusion of "Maratha" in the Central List of Backward Classes for Maharashtra along with Kunbi should be rejected. In fact, "Maratha" does not merit inclusion in the Central List of Backward Classes for Maharashtra either jointly with "Kunbi" or under a separate entry of its own."

14. On 16.11.1992 a nine-Judge Constitution Bench of this Court delivered a judgment in ***Indra Sawhney*** **v. Union of India [1992 Suppl. (3) SCC 217]** (hereinafter referred to as "***Indra Sawhney***'s case"), apart from laying down law pertaining to principle of reservation under Constitution this Court also issued directions to the Government of India, each of the State Governments to constitute a permanent body for entertaining, examining and recommending upon on requests for inclusion and complaints of over inclusion of other backward classes of citizens.

15. The Maharashtra State OBC Commission headed by Justice R.M. Bapat submitted a report on 25.07.2008 conclusively recording that Maratha could not be included in the OBC list because it is a forward caste. The report in the end concluded:

> "It was agreed with majority that the resolution, stating that it would not be appropriate from social justice perspective to include Maratha community in the 'Other Backward Class' category,

> has been passed with majority in the commission's meeting convened in Pune on 25/07/2008. And it was agreed with majority that such a recommendation should be sent to the government. The opposite opinion in relation to this has been separately recorded and it has been attached herewith."

16. The Maharashtra State Other Backward Classes Commission on 03.06.2013 rejected the request of the State Government to review the findings recorded by the State OBC Commission in its report dated 25.07.2008 holding the Maratha caste as forward community. Despite the existence of statutory State OBC Commission, the Government of Maharashtra appointed a special Committee headed by a sitting Minister, Shri Narayan Rane to submit a report on the Maratha Caste. On 26.02.2014 Rane Committee submitted its report to the State and recommended that for the Maratha special reservation under Article 15(4) and 16(4) of the Constitution of India be provided. On 09.07.2014 Maharashtra Ordinance No.XIII of 2014 was promulgated providing for 16% reservation in favour of the Maratha caste. Writ Petition No.2053 of 2014 (Shri Sanjeet Shukla vs.

State of Maharashtra) along with other writ petitions were filed where two separate Ordinances promulgated on 09.07.2014 providing for reservation for seats for admissions in aided and non-aided institutions of the State and appointment to the post to public service under the State a separate 16% reservation in which Maratha was included, was challenged. The Government resolution dated 15.07.2014 specifying the Maratha community as the community socially and economically backward entitled for 16% reservation was challenged.

17. The Division Bench of the High Court by an elaborate order considering the relevant materials including the reports of National Backward Classes Commission and State Backward Classes Commission and other materials on record stayed the operation of Maharashtra Ordinance No.XIII of 2014 and Resolution dated 15.07.2014. However, it was directed that in case any admission has already been granted in educational institution till that date based on Ordinance No.XIII of 2014 the same shall not be

disturbed and the Students shall allow to complete their respective courses.

18. The SLP(C)Nos.34335 and 34336 were filed in this Court challenging interim order dated 14.11.2014 which SLPs were not entertained by this Court with request to decide the writ petitions at an early date.

19. The Maharashtra Legislature passed the Act, 2014 on 23.12.2014 which received the assent of the Governor on 09.01.2015, and was deemed to have come into force with effect from 09.07.2014. In Writ Petition (C)No. 3151 of 2014 and other connected matters the Division Bench of the Bombay High Court passed an order on 07.04.2015 staying the implementation of the provisions of the Act 1 of 2015 providing 16% reservation to Maratha. The interim order, however, directed that appointment to 16% reservation for Maratha under Act 1 of 2015 in the advertisements already issued shall be made from open merit candidates till final disposal of the

writ petition and appointment shall be made subject to the outcome of the writ petition.

20. On 30.06.2017 the State Government made a reference to State Backward Classes Commission to submit a report on the facts and the observation made in the reference to the Government regarding Maratha. On 02.11.2017 Justice M.G. Gaikwad came to be appointed as Chairman of State Backward Classes Commission. On 14.08.2018 the National Commission for Backward Classes (Repeal) Act was passed repealing the National Commission for Backward Classes Act, 1993. On 15.08.2018 the Constitution (102nd Amendment) Act, 2018 was brought into force adding Article 338B, 342A and 366(26C). Article 338, sub-clause (10) was also amended. On 15.11.2018, the State Backward Classes Commission submitted its report on social and educational and economic status of Maratha. The Commission recommended for declaring Maratha caste of citizens as social and economic backward class of citizens with inadequate representation in services. The Commission also

opined that looking to the exceptional circumstances and extraordinary situations on declaring Maratha class as SEBC and their consequential entitlement to the reservation benefits, the Government may take decision within the constitutional provisions. The Government after receipt of the above report enacted Act, 2018 which was published on 30.11.2018 and came into force from that day. PIL No.175 of 2018 **(Dr. Jaishri Laxmanrao Patil Vs. The Chief Minister and Ors.)** and other writ petitions and PILs were filed challenging the Act, 2018. The High Court in the impugned judgment has noticed the pleadings in three writ petitions being PIL No.175 of 2018 giving rise to C.A.No.3123 of 2020, **W.P.(LD.) No.4100 of 2018 (Sanjeet Shukla vs. The State of Maharashtra)** giving rise to C.A.No.3124 of 2020 **and PIL No.4128 of 2018 (Dr. Uday Govindraj Dhople & Anr. vs. The State of Maharashtra & Anr.)** giving rise to C.A.No.3125 of 2020. Before us in C.A.No.3123 of 2020 and C.A.No.3124 of 2020 most of the volumes and written submissions have been filed. It shall be sufficient to notice these three Civil Appeals, apart from the

details of few other cases which shall be noted hereinafter.

C.A.No.3123 of 2020 (Dr. Jaishri Laxmanrao Patil Vs. The Chief Minister and Ors.)

21. This appeal has been filed against the judgment of the High Court in PIL NO.175 of 2018 filed by Dr. Jaishri Laxmanrao Patil questioning the 16% separate reservation given to Maratha under Act, 2018 published on 30.11.2018. The writ petitioner pleaded that providing reservation to Maratha community to the extent of 16% amounts to breach of Article 14, 16 and 21 of the Constitution of India and also bypassing ceiling of reservation of 50%. Referring to judgment of this Court in ***Indra Sawhney***'s case and law laid down in **Mr. Nagraj and others vs. Union of India & Ors. (2006) 8 SCC 212,** it was pleaded that the reservation is not permissible beyond 50%. Various grounds had been taken in the writ petition questioning the 16% reservation for Maratha. During the pendency of the writ petition subsequent events occurred resulting into enlarging the scope of the petition, in the writ petition several applications

for intervention and impleadment have been filed seeking to justify the Act, 2018. The High Court allowed the applications for intervention and they were directed to be added as party respondents.

C.A.No.3124 of 2020 (Sanjeet Shukla vs. The State of Maharashtra)

22. This appeal arises out of the judgment in Writ Petition (C) No.4100 of 2018. In the writ petition an extensive challenge was made to the Backward Classes Commission report which was basis for Act, 2018. The same writ petitioner i.e. Sanjeet Shukla has earlier filed Writ Petition (C) No.3151 of 2014 challenging the Ordinance promulgated by the Government of Maharashtra in the year 2014. The interim order dated 14.11.2014 was passed in the Writ Petition No.3151 of 2014. The petitioner has also pleaded that the Act, 2014 was also stayed by the High court on 07.04.2015. It was pleaded that Maratha community is a powerful community in the State of Maharashtra with proved dominance in Government Service, Co-operatives, Sugar Co-operatives etc. reference of earlier National

Backward Class Commission and State Backward Class Commission was made wherein the claim of Maratha to be included in OBC was rejected. The comments have also been made on the aggressive tactics adopted by the Maratha community by agitation, dharna for the grant of reservation to them. It was also pleaded that Act, 2018 is passed without complying with the requirement of Constitution (102nd Amendment) Act, 2018. In the writ petition following prayers have been made:

> "(a) Issue a writ, order or direction in the nature of certiorari or any other appropriate writ, order or direction of that nature thereby quashing and striking down Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018, as being invalid and violative of the provisions of the Constitution of India;
>
> (b) During pendency of the petition, this Hon'ble Court be pleased to say to the operation, implementation and effect of the Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;

b1. during pendency of the present petition, this Hon'ble Court be pleased to issue an appropriate writ, order or direction that no appointments should be made under Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;

b2. during pendency of the present petition, this Hon'ble Court be pleased to issue an appropriate writ, order or direction of that nature that no posts should be kept vacant by reference to the Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;

b3. during pendency of the present petition, this Hon'ble Court be pleased to issue an appropriate writ, order or direction of that nature that no advertisements for vacancies should be placed reserving any posts under Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;

b4. during pendency of the present petition, this Hon'ble Court be pleased to issue an appropriate writ, order or direction of that nature that no admission in educational institutions should be made

under reserved category as per Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;

b5. during pendency Court be pleased to issue an appropriate writ, order or direction of that nature that no Caste Certificates should be issued under Maharashtra State Socially and Educationally Backward (SEBC) Class (Admission in Educational Institutions in the State and for posts for appointments in public service and posts) Reservation Act, 2018;"

C.A.No.3125 of 2020 (Dr. Uday Govindraj Dhople & Anr. vs. State of Maharashtra & Anr.)

23. This appeal arises out of Writ Petition (LD.)No.4128 of 2018 filed by Dr. Udai Govindraj Dhople. The writ petition was filed in representative capacity on behalf of the similarly situated medical students/medical aspirants who are adversely affected by the Act, 2018.

24. The writ petitioners seek quashing of Act, 2018 and in the alternative quashing and setting aside

Sections 2(j), 3(2), 3(4), 4,5,9(2),10 and 12 of the Act, 2018. The petitioner pleads that reservation system has become a tool of convenience for the Government and politicians in power for their vote bank. It is further pleaded that Maratha was never treated as backward class community and earlier their claim was rejected. It was further pleaded that the impugned enactment seriously prejudices the chances of open candidates in all fields of education as well as in service. It was further pleaded that Gaikwad Commission's report is not based on fiscal data. There was inadequacy of data base. A community which was found not to be backward for last 50 years is now declared as backward class without any change of circumstances. The writ petitioner, pleads that enactment shall have an adverse effect which shall divide the society by caste basis on communal line. The impugned enactment is claimed to be violative of the basic structure and fundamental value of the Constitution capitulated in Article 14, 16 and 19 of the Constitution.

C.A.Nos.3133, 3134 and 3131 of 2020

25. These appeals have been filed by the appellants who were not parties in the PIL No.175 of 2018, against the High Court judgment praying for permission to file SLP which has already been granted.

26. C.A.No.3129 arising out of PIL(ST)No.1949 of 2019 whereby 16% reservation to Maratha under Act, 2018 has been challenged.

27. Writ Petition (C)No.915 of 2020 has been filed under Article 32 of the Constitution of India praying for directing the respondents that all the admission to Post Graduate Medical & Dental Courses in the State of Maharashtra for the academic year 2020-21 shall be made subject to the outcome of the SLP(C)No.15735 of 2019 and connected petitions.

28. Writ Petition (C) No.504 of 2020 filed under Article 32 has been filed seeking mandamus direction to the respondents that provisions of Act, 2018

should not be made applicable to the admission to Post Graduate Medical & Dental Courses in the State of Maharashtra for the academic year 2020-21.

29. Writ Petition (C) No.914 of 2020 filed under Article 32 prays for writ in the nature of certiorari or any other writ or order or direction to hold the impugned Socially and Educationally Backward Classes (SEBC) Act, 2018 as unconstitutional and violative of Article 14, 16 & 19 of the Constitution of India and further Act, 2018 should not be made available to the medical admission process for Post-graduate students for the academic year 2020-21 in the State of Maharashtra.

30. C.A.No.3127 of 2020 arises out of Writ Petition (C)No.4128 of 2018. The prayer of which writ petition has already been noticed by C.A.No.3125 of 2020.

31. C.A.No. 3126 of 2020 has been filed against the impugned judgment of the High Court in Writ Petition (C)No.3846 of 2019 **(Mohammad Sayeed Noori Shafi Ahmed & Ors. vs. The State of Maharashtra & Ors.).**

Writ Petitioners were challenging the Act, 2018 as well as the Maharashtra State Backward Class Commission Report on the Social, Educational, Economic Status of the Marathas and Allied Aspects, 2018. The question was also raised about inaction on the part of the State of Maharashtra in not acting upon the report of Maharashtra State Minority Commission (2011) recommending special reservation to certain Muslim communities and failure to introduce a Bill on the floor of the State Legislature providing for 5% reservation to 52 Muslim communities in Maharashtra.

32. C.A.No.3128 of 2020 arising out of Writ Petition (C) No.4269 of 2018(Vishnuji P. Mishra vs. The State of Maharashtra) wherein similar reliefs have been claimed as in PIL No.175 of 2018.

33. Writ Petition (C) No.938 of 2018 has been filed under Article 32 of the Constitution of India challenging the validity of Constitution (102nd Amendment) Act, 2018. Writ Petition notices that issue regarding Constitution (102nd Amendment) Act,

2018 is pending in SLP(C)No.15737 of 2019(C.A.No.3123 of 2020). The writ petitioner also claimed to have filed an I.A.No.66438 of 2020 for impleadment in SLP(C) No. 15737 of 2019. The petitioner's submission is that if the effect of Constitution (102nd Amendment) Act, 2019 is to take away power of State Legislature with respect to identification of OBC/SEBC, it is obvious that Constitution (102nd Amendment) Act, 2018 has taken away the legislative powers of State Legislature with respect to some areas of law making power. The petitioner, further, submits that the procedure prescribed by the proviso to clause (2) of Article 368 of the Constitution of India has not been followed since no ratification by the legislatures of not less than one-half of the States by Resolution was obtained. In the writ petition following prayers have been made:

> "a) This Hon'ble Court be pleased to hold and declare that the 102nd Amendment of the Constitution of India published in the Gazette of India dated 11.08.2018 is unconstitutional being in violation of proviso to clause (2) of Article 368 and

> also being violative of the right guaranteed under Article 14 and 21 of the Constitution of India.
>
> b) This Hon'ble Court please to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction directing that the 102nd Amendment of the Constitution of India shall not be enforced hereafter as a result of its being violative of Article 368 as also the basic structure of the Constitution of India and also being violative of Article 14 and 21 of the Constitution of India."

34. In the writ petitions before the High Court, the State of Maharashtra has filed affidavit in reply dated 16.01.2018 in Writ Petition No.4100 of 2018 supporting the Act, 2018, which has been extensively relied by the High Court in the impugned judgment. The affidavits were also filed by the intervenors and affidavits were filed in support of Chamber Summons. The High Court after perusing the writ petitions, affidavits, applications filed by the interveners, Chamber Summons and supporting other materials and after hearing counsel appearing for the respective parties has broadly capitulated following points for consideration:

(3) <u>Points for consideration before the High Court</u>.

35. "(III) Whether the impugned Act of 2018 is constitutionally invalid on account of lack of legislative competence on the following sub-heads:-

(a) The subsisting interim order passed by the Bombay High Court in Sanjeet Shukla vs. State of Maharashtra (WP 3151/2014) thereby granting stay to a similar enactment and ordinance of the State, which is pending for adjudication before this Court.

(b) The 102nd (Constitution) Amendment, 2018 deprives the State legislature of its power to enact a legislation determining the Socially and Educationally Backward Class and conferring the benefits on the said class in exercise of its enabling power under Article 15(4) and 16(4) of the Constitution.

(C) The limitation of 50% set out by the Constitution bench in ***Indra Sawhney*** in form of constitutional principle do not permit reservation in excess of 50%.

(IV) Whether the State has been able to establish the social and educational backwardness and inadequacy of representation of the Maratha community in public employment on the basis of the report of MSBCC under the Chairmanship of Justice Gaikwad on the basis of quantifiable and contemporaneous data ?

(V) Scope of Judicial Review for interference in the findings, conclusions and recommendation of the MSBCC.

(VI) Whether the reservation carved out for Maratha community by the State Government in form of impugned legislation satisfies the parameters of reasonable classification under Article 14 of the Constitution ?

(VII) Whether the ceiling of 50% laid down by the Hon'ble Apex Court in case of ***Indra Sawhney*** vs. Union of India, is to be taken as a constitutional principle and deviation thereof violates the basic tenet of equality enshrined in the Constitution?

(VIII) Whether the State is able to justify existence of exceptional circumstances or extra-ordinary situation to exceed the permissible limit of 50% within the scope of guiding principles laid down in ***Indra Sawhney*** ?

(IX) Whether in the backdrop of the findings, conclusions and recommendations of the MSBCC report, whether the State Government has justified exercise of its enabling power under Article 15(4) and 16(4) of the Constitution ?"

36. The High Court in paragraph 177 of the judgment has summarised its conclusion to the following effect:

"**177.** In the light of the discussion above, we summarize our conclusions to the

points which we have formulated in the proemial of the judgment and deliberated in the judgment. We summarize our conclusions in the same sequence :

[1] We hold and declare that the State possess the legislative competence to enact the Maharashtra State Reservation for Seats for Admission in Educational Institutions in the State and for appointments in the public services and posts under the State (for Socially and Educationally Backward Classes) SEBC Act, 2018 and State's legislative competence is not in any way affected by the Constitution (102nd Amendment) Act 2018 and the interim order passed by this Court in Writ Petition No. 3151 of 2014. We resultantly uphold the impugned enactment except to the extent of quantum of reservation as set out in point no. 6.

[2] We conclude that the report of the MSBCC under the Chairmanship of Justice Gaikwad is based on quantifiable and contemporaneous data and it has conclusively established the social, economical and educational backwardness of the Maratha community and it has also established the inadequacy of representation of the Maratha community in public employment / posts under the State. Accordingly we uphold the MSBCC report.

[3] We hold and declare that the classification of the Maratha class into "Socially and Educationally Backward Class" complies the twin test of reasonable classification permissible under Article 14 of the Constitution of India, namely, (a) intelligible

differentia and (b) rational nexus to the object sought to be achieved.

[4] We hold and declare that the limit of reservation should not exceed 50%, however in exceptional circumstances and extra-ordinary situations, this limit can be crossed subject to availability of quantifiable and contemporaneous data reflecting backwardness, inadequacy of representation and without affecting the efficiency in administration.

[5] We hold and declare that the report of the Gaikwad Commission has set out the exceptional circumstances and extra-ordinary situations justifying crossing of the limit of 50% reservation as set out in ***Indra Sawhney***'s case.

[6] We hold and declare that the State Government in exercise of its enabling power under Articles 15(4)(5) and 16(4) of the Constitution of India is justified, in the backdrop of report of MSBCC, in making provision for separate reservation to Maratha community. We, however, hold that the quantum of reservation set out by the Maharashtra State Reservation for Seats for Admission in Educational Institutions in the State and for appointments in the public services and posts under the State (for Socially and Educationally Backward Classes) SEBC Act, 2018, in section 4(1)(a) and 4(1)(b) as 16% is not justifiable and resultantly we quash and set aside the quantum of reservation under the said provisions over and above 12% and 13% respectively as recommended by the Commission."

In view of the conclusions, the High Court passed following order in the batch of writ petitions:

": O R D E R :

[A] In the light of summary of conclusions above, we dispose of the following writ petitions / PILs by upholding the Impugned Act of 2018 except to the extent of quantum of reservation prescribed by section 4(1)(a) and 4(1)(b) of the said Act :

1] PIL No. 175 of 2018,
2] WP (stamp No.) 2126 of 2019
3] WP (stamp No.) 2668 of 2019
4] WP (stamp No.) 3846 of 2019
5] PIL No. 140 of 2014
6] WP (Lodg. No.) 4100 of 2018
7] WP (Lodg. No.) 4128 of 2018.
8] WP (Lodg. No.) 4269 of 2018
9] PIL No. 6 of 2019.
10] WP (Lodg No.) 969 of 2019.

[B] The following writ petitions / PILs seeking implementation of the Impugned Act of 2018, are also disposed of in view of the Impugned Act being upheld except to the extent of quantum of reservation prescribed by section 4(1)(a) and 4(1)(b).

1] PIL No.19 of 2019 :- The petition is allowed in terms of prayer clause (a).

2] PIL No.181 of 2018 :- The petition is allowed in terms of prayer clause (a). As far as prayer clause (b) is

concerned, we grant liberty to the petitioner to file a fresh petition in case cause of action survives.

[C] The following writ petitions are rendered infructuous on account of the passing of SEBC Act of 2018 which has repealed the earlier ESBC Act of 2015.

1] Writ Petition (Stamp No.) 10755 of 2017
2] PIL No. 105 of 2015
3] PIL No. 126 of 2019
4] PIL No. 149 of 2014
5] PIL No. 185 of 2014
6] PIL No. 201 of 2014
7] Writ Petition No. 3151 of 2014.”

[D] The following writ petitions are de-tagged from the present group of petitions as they claim reservation for the Muslim communities.

1] Writ Petition No. 937 of 2017
2] Writ Petition No. 1208 of 2019
3] PIL No.209 of 2014
4] PIL (Stamp No.) 1914 of 2019.

[E] WP No.11368 of 2016:- The Petition is dismissed as far as prayer clause (A) is concerned. As far as prayer (B) is concerned the petitioner is at liberty to file an appropriate Writ Petition seeking said relief.

[F] PIL (Stamp No.) 36115 of 2018 :- The is disposed of since the recommendation of the commission are implemented in form of the impugned SEBC Act, 2018.

[G] In the light of disposal of above writ petitions and PILs, all pending civil

> applications / notice of motions / Chamber Summons taken out in these writ petitions and PILs do not survive and the same are accordingly disposed of."

37. Aggrieved with the impugned judgment of the High Court dated 27.06.2019, the appellants have filed the Civil Appeals noted above in this Court.

38. We have heard Shri Arvind P. Datar, learned senior counsel, Shri Shyam Divan, learned senior counsel, Shri Gopal Sankaranarayanan, learned senior counsel, Shri Pradeep Sancheti, learned senior counsel, Dr. Rajiv Dhawan, learned senior counsel, Shri Sidharth Bhatnagar, learned senior counsel, Shri B.H. Marlapalle, learned senior counsel, Shri R.K. Deshpande, learned counsel, Dr. Gunratan Sadavarte, learned senior counsel, Shri Amit Anand Tiwari, learned counsel and Shri S.B. Talekar, learned counsel for the appellants. Shri Amol B. Karande, learned counsel, has been heard in support of Writ Petition No.938 of 2020.

39. We have heard Shri K.K. Venugopal, learned Attorney General for India and Shri Tushar Mehta,

learned Solicitor General. Shri Mukul Rohatgi, learned senior counsel, has appeared for the State of Maharashtra and Chhattisgarh. Shri Shekhar Naphade, learned senior counsel, and Shri P.S. Patwalia, learned senior counsel, have also appeared for the State of Maharashtra. Shri Kapil Sibal, learned senior counsel, has appeared for the State of Jharkhand. Dr. Abhishek Manu Singhvi, learned senior counsel, has also appeared for the respondent No.3 in C.A. No.3123 of 2020.

40. We have also heard several learned counsel appearing for different States. Shri Manish Kumar, learned counsel has appeared for the State of Bihar, Shri Karan Bharihok, has appeared for the State of Punjab, Dr. Manish Singhvi, learned senior counsel, has appeared for the State of Rajasthan. Shri C.U. Singh, learned senior counsel, has appeared for the respondents. Shri Sudhanshu S. Choudhari, learned counsel has appeared for some of the respondents, Shri V. Shekhar, learned senior counsel has appeared for the State of Maharashtra, Shri S.

Niranjan Reddy, learned senior counsel, has appeared for the State of Andhra Pradesh, Shri Shekhar Nephade, learned senior counsel and Shri Jayanth Muth Raj, learned senior counsel have appeared for the State of Tamil Nadu. Shri Jaideep Gupta, learned senior counsel has appeared for the State of Karnataka. Shri Vinay Arora, learned counsel, has appeared for the State of Uttarakhand. Shri Arun Bhardwaj, learned counsel, has appeared for the State of Haryana. Shri Amit Kumar, learned counsel, has appeared for the State of Meghalaya. Shri Pradeep Misra, learned counsel, has appeared for the State of U.P. and Shri Tapesh Kumar Singh, learned counsel, has appeared for the Madhya Pradesh Public Service Commission. Ms. Diksha Rai, learned counsel, has appeared for the State of Assam.

41. We have also heard Mrs. Mahalakshmi Pavani, learned senior counsel, Shri A.P. Singh, learned counsel, Mr. Shriram Pingle, learned counsel, Shri V.K. Biju, learned counsel, Shri Hrishikesh s. Chitaley, learned counsel, Shri Mr. Kaleeswaram Raj,

learned counsel, and Shri Ashok Arora for intervenors. Mr. Akash Avinash Kakade has also appeared for the interveners.

42. Learned counsel for the parties have made elaborate submissions on the six questions as noted above. Learned counsel for the parties have also made their respective submissions on the points for consideration as was formulated by the High Court in the impugned judgment. The elaborate submissions have also been made by the petitioners challenging the various provisions of Act, 2018. Learned counsel appearing for the petitioners have made scratching attack on the Gaikwad Commission's report, various data and details have been referred to by the petitioners to support their submissions that Maratha community is not a socially and educationally backward class.

43. We shall now proceed to notice the submission advanced by learned counsel including submissions of Attorney General for India in seriatim.

(4) Submissions of the parties.

44. Shri Arvind Datar, learned senior counsel, led the arguments on behalf of the appellant. Shri Datar submits that there is no need to refer the judgment of Constitution Bench of this Court in ***Indra Sawhney*** to an Eleven-Judge Bench. Reference to larger Bench can be made only for compelling reasons. No judgment of this Court has doubted the correctness of nine-Judge Constitution Bench of this Court in ***Indra Sawhney***'s case. On the other hand 50% limit for reservation has been reiterated at least by four Constitution Bench judgments of this Court rendered after judgment in ***Indra Sawhney***'s case. All the High Courts have uniformly accepted the limit of 50% reservation. In some States where for political reasons 50% limit had been breached, it was struck down repeatedly. The limit of 50% reservation laid down by the Constitution Bench of this Court in ***Indra Sawhney*** is now an integral part of the trinity of Article 14, 15 and 16 of the Constitution. Any

legislative or executive legislations against it are void and have to be struck down. Shri Datar has specifically referred to the Constitution Bench judgment of this Court in ***M. Nagaraj vs. Union of India, (2006) 8 SCC 212*** in which case the Constitution Bench of this Court laid down that the State cannot obliterate the Constitutional requirement of ceiling limit of 50%. It was held that if the ceiling limit of 50% is breached the structure of quality and equality in Article 16 would collapse.

45. It was further held that even the State has compelling reason, the State has to see that its reservation provision does not lead to excessiveness so as to breach the limit of 50%. The request to refer the judgment of Nagaraj has been refused by subsequent Constitution Bench judgment of this Court in **Jarnail Singh and others vs. Lachhmi Narain Gupta and others**, ***2018(10) SCC 396***. The parameters, when this Court revisits its judgments have been clearly laid down in which the present case does not fall. The judgment delivered by nine-Judge Bench needs to

be followed under the principle of *stare decisis.* More so for the last more than 28 years no judgment of this Court had expressed any doubt about the law laid down by this Court in ***Indra Sawhney***'s case. A very high threshold is to be crossed when reference is to be made to eleven-Judge Bench. In law, certainty, consistency and continuity are highly desirable. The Parliament has not touched 50% limit laid down under Article 15(4) and 16(4) of the Constitution for the last several decades.

46. The impugned judgment of the Bombay High Court is liable to be set aside as it is contrary to the clear principle laid down in the ***Indra Sawhney***'s case. The High Court has not given any reason as to how extra-ordinary situations as mentioned in paragraph 810 in ***Indra Sawhney*** case is made out in the context of reservation for the Maratha caste/community in Maharashtra. Exception and certain extra-ordinary situations to the 50% principle carved out in ***Indra Sawhney*** does not cover the case of Maratha since such "rule is confined to

far flung and remote areas, where they are out of main stream of national life". ***Indra Sawhney*** has also mandated extreme caution for going beyond 50%. The reservation limit of 50% has also been applied in the decisions rendered in the context of Article 243D and 243T of the Constitution of India relating to Panchayats and Municipalities. The earlier reports of National Commission for Backward Classes has rejected claim of Maratha to be included in backward class. The opinion of National Commission for Backward Classes cannot be disregarded by the State and in the event it had any grievance remedy of review was provided.

47. The Maratha community has been found to be socially advanced and prestigious caste. It is submitted that limit of 50% is essential right on part of equality which is part of basic structure. Even members of Scheduled Tribes and Other Backward Classes who qualify on merit can continue to enjoy the benefit of merit quota. The limit of 50% as laid down in ***Indra Sawhney***, only a Parliamentary amendment is contemplated. Whenever Parliament

wanted to get over 50% ceiling limit laid down by ***Indra Sawhney***, the constitutional Amendments were brought, namely, Constitution 77th Amendment and Constitution 81st Amendment.

48. Shri Datar has referred to various paragraphs of judgment of this Court in ***Indra Sawhney***. In support of his submission that majority has laid down upper ceiling of 50% for providing reservation under Article 16(4) and 15(4), Shri Datar submits that the judgment of ***Indra Sawhney*** cannot be confined only to Article 16(4) but the law was laid down taking into consideration Article 15(4) and 16(4).

49. Shri Shyam Divan, learned senior counsel for the appellant/writ petitioner submits that social and financial status of Maratha community has been examined by successive Commissions or Committees up to June 2013 and each of the Commission and Committee did not recognise members of Maratha community as deserving for reservation as backward class. Shri Divan has referred to Kalelkar Commission Report (1955), Mandal Commission Report

(1980) and National Backward Class Commission Report (2000). He has also referred to the Deshmukh Committee report which did not include the Maratha Community in the list of backward communities. Reference has also been made to the Khatri Commission (1995) and Bapat Commission (2008).

50. It is submitted that when the Maharashtra State Commission for backward class declined to reconsider in the matter of reservation of Maratha, the State Government appointed Narayan Rane Committee who was a Minister in the State Government which submitted a report in 2014 that although Maratha Community may not be socially backward but it recommended a new Socially and Economically Backward Class (SEBC). Shri Divan has submitted that Gaikwad Commission which submitted its Report on 15.11.2018 concluding that Maratha Community in Maharashtra are socially, educationally and economically backward and are eligible to be included in backward class category is completely flawed. It was not open for the Gaikwad Commission to ignore determination by

National Commission and State Committees/Commission until June 2013 holding that Maratha are forward class in the State of Maharashtra. The report failed to recognize the consequences of Maratha Community being politically organised and being the dominant political class in Maharashtra for several decades. Politically organised classes that dominate government are not backward in any Constitutional sense.

51. Coming to the Constitution (One Hundred and Second Amendment), 2018, Shri Divan submits that 102nd Constitution Amendment now contemplates identification by National Commission of Backward Classes. The Constitutional scheme which is delineated by Article 341 and 342 has also been borrowed in Article 342A. The identification of backward classes is now centralized. Shri Divan has also highlighted adverse impact of the impugned act on medical admission in the State of Maharashtra.

52. Law laid down by Constitution Bench in ***Indra Sawhney's case*** that reservation under Article 15(4)

and 16(4) should not exceed the upper limit of 50 percent has been followed and reiterated by several judgments of this Court including Constitution Bench judgments. The Gaikwad Commission report and the reason given by the report does not make out any case for exception regarding Maratha Community to fall in extraordinary circumstances as contemplated in paragraph 810 of the judgment in ***Indra Sawhney's case.***

53. Shri Gopal Sankaranarayanan, learned senior Counsel has made his submission on the Constitution (One Hundred and Second Amendment), 2018. Shri Narayanan submits that after the Constitution (One Hundred and Second Amendment), 2018, the State legislature could not have passed the 2018 Act. Article 338B and 342A brought by the Constitution (One Hundred and Second Amendment), mark see change in the entire regime regarding identification of backward classes. The power of the National Commission of Backward Classes as per Article 338B sub-clause (5) includes power to make reports and

recommendations on measures that should be taken by the Union or any State. The National Commission for Backward Class is also required to be now consulted both by the Union and the State. Article 366(26) states that the phrase 'Socially, Educationally and Backward Classes' means such Backward Classes as are so deemed under Article 342A, for the purposes of this Constitution which provision does not permit Socially, Educationally and Backward Classes to have any other meaning. The purposes of this Constitution, as occurring in Article 366(26C) shall also apply to Article 16(4). After the Constitution (One Hundred and Second Amendment), the States have no power to identify socially, educationally and backward classes. The State Governments are still left free to decide the nature or extent of provision that may be made in favour of socially and educationally backward classes identified in accordance with Article 342A. When the power to determine SCs and STs have always been centralized, it is absurd to suggest that allowing the same procedure for identification of socially,

educationally and backward classes shall violate federalism.

54. Shri Gopal Sankaranarayanan further submitted that the reliance on Select Committee Report of Rajya Sabha is unwarranted. In the Select Committee Report which was submitted in July 2018, there were several dissents, since many members of the Select Committee understood that the Constitution (One Hundred and Second Amendment), shall take away the power of the State to prepare their own list of socially, educationally and backward classes. Article 342A has been brought in the Constitution to achieve uniformity and certainty and not due to any political reasons. There is no ambiguity in Article 342A which requires any external aid for interpretation.

55. Shri Sidharth Bhatnagar, learned counsel appearing for the appellant also adopts the submissions of Mr. Datar and Mr. Gopal Sankaranarayanan and submits that the judgment of this Court in ***M.R. Balaji versus State of Mysore,***

AIR 1963 SC 649,had laid down that reservation under Article 15(4) shall be less than 50 percent which principle finds its approval in ***Indra Sawhney's Case.***In ***Indra Sawhney's Case,*** Eight out of Nine Judges took the view that reservation cannot exceed 50 percent. He submits that judgment of ***Indra Sawhney*** need not be referred to a larger Bench.

56. Mr. Pradeep Sancheti, learned senior Advocate, has confined his submissions to the Gaikwad Commission Report. He submits that due difference to the opinion of the Commission does not mean that opinion formed is beyond the judicial scrutiny. He submits that backwardness has to be based on objective factors where inadequacy has to factually exist. The Court while exercising power of Judicial Review has to consider the substance of the matter and not its form, the appearance or the cloak, or the veil of the executive action is to be carefully scrutinized and if it appears that Constitutional power has been transgressed, the impugned action has to be struck down.

57. Shri Sancheti submitted that three National Backward Class Commissions and three State Backward Class Commissions did not include Maratha Community as backward community which findings and reasons could not have been given a goby by Gaikwad Commission constituted in the year 2017. The Gaikwad Commission (hereinafter referred to as Commission), survey, data results, analysis suffers from various inherent flaws. The sample survey conducted by the Commission is skewed, unscientific and cannot be taken as a representative sample. Sample size is very small. Out of 43,629 persons surveyed, only 950 persons were from the Urban Area. Mumbai was excluded from the Survey. Sample size of total population was well below 0.02 percent. The Commission assumes that the Maratha form 30 percent of the State's population. Without there being any quantifiable data, the Commission picked up and chose certain parameters whereas conveniently left out many of the parameters where Maratha Community is better off. The Commission has not provided a

comparable State average for at least 28 of the parameters used in the study. When the State Average is not on the record, treating those parameters as parameters of backwardness is wholly unfounded. The High Court in the impugned judgment has also not met the submissions which were brought on record before the High Court regarding the serious flaws committed by the Commission.

58. The marking system adopted by the Commission was not rational; the Constitution of the Commission and experts was loaded in favour of the Maratha community since the majority of the members of the Commission were all Marathas. It is submitted that Marathas are the most dominant community not only in politics but also in other fields such as educational institutions, sugar factories, agriculture etc. which aspects are relevant criteria for identifying backwardness of a community. The sample size was so small that no quantifiable data could have been found.

59. Referring to Chapter 10 of the Commission's report, Shri Sancheti submits that no extraordinary situation as contemplated in paragraph 810 of judgment of ***Indra Sawhney's case*** could be made out, even if all the findings given by the Commission are accepted to be true. The Commission has relied on outdated data for holding that 'Marathas' were 'Shudras'. When an unscientific survey is done, an unrealistic result is bound to come. There has been adequate representation of Maratha Community in the Public Services. The Commission erred in holding that the representation is not proportionate and recommended reservation under Article 16(4). The Commission has not even adverted to the requirement regarding efficiency as contemplated under Article 335 of the Constitution of India.

60. Shri Sancheti submits that more than 40 percent Members of Parliament and 50 percent of Members of Legislative Assembly are Marathas. Shri Sancheti submits that the Commission's report is only paperwork which could not be accepted by the Court,

while the Act, 2018, purports to create reservation for socially and economically Backward Classes but in effect the enactment is reservation for only Maratha which enactment is not sustainable.

61. Shri Sancheti submits that from the various data regarding representation in jobs of Maratha community itself make it clear that Maratha community is adequately represented in Public Services and there is no Constitutional requirement for providing reservation under Article 16(4). Shri Sancheti submits that the Commission has given undue importance to the suicide by the Maratha farmers. He submits that from the data given in the report, the proportion of suicide of Maratha comes to 23.56 percent which is even less from the proportion of 30 percent as claimed by the Commission. The High Court by wrong appreciation of facts concludes that those who committed suicide, 80.28 percent were Marathas. There is no basis to attribute farmer suicide to Maratha Backwardness. Shri Sancheti submits that undue weightage has been given to the percentage of

Maratha in 'Dubbeywala class' which cannot be any relevant consideration.

62. Dr. Rajeev Dhavan, appearing on behalf of the appellant, submits that no case has been made out to review or refer the judgment of this Court in ***Indra Sawhney's case*** which is based on principles of equality and reasonableness. Dr. Dhavan submits that in fact ***Indra Sawhney*** should be strengthened to make 50 percent strict subject to dire restrictions and stronger judicial review. The ***Indra Sawhney*** should be treated as a comprehensive decision on various aspects of reservation as a whole and the attempt of the respondents to distinguish ***Indra Sawhney*** on the basis that it was a decision only on Article 16(4) is spurious.

63. Dr. Dhavan, however, submits that in the judgment of ***Indra Sawhney***, a weak test for judicial scrutiny in matters within the subjective satisfaction of the scrutiny was laid down i.e. test as laid down by this Court in ***Barium Chemicals ltd. and another versus The Company Law Board and others,***

AIR 1967 SC 295. Dr. Dhavan submits that there ought to be a strict scrutiny test and this Court may tweak this aspect of ***Indra Sawhney*** so that the strict scrutiny test applies. The 50 percent test as has been articulated in the ***Indra Sawhney*** is based on the principle of giving everyone a fair chance. 50 percent ceiling is based on principle of equality to prevent reverse discrimination which is as much a principle that the Constitution records to equality as anything else. The direction of ***Indra Sawhney*** that list of Other Backward Classes be reviewed periodically is not being followed. Dr. Dhavan, however, submits that the entire power of reservation has not been taken away from the State.

64. Elaborating his submissions on the Constitution (One Hundred and Second Amendment) Act, 2018, Dr. Dhavan submits that the essence of 102nd Amendment as exemplified in Article 342A results in the monopoly of identification even though implementation is left to the State. His submission is that this is contrary to the basic structure of

federalism of the Constitution. In that it deprived the States of the crucial power of identification which was a very important power of the State under Article 15, 16 and 46. The obligation of the State in Article 15, 16 and 46 continue to be comprehensive.

65. Alternate submissions advanced by Dr. Dhavan is that Article 342A can be read down to describe the power of the Centre in relation to the Central Services and leaving the identification and implementation power of the States intact. Dr. Dhavan, however, submits that Maharashtra legislature had the competence to enact the 2018 Act, even though the Constitution (One Hundred and Second Amendment) had come by that time. He, however, submits that any legislation which is enacted will still be subject to ***Indra Sawhney and Nagraj principles.***

66. Dr. Dhavan submits that various reports of Maharashtra in fact found that it is not necessary to include Maratha despite their persistent efforts.

He submits that the test to be applied is "what has happened since the last report negating inclusion of Maratha that now requires a change to include them". He submits that the logic of the principle is that if the Marathas were not backward for over Seventy years, how they have suddenly become backward now. Dr. Dhavan reiterates his submission that there is no judgment which has questioned ***Indra Sawhney's case.*** He submits that reservation under political pressure, social pressure need not to be taken. A political obligation to the electorate is not a constitutional obligation. He further submits that object of Article 16(4) is empowerment i.e. sharing of the State power. He submits that Maratha are not deprived of sharing power; hence, no case is made out for granting reservation under Article 16(4).

67. Shri B.H. Marlapalle, learned senior counsel, has also submitted that doctrine of extraordinary circumstances cannot be applied to a dominant class of Society. He submits that the representation of Maratha in the Legislative Assembly of the State is

more than 50 percent and in the Cabinet of the State they are more than 50 percent. After enforcement of the Constitution, Marathas were never regarded as an Other Backward Community. Three Central Commission and three State Commissions have rejected the claim of the Marathas to be backward.

68. Shri S.B. Talekar, appearing in Civil Appeal No.3126 of 2020 has submitted that Writ Petition No.3846 of 2019 was filed by Mohd. Saeed Noori & Others, claiming reservation for Muslims. The High Court although noted the submissions but had made no consideration. Learned Counsel contended that the State has no legislative competence to enact the 2018 Act. He submits that power to legislate on the subject has been taken away by virtue of 102nd Constitutional Amendment by adding Article 342A in the Constitution of India. He also questioned the composition of Gaikwad Commission.

69. Shri R.K. Deshpande, appearing for the appellant has also contended that by Article 342A, a separate mechanism has been introduced for the purpose of

identification of backward class. He submits that there cannot be any State list of 'Socially and Educationally Backward Class' after the 102nd Constitutional Amendment. He submits that identification of the caste was never the exclusive domain of the States.

70. Shri Amit Anand Tiwari, appearing in writ petition i.e. W.P. No.504 of 2020, referring to the Order dated 09.09.2020 contends that Three-Judge Bench having refused the prayer to refer the ***Indra Sawhney*** judgment to a larger Bench, the Said prayer needs no further consideration. Shri Tiwari submits that present is not a case covered by any exceptional circumstances as mentioned in the ***Indra Sawhney's*** judgment. Historically, Marathas have been treated as a forward class who are socially, economically and politically well-of. Prior to the report of Gaikwad Commission, as many as six Commissions have held Marathas are not entitled to be treated as a backward class. There has been no change in the circumstances to include Maratha

Community in the list of Backward Classes. With respect to 102nd Constitutional Amendment, shri Tiwari submits that now States are not empowered to notify a class of persons as socially and educationally backward for the purposes of the Constitution. However, State's power to confer benefits on an already identified class of persons as SEBC as identified under Article 342A remains intact. The High Court committed an error in holding that States still have power to identify class as SEBC. The High Court erred in not appreciating the import of Article 366(26C).

71. We may also notice the submission of writ petitioner in W.P.(civil) No.938 of 2020, challenging the 102nd Constitutional Amendment Act, 2018.

72. Shri Amol B. Karande, learned counsel for the petitioner submits that in event Article 342A read with Article 366(26C) of the Constitution of India takes away the power of the State to identify a backward class, the said Constitutional Amendment

shall be violative of basic feature of the Constitution, i.e. Federalism.

73. He further submits that by the Constitutional Amendment, the power of the State to legislate under various Entries under List-II and List-III have been taken away, hence, it was obligatory to follow the procedure as prescribed in Proviso to Article 368(2) of the Constitution of India, which having not done, the Constitutional Amendment is not valid.

74. Learned Counsel submits that Article 366(26C) requires certain clarification since there is no clarity regarding Central List and State List. He submits that States shall have still power to legislate on the identification of the backward class.

75. Learned Attorney General, Shri K.K.Venugopal, has made submissions on the 102nd Constitutional Amendment. Shri Venugopal submits that he shall confine his arguments on the 102nd Constitutional Amendment only. Referring to Article 12 of the

Constitution, the learned Attorney General submits that the definition of the "State includes Government and Parliament of India and Government and Legislature of each State." Under Article 15(4) and 16(4), the State has power to identify the 'Socially and Educationally Backward Class/Backward Class' and take affirmative action in favour of such classes which power has been regularly exercised by the State.

76. Learned Attorney General submits that the Constitution Bench in ***Indra Sawhney*** held that there ought to be a permanent body, in the nature of a Commission or a Tribunal to which inclusion and non-inclusion of groups, classes and Sections in the list of Other Backward Classes can be made. The Constitution Bench directed both the Union Government and the State Government to constitute such permanent mechanism in the nature of a Commission.

77. Learned Attorney General submits that it is inconceivable that no State shall have power to

identify backward class, the direction issued by the Nine-Judge Bench still continuing. He has referred to the judgment delivered by Justice Jeevan Reddy for himself and three other Judges and judgment delivered by Justice Thommen and submits that the above directions were the directions of the majority. Learned Attorney General submits that no such amendment has been made by which the effect of Article 15(4) and 16(4) have been impacted. He submits that National Backward Class Commission Act, 1993 was passed in obedience of direction of this Court in ***Indra Sawhney's case.*** He submits that Section 2(C) of 1993 Act refers to a Central list. Learned Attorney General has also referred to Maharashtra Act No.34 of 2006, especially Section 2(C), 2(E) and Section 9(1) which refers to State List. He submits that Article 342A was to cover the Central list alone, the 1993 Act, having been repealed on 14.08.2018. The Attorney General has also referred to Select Committee Report dated 17.07.2017, paragraph 12, 18, 19 and 55 and submits that Select Committee Report indicate that the

intention of Constitutional Amendment was not to take away the State's power to identify the Backward Class, the Select Committee Report clearly indicate that State's Commission shall continue to perform their duties.

78. Learned Attorney General submits that Central List as contemplated under Article 342A (2) relates to employment under the Union Government, Public Sector Corporation, Central institutions in States where Central list was to be utilized. He submits that State Government identification of Backward Class/Socially and Educationally Backward Classes is not touched by Article 342A.

79. Referring to Scheduled Castes and Scheduled Tribes learned Attorney General submits that the power was given to the President under the Constitutional Scheme and States had no concern at all with Scheduled Castes/Scheduled Tribes. He submits that Article 342A deals with the Central List for its own purpose whereas in every State, there is a separate State list of Other Backward

Class. There was no attempt to modify Articles 15(4) and 16(4) by the Parliament. Unless Articles 15(4) and 16(4) are amended, the State's power cannot be touched.

80. Learned Attorney General had also referred to an affidavit filed on behalf of Government of India in ***Writ Petition (Civil) No.12 of 2021, Dinesh B. versus Union of India and others,*** in which affidavit Union of India with respect to the Constitution (One Hundred and Second Amendment) Act, 2018 has pleaded that power to identify and specify the Socially and Educationally Backward Class list lies with Parliament, only with reference to Central List of Socially and Educationally Backward Class. It is further pleaded that the State Government may have their separate State list for Socially and Educationally Backward Class for the purposes of providing reservation to the recruitment to State Government Services or admission to the State Government Educational Institutions. Learned Attorney General reiterates the above stand in

respect of the Constitution (One Hundred and Second Amendment) Act, 2018.

81. Referring to the Other Backward Caste list, with regard to the State of Punjab, the learned Attorney General submits that in the Central list, there are 68 castes and whereas in the State list, there are 71 castes. Learned Attorney General submits that the question of validity of the Constitution (One Hundred and Second Amendment) shall arise only when the State's power is taken away. Replying to the submissions made by the learned counsel for the writ petitioner in W.P.No.938 of 2020, learned Attorney General submits that in the Constitution (One Hundred and Second Amendment), there was no applicability of proviso to Article 368(2). He submits that insofar as legislation under List-III is concerned, since Parliament by legislation can override the States, hence, by Constitutional Amendment, the same can very well be taken away.

82. Referring to Entry number 41 of List-II, the learned Attorney General submits that Entry 41 has

no concern with identification of backward class. The Constitution (One Hundred and Second Amendment) does not amend the lists under Schedule VII; hence, there is no requirement of ratification by the States.

83. Shri Mukul Rohtagi, learned senior counsel, appearing for the State of Maharashtra has led the arguments. Shri Rohtagi has articulated his submissions in a very effective manner. Shri Rohtagi states that his submission shall be principally confined to question No.1.

84. Shri Rohtagi submits that there are several reasons which require that the Constitution Bench judgment in ***Indra Sawhney*** be revisited, necessitating reference to the larger Bench of Eleven Judges. Shri Rohtagi during course of submission has handed over a chart giving history of judgments on reservation. The chart makes reference of the relevant paragraphs of judgments of this Court in **M.R.*Balaji versus State of Mysore(Supra),T. Devadasan versus Union of India and another, AIR***

(1964) SC 179, State of Punjab versus Hiralal and others, (1970) 3 SCC 567; State of Kerala and others versus N.M. Thomas and others, (1976) 2 SCC 310; Akhil Bharatiya Soshit Karamchari Sangh, (Railway) versus Union of India and others, (1981) 1 SCC 246; K.C. Vasant Kumar and another versus State of Karnataka, (1985) supp. (1) SCC 714; T.M.A. Pai Foundation and others versus State of Karnataka and others, (2002) 8 SCC 481, M. Nagaraj and others versus Union of India and others, (2006) 8 SCC 212; S.V.Joshi versus State of Karnataka, (2012) 7 SCC 41; Union of India and others versus Rakesh Kumar and others, (2010) 4 SCC 50; K. Krishnamurthy and others versus Union of India and another ,(2010) 7 SCC 202; Chebrolu Leela Prasad Rao versus State of Andhra Pradesh, (2020) SCC Online SC 383; Vikas kishanrao Gawali versus The State of Maharashtra, (2021) SCC Online SC 170 and Constitution Bench judgment of this Court in ***Indra Sawhney.*** The Chart also indicates the reasons why ***Indra Sawhney'***s judgment requires a review. The Chart in a comprehensive manner discloses the law on

reservation prior to ***Indra Sawhney*** and subsequent thereto.

85. We may now notice the Grounds which have been emphasized by Shri Mukul Rohtagi for referring the judgment of ***Indra Sawhney*** to a larger Bench.

(5) The 10 grounds urged for referring Indra Sawhney judgment to a larger Bench.

i) In the judgment of ***Indra Sawhney***, there is no unanimity, in view of different reasoning adopted in six separate judgments delivered in the case. He submits that the judgments are in three groups – one containing the judgment of Justice Jeevan Reddy, which is for himself and three other judges, which held that while 50 percent is the rule but in certain extraordinary situations, it can be breached. Shri Rohtagi submits that Justice Pandian and Justice Sawant have held that 50 percent can be breached, hence, the majority opinion is that 50 percent can be breached. It is only Justice Thommen, Justice Kuldip Singh and Justice R.M. Sahai who

have held that 50 percent cannot be breached. He submits that the judgment of majority opinion in ***Indra Sawhney*** is being wrongly read as holding that 50 percent is the ceiling limit for reservation.

ii) Different judges from 1963 till date have spoken in different voice with regard to reservation under 15(4) and 16(4) which is a good ground to refer ***Indra Sawhney*** judgment to a larger Bench.

iii) The **Balaji** has held that Article 15(4) is an exception to Article 15(1) which theory has not been accepted by this Court in **N.M. Thomas** as well as ***Indra Sawhney***, the very basis of fixing the ceiling of 50 percent has gone. Shri Rohtagi submits that the Constitution of India is a living document. The ideas cannot remain frozen, even the thinking of framers of the Constitution cannot remain frozen for times immemorial.

iv) Neither Article 16(4) nor Article 15(4) contains any percentage. The Court cannot read a

percentage i.e. 50 percent for effecting reservation under Article 15(4) and Article 16(4), providing a ceiling by number is cutting down the Constitutional provisions of Part-III and Part-IV. ***Indra Sawhney's*** judgment has restricted the sweep of Article 15 and Article 16 of the Constitution. The Constitutional provisions cannot be read down which principle is applicable only with regard to statutes.

v) Judgment of ***Indra Sawhney*** is a judgment on Article 16(4) and not on Article 15(4), hence, the ratio of judgment cannot be applied with regard to Article 15(4). He submits that ***Indra Sawhney*** itself states that Article 15(4) and Article 16(4) are distinct and different provisions.

vi) The judgment of ***Indra Sawhney*** does not consider the impact of Directive Principles of State Policy such as Article 39(b)(c) and Article 46, While interpreting Article 14, 16(1) and 16(4).

vii) The 50 percentage ceiling limit was followed by Constitution Bench of this Court in **St. Stephen's College versus University of Delhi, (1992) 1 SCC 558,** by upholding the procedure for admission of students in aided minority educational institutions which ceiling limit of 50 percent has been set aside by 11-Judge Bench judgment in ***T.M.A. Pai Foundation (Supra)***. 11-Judge Bench judgment in ***T.M.A. Pai*** judgment indicates that the ceiling of 50 percent is no longer available to be relied on even for purposes of Article 15 and Article 16.

viii) The Constitutional 77th and 81st Amendment Act inserting Article 16(4)(A) and Article 16(4)(B) have the effect of undoing in part the judgment of ***Indra Sawhney*** and thus mandating a re-look.

ix) The 103rd Constitutional Amendment by which 10 percent reservation have been provided for Economically Weaker Sections in addition to reservation given under Article 15(4) and

Article 16(4) is a clear pointer of overruling of 50 percent ceiling for reservation under 15(4) and 16(4).

x) The extraordinary circumstances as indicated in paragraph 810 of ***Indra Sawhney's case*** is not exhaustive, far flung and remote areas mentioned therein are only illustrative. There may be other exceptions where states are entitled to exceed the 50 percent ceiling limit.

86. Shri P.S. Patwalia, appearing for the State of Maharashtra has advanced the submissions on rest of the questions. Shri Patwalia has advanced submissions supporting the report of Gaikwad Commission. He submits that Gaikwad Commission was appointed under the 2005 Act at the time when the challenge to 2014 Act was pending in the Bombay High Court. He submits that there was no challenge to the constitution of Gaikwad Commission before the High Court at any stage. He submits that if 30 percent Maratha are to be fit in 27 percent OBC reservation,

we will be giving them a complete mirage. Shri Patwalia has taken us to the different chapters of the report and submits that the Commission has mentioned about procedure, investigations and evidence collected. He submits that quantifiable data was collected by the Commission through experts and three agencies appointed by the Commission. Experts were also engaged to marshal the data and submit their opinion. Chapter 10 of the report dealt with the exceptional circumstances regarding Marathas justifying exceeding 50 percent ceiling limit for reservation. He submits that the Commission has assessed the Maratha population as 30 percent.

87. Shri Patwalia submits that the scope of judicial review of a Commission's report is very limited. This Court shall not enter into assessment of evidence to come to a different conclusion. He submits that the Gaikwad Commission report is a unanimous report. After the receipt of the report, the Act, 2018 was passed unanimously by the

Legislative Assembly. The subjective satisfaction of the State Government to declare a community as socially and educationally backward is not to be easily interfered by the Courts in exercise of Judicial Review Jurisdiction.

88. On the basis of the Commission's report, the State Government arrived at the satisfaction that Maratha are socially and educationally backward class which satisfaction need not be tested in Judicial Review Jurisdiction. Formation of the opinion by the State is purely a subjective process. This Court has laid down in several judgments that the Commission’s report needs to be treated with deference. The High Court in the impugned judgment has elaborately considered the Gaikwad Commission’s report and the other material including the reservation which was granted to Other Backward Community in the year 1902 by Sahuji Maharaj. He submits that the High Court had considered the effect of reports given by the earlier Commissions in the impugned judgment and gave reasons why

earlier reports cannot operate detriment to the Marathas.

89. It is submitted that method and manner of survey is to be decided on by the Commission. No contrary data of any expert or technical body has been placed before this Court by the appellants to come to the conclusion that the data considered by the Commission was not relevant. The choice of parameters is essentially to be decided by the expert body appointed to determine the backwardness. The statistics of population of Maratha community is credible and rightly been accepted by the Commission.

90. The Commission had given a common questionnaire to maintain uniformity for social, economical and educational backwardness. The Commission has given relevant parameters. The Commission had considered the number of representations received and collected. The Commission also considered the objection for inclusion of Maratha as backward class in Other Backward classes category and otherwise.

91. Shri Patwalia with respect to 102nd Constitutional Amendment states that he adopts the submissions of learned Attorney General completely. He submits that Article 342A and mechanism which has been brought in force only relate to the Central list which is for the purposes of appointment in posts under the Central Government or Educational Institutions under the control of the Central Government. Shri Patwalia further submits that the Select Committee report relied by the High Court is fully admissible for deciphering the history of legislation and the intention of the Parliament. He further submits that today there is no central list, hence, there is no question of affecting the State list. He submits that it is premature to set aside the said action.

92. Shri Shekhar Naphade, learned senior counsel, appearing for the State of Maharashtra, has elaborately dealt with the judgment of this Court in ***M. R. Balaji(Supra).*** He submits that all subsequent judgments providing a ceiling of 50 percent are

based on **Balaji's Case** and there being several flaws in the said judgment, the case needs to be referred to larger Bench. He submits that 50 percent ceiling on reservation for Scheduled Caste, Scheduled Tribes and Other Backward Class is a judicial legislation which is impermissible. He further submits that reservation cannot exceed 50 percent is not the ratio of judgment of ***Balaji.*** It is submitted that ***Balaji*** has not considered the effect of the non obstante clause contained in Article 15(4). Shri Naphade has also dealt with the judgments of this Court in ***T.Devadasan(Supra), N.M. Thomas(Supra) and Indra Sawhney.***

93. Shri Naphade elaborating his submissions on Article 342A submits that the State has legislative competence to prescribe reservation to backward class. He has referred to Entry 25 of List-III and Entry 41 of List-II. He submits that a careful perusal of Article 342A indicates that the scheme of this Article is substantially different from Article 341 and 342. The difference in the language of

clause (2) of Article 342A as compared to clause (2) of Article of 341 and 342 makes all the difference. The view canvas by petitioners that 102nd Constitutional Amendment takes away the legislative competence and legislative power of the States runs counter to the basic structure of the Constitution and the scheme of distribution of power between the State and Centre. It is settled principle of interpretation that by construing any provision of Act of Parliament or Constitution, the legislative history of the relevant subject is necessary to be seen.

94. Shri Kapil Sibal, senior advocate, appearing for the State of Jharkhand has advanced the submissions on all aspects of the matters which are under consideration in the present batch of cases. He submits that how balance for Article 14, 15 and 16 shall be maintained is matter within the domain of the executive/State legislature. No Court should fix the percentage for Article 15 and 16. In ***Indra Sawhney's case***, there was no data for imposing a

ceiling of 50 percent. Justice Jeevan Reddy did not rely on the Mandal Commission's report. Mr. Sibal submits that 50 percent was not an issue in the ***Indra Sawhney.*** He submits that parameters for Article 15(4) and Article 16(4) are entirely different where Article 15 is eligibility and Article 16 is ability to get a job. Apart from ***Balaji***, all other judgments are on Article 16. He submits that question No.VI framed in ***Indra Sawhney's case*** could not have been answered without looking into the statistics. The concept of equality will differ from State to State. There cannot be a strait Jacket formula. Why stop reservation to only 50 percent when matter relates to affirmative action by the State which is felt required by the concerned State. Limiting access to education to 50 percent will cause more problems than solved. It is the State which has to look at the relevant percentage to be followed in a particular case. In ***Indra Sawhney's case***, the Court was dealing with Office Memorandum issued by Government of India where reservation was less than 50 percent. The

observation regarding 50 percent is only an Obiter. By the judgment of this Court in N.M. Thomas, the basis of ***Balaji Case*** that Article 15(4) is an exception to Article 15(1) has gone. The whole judgment could not be relied on as a precedent anymore. Whether a particular quota of reservation is violative of Article 15(1) depends on facts of each case. The State ought to be given a free hand to pick the percentage as per need and requirement of each State. There is no judicial power to pick a percentage.

95. Shri Sibal giving illustration of Kendriya Vidyalaya submitted that General students cannot come and those institutions cater only to the employees of Government, Army; and the General can only come when the seats are vacant. He submits that the balance has to be done by the executive and not by the Court. These are the issues which need to be decided by a larger Bench. These issues having never been addressed before this Court in ***Indra Sawhney's***

case, the matter needs to be referred to a larger Bench.

96. The Constitution of India is a living, transformative document. The Court cannot shackle the legislature. Shri Sibal submits that 50 percent limit for reservation prescribed in ***Indra Sawhney*** is no longer a good law after 103rd Constitutional Amendment which inserted Article 15(6) and Article 16(6) into the Constitution. Several States have already provided for reservation beyond 50 percent to Scheduled Caste, Scheduled Tribe and Socially and Educationally Backward class. In the above circumstances, it is necessary that these matters may be referred to a larger Bench for fresh adjudication.

97. Shri Sibal on Article 342A submits that under Articles 15(4) and 16(4) the Union and the States have co-equal powers to advance the interest of socially and educationally backward classes. Any exercise of power by the Union cannot encroach upon the power of the State to identify and empower the

socially and educationally backward classes and determine the extent of reservation required. The expression, "for the purposes of this Constitution" can therefore only be construed within the contours of power that the Union is entitled to exercise with respect to entities, institutions, authorities and Public Sector Enterprises under the aegis and control of the Union.

98. The expression "Central List" in Article 342A(2) relates to the notification under Article 342A(1), wherein the Central List will include identification of socially and educationally backward classes for the purposes of entities, institutions, authorities and public sector enterprises in a State, but under the aegis or control of the Union. Any other interpretation would allow an executive act to whittle down the legislative power of the States to provide for the advancement of the socially and educationally backward classes, under Articles 15(4), 15(5) as well as in Article 16(4), which are

an integral part of the chapter on fundamental rights.

99. Article 342A and Article 342A(1) and 342A(2) must be interpreted in the historical context and developments both pre and post ***Indra Sawhney,*** where the identification of the socially and educationally backward classes in the State lists was the basis for determining the extent of reservations. In this regard, the use of the word "Central list" is of significance, as opposed to Articles 341 and 342, which only use the expression "list" in the context of identification of Scheduled Castes and Scheduled Tribes. This is because historically, Scheduled Castes and Tribes were identified by the Government of India and accepted by the States.

100. Learned Solicitor General Shri Tushar Mehta, submits that he adopts the submissions made by learned Attorney General. He submits that 102ndConstitutional Amendment shall not dilute the power of the State. Article 342A (1) is only

enabling provision. The Act, 2018, does not violate 102ndConstitutional Amendment.

101. Dr. Abhishek Manu Singhvi, appearing for the respondent submits that State's power was never intended to be taken away. He submits that material including discussion in reports of Parliamentary Committee are fully admissible and has to be relied for finding the intent and purpose of a Constitutional provision. Dr. Singhvi has elaborately taken us to the proceedings of the Select Committee and its report. Dr. Singhvi has cited the Constitution Bench judgment of this Court in ***Kalpana Mehta and others versus Union of India and others, (2018) 7 SCC 1.***He has also referred to the Statements of objects of 123rdBill which notices that there were State lists prior to ***Indra Sawhney***. The Central list was confined to Central Institutions and Central Government posts. Shri Singhvi has also referred to 1993 Act and submits that in the said Act Section 2(C) referred to a list which was only a Central list. Article 342A(2) uses

the same Central list and interpretation of Article 342A(2) has to be made taking the same meaning of Central list as was known and understood under the regime prior to 102nd Constitutional Amendment Act. This Court shall not annotate the State's power under some interpretive exercise. Dr. Singhvi further submits that today there is no Central list under Article 342A, there being no occupied field, it its premature and academic.

102. Shri C.U. Singh, learned senior Advocate, appearing for respondents has referred to Gaikwad Commission's report in detail. He has referred to data collected and reflected in the report and submit that the Commission on the basis of quantifiable data has determined Maratha as socially and educationally backward community. He has also referred to Chapter 10 of the report which carves out exceptional circumstances for exceeding 50 percent limit. Shri C.U. Singh has taken the Court to various tables and charts regarding representation of Maratha Community in the Public

services, Universities and Higher Institutions. Shri C.U. Singh submits that the representation in the public services is not in accordance with the proportion of population of Maratha. He submits that backwardness has to come from living standard, job. The Commission has found that Marathas to be more in Agriculture and in Agricultural labour. He submits that we need to take into consideration the overall situation.

103. Learned Counsel for the State of Bihar, State of Punjab, State of Rajasthan, State of Andhra Pradesh, State of Tamil Nadu, State of Kerala, State of Assam, State of Uttar Pradesh, State of Haryana have also advanced the similar submissions as advanced by the State of Maharashtra that 102ndConstitutional Amendment shall not take away power of the legislative/executive power of the State to identify OBC and to take measures for implementation of reservation. All State's counsel submitted that there has always been two lists i.e. Central List and State List. It is submitted that

any other interpretation shall violate the federal structure as envisaged in the Constitution of India.

104. Shri Amit Kumar, learned Advocate General, Meghalaya, submits that in State of Meghalaya there are about 85.9 percent tribal population. He submits that reservation allowed in State of Meghalaya is in accord with paragraph 810 of the ***Indra Sawhney's*** judgment.

105. Shri Vinay Arora, learned counsel appearing for State of Uttarakhand, submits that State has two lists one drawn by State and another Central list. He adopts the arguments of learned Attorney General. Shri Vinay Arora submits that judgment of ***Indra Sawhney*** need not to be referred to a larger Bench. He submits that affirmative action under Articles 16(4) and 15(4) are facets of Article 14.

106. We have also heard various counsel appearing for interveners. Most of the interveners have adopted the submissions of the State of Maharashtra. However, learned counsel Shri A.P.Singh and Shri

B.B. Biju, appearing for different interveners submits that judgment of ***Indra Sawhney*** need not be referred to larger Bench. They submitted that after seventy years, there has been upliftment. The reservation is affecting the merit as well as the society.

107. We have heard learned counsel for the parties and perused the records.

108. All the relevant materials which were before the High Court have been compiled in different volumes and filed for convenience. Learned counsel for the parties during submissions have referred various materials including necessary relevant enactments and reports. From various volumes a master index containing all details of volumes has also been prepared and submitted. Before we enter into submissions of the learned counsel for the parties on six questions framed by us and the impugned judgment of the High Court including points for consideration noted in the judgment of the High Court, we need to first look into the statutory

provisions pertaining to reservation in force at the time when Act, 2018 was enacted.

(6) The status of Reservation at the time of commencement of Enactment of Act, 2018

109. The State of Maharashtra has issued a unified list of OBC consisting of 118 castes on 13.08.1967. On 10.09.1993 after the judgment of this Court in ***Indra Sawhney*** case, the Central List of OBC was issued by the Ministry of Welfare, Government of India notifying the Central List of OBC consisting of more than 200 castes. The **Central List of OBC as on date contains about 252 OBC**. The Government of Maharashtra by its Government decision dated 07.12.1994 created special backward category containing several castes and communities. The Maharashtra State Public Services Reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes(Vimukta Jatis), Nomadic Tribes, Special Backward Category and other Backward Classes) Act, 2001 was enacted which was published in the Maharashtra Government Gazette on 22.01.2004.

Section 2(b) defines De-notified Tribes. Section 2(f) defines Nomadic Tribes. Section 2(g) defines Other Backward Classes and Section 2(k) defines reservation and Section 2(m) defines Special Backward Category. Sections 2(b), 2(f), 2(g), 2(k) and 2(m) are as follows:

> “Section 2(b) " De-notified Tribes (Vimukta Jatis) " means the Tribes declared as such by the Government from time to time ;
>
> 2(f) "Nomadic Tribes " means the Tribes wandering from place to place in search of their livelihood as declared by Government from time to time ;
>
> 2(g) "Other Backward Classes" means any socially and educationally backward classes of citizens as declared by the Government and includes Other Backward Classes declared by the Government of India in relation to the State of Maharashtra ;
>
> 2(k) "reservation" means the reservation of post in the services for the members of Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes;
>
> 2(m) "Special Backward Category" means socially and educationally backward classes of citizens declared as a Special Backward Category by the Government.”

110. Section 4 provides for reservation and percentage. Section 4(2) is as follows:

> Section 4(2) Subject to other provisions of this Act, there shall be posts reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes, at the stage of direct recruitment in public services and posts specified under clause (j) of section 2, as provided below:-

Description of Caste/Tribe/ Category/Class	Percentage of vacancies reservation Or seats to be reserved
(1) Scheduled Castes . .	13 per cent.
(2) Scheduled Tribes . .	7 per cent.
(3) De-notified Tribes (A) . .	3 per cent.
(4) Nomadic Tribes (B) . .	2.5 per cent.
(5) Nomadic Tribes (C) . .	3.5 per cent.
(6) Nomadic Tribes (D) . .	2 per cent.
(7) Special Backward Category . .	2 per cent.
(8) Other Backward Classes . .	19 per cent.
Total . .	52 per cent.

”

111. The Maharashtra State Commission for Backward Classes Act, 2005 was enacted by the State

Legislature providing for constitution of State level Commission for Backward Classes other than the Scheduled Castes and Scheduled Tribes and to provide for matters connected therewith or incidental thereto. Section 2(e) defined the Lists in following words:

> "Section 2(e) "Lists" means the Lists prepared by the State Government, from time to time, for the purposes of making provision for the reservation of appointments or posts, in favour of the backward classes of citizens who, in the opinion of the State Government, are not adequately represented in the services under the State Government and any local or other authority within the State or under the control of the State Government;"

112. Section 9 of the Act deals with functions of the Commission in the following words:

> "Section 9.(1) It shall be the function of the Commission,—
>
> (a) to entertain and examine requests for inclusion of any class of citizens as a backward class in the Lists ;
>
> (b) to entertain, hear, enquire and examine complaints of over-inclusion or under-inclusion of any

backward class in such Lists and tender such advice to the State Government as it deems appropriate;

(c) to take periodical review and make recommendations to the State Government regarding the criteria and methodology of determining the backward class of citizens ;

(d) to cause studies to be conducted on a regular basis through and in collaboration with reputed academic and research bodies for building of data about the changing socio-economic status of various classes of citizens;

(e) to regularly review the socio-economic progress of the backward class of citizens ; and (f) to perform such other functions as may be prescribed.

(2) The advice given or recommendations made by the Commission under this section shall ordinarily be binding on the State Government and the State Government shall record reasons in writing, if, it totally or partially rejects the advice or recommendations or modifies it."

113. Another Enactment, namely, Maharashtra Private Professional Educational Institutions (Reservation of seats for admission for Scheduled Castes, Scheduled Tribes, De-notified Tribes(Vimukta Jatis), Nomadic Tribes and Other Backward Classes)Act, 2006

was enacted which was published in Maharashtra Gazette on 01.08.2006. Section 2 defines various expressions including Nomadic Tribes and Other Backward Classes in other words. Section 4 provided that in every Aided Private Professional Educational Institution, seats equal to 50% shall be reserved for candidates belonging to the Reserved Category. Section 4 of the Act is as follows:

> "Section 4. (1) In every Aided Private Professional Educational Institution, seats equal to fifty per cent. of the Sanctioned Intake of each Professional Course shall be reserved for candidates belonging to the Reserved Category.
>
> (2) The seats reserved for candidates belonging to the Reserved Category under sub-section (1) shall be filled in by admitting candidates belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes and Other Backward Classes, respectively, in the proportion specified in the Table below :-

Description of Caste/Tribe/ Category/Class of Reserved Category	Percentage of reservation
(1) Scheduled Castes and Scheduled Castes converts to Buddhism	13%
(2) Scheduled Tribes	7%

(3) De-notified Tribes(A)	3%
(4) Nomadic Tribes(B)	2.5%
(5) Nomadic Tribes(C)	3.5%
(6) Nomadic Tribes(D)	2%
(7) Other Backward Classes	19%
Total	50%

”

114. As noted above, at the time of enactments of above 2001 and 2006 Acts, list containing Other Backward Classes had been existing which was issued by the State Government from time to time. By GR dated 26.09.2008, the **State of Maharashtra extended the list of OBC to include 346** castes. We have already noticed that the Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments or posts in the public services under the State) for Educationally and Socially Backward Category (ESBC) Act, 2014 was enacted by the State Legislature which received the assent of the Governor on 09.01.2015. In the said Act Maratha community was declared as Educationally and Socially Backward Category (ESBC).

The implementation of the Act was stayed by the High Court by its order dated 07.04.2015 passed in Writ Petition No.3151 of 2014 which continued in operation till the writ petition was dismissed as infructuous by the impugned judgment. From the Acts 2001 and 2006 as noted above, it is clear that the percentage of reservation in the State of Maharashtra in Public Services was 52% whereas percentage of reservation of seats for admission for SC and ST, De-notified Tribes and Nomadic Tribes and Other Backward Classes in Private Professional Educational Institutions was 50% at the time of enactment of Act, 2018. We may also notice certain relevant provisions of Act LXII of 2018. The Preamble of the Act reads:

> "An Act to provide for reservation of seats for admission in educational institutions in the State and for reservation of posts for appointments in public services and posts under the State, to Socially and Educationally Backward Classes of Citizens (SEBC) in the State of Maharashtra for their advancement and for matters connected therewith or incidental thereto.

> WHEREAS it is expedient to provide for reservation of seats for admission in educational institutions in the State and for reservation of posts for appointments in public services and posts under the State to Socially and Educationally Backward Classes of Citizens (SEBC) in the State of Maharashtra for their advancement and for matters connected therewith or incidental thereto ; it is hereby enacted in the Sixty-ninth Year of the Republic of India, as follows :—"

115. Section 2(1)(j) provides that Socially and Educationally Backward Classes of Citizens (SEBC) includes the Maratha community. Section 2(1)(j) is as follows:

> "2(1)(j) "Socially and Educationally Backward Classes of Citizens (SEBC)" includes the Maratha Community declared to be Educationally and Socially Backward Category (ESBC)in pursuance of the Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments or posts in the public services under the State) for Educationally and Socially Backward Category (ESBC) Act, 2014."

116. Section 3 provides for applicability to all the direct recruitments, appointments made in public services and posts in the State which is as follows:

"3. (1) This Act shall apply to all the direct recruitments, appointments made in public services and posts in the State except,—

(a) the super specialized posts in Medical, Technical and Educational field ;

(b) the posts to be filled by transfer or deputation ;

(c) the temporary appointments of less than forty-five days duration ; and

(d) the post which is single (isolated) in any cadre or grade.

(2) This Act shall also apply, for admission in educational institutions including private educational institutions, whether aided or un-aided by the State, other than the minority educational institutions referred to in clause (1) of article 30 of the Constitution of India.

(3) The State Government shall, while entering into or renewing an agreement with any educational institution or any establishment for the grant of any aid as provided in the explanation to clauses (d) and (e) of section 2, respectively, incorporate a condition for compliance with the provisions of this Act, by such educational institution or establishment.

(4) For the removal of doubts it is hereby declared that nothing in this Act shall affect the reservation provided to the Other Backward Classes under the Maharashtra State Public Services (Reservation for Scheduled Castes,

> Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 and the Maharashtra Private Professional Educational Institutions (Reservation of seats for admission for Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes and Other Backward Classes) Act, 2006."

117. Section 4 deals with seats for admission in educational institutions and appointments in public services and posts under the State or SEBC. Section 4 is as follows:

> "4. (1) Notwithstanding anything contained in any judgment, decree or order of any Court or other authority, and subject to the other provisions of this Act,—
>
> (a) sixteen per cent. of the total seats in educational institutions including private educational institutions, whether aided or un-aided by the State, other than minority educational institutions referred to in clause (1) of article 30 of the Constitution of India ; and
>
> (b) sixteen per cent. of the total appointments in direct recruitment in public services and posts under the State, shall be separately reserved for the Socially and Educationally Backward Classes (SEBC) including the Maratha Community :

> Provided that, the above reservation shall not be applicable to the posts reserved in favour of the Scheduled Tribes candidates in the Scheduled Areas of the State under the Fifth Schedule to the Constitution of India as per the notification issued on the 9th June 2014 in this behalf.
>
> (2) The principle of Creamy Layer shall be applicable for the purposes of reservation to the Socially and Educationally Backward Classes (SEBC) under this Act and reservation under this Act shall be available only to those persons who are below Creamy Layer.
>
> Explanation.—For the purposes of this sub-section, the expression "Creamy Layer" means the person falling in the category of Creamy Layer as declared by the Government in the Social Justice and Special Assistance Department, by general or special orders issued in this behalf, from time to time."

118. We have already noticed that in the writ petitions filed before the High Court, Act, 2018 was challenged being invalid and violative of the provisions of the Constitution of India.

(7) Consideration of 10 Grounds urged for revisiting and referring the judgment of Indra Sawhney to a larger Bench.

119. Shri Mukul Rohtagi as well as Shri Kapil Sibal, learned senior counsel have submitted that judgment of ***Indra Sawhney*** needs to be revisited and refer to a larger Bench of eleven Judges.

120. We shall proceed to consider the grounds given by Shri Mukul Rohtagi in seriatim which shall also cover the grounds raised by Shri Sibal.

121. First ground of Shri Rohatgi is that it is only three Judges, Justice T.K. Thommen, Justice Kuldip Singh and Justice R.M. Sahai who held that 50% reservation cannot be breached whereas other six Judges have held that 50% can be breached, hence, majority opinion in ***Indra Sawhney*** does not hold that 50% is the ceiling limit for reservation. For considering the above submission we need to notice the opinion expressed in each of the six judgments delivered in ***Indra Sawhney***'s case.

122. Before we proceed to notice the relevant paragraphs of the judgment of ***Indra Sawhney***, we need to first notice method of culling out the majority

opinion expressed in a judgment where more than one judgments have been delivered. The Constitution Bench of this Court in **Rajnarain Singh vs. Chairman, Patna Administration Committee, Patna and another, AIR 1954 SC 569,** had occasion to find out the majority opinion of a seven-Judge Bench judgment delivered by this Court in **Re Delhi Laws Act, 1912, Ajmer-Merwara (Extension of Laws)Act, 1947 vs. Part 'C' States(Laws) Act, 1950, AIR 1951 SC 332.** The **Constitution Bench** laid down that opinion which embodies the greatest common measures of the agreement among the Bench is to be accepted the decision of the Court. Thus, for culling out the decision of the Court in a case where there are several opinions, on which there is greatest common measure of agreement is the decision of the Court.

123. We now revert back to the judgment of ***Indra Sawhney*** to find out what is the greatest common measures of the agreement between the Judges with regard to the reservation to the extent of 50%. Justice B.P. Jeevan Reddy for himself, M.H. Kania,

CJ, M.N.Venkatachaliah, A.M. Ahmadi, JJ., has elaborately dealt with the extent of the reservation under Article 16(4). In paragraph 809 conclusion was recorded by the Court that reservations contemplated under Article 16(4) should not exceed 50%. In paragraph 810 it was observed that in certain extra-ordinary circumstances, some relaxation in this strict rule of 50% may become imperative. Paragraphs 809 and 810 are to following effect:

> "**809.** From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.
>
> **810.** While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

124. Justice S. Ratnavel Pandian while delivering a separate judgment has expressed his disagreement with the proposition of fixing the reservation for socially and educationally backward classes at 50% as a maximum limit. In paragraph 243(9) following was laid down by Justice Pandian:

> "243(9) No maximum ceiling of reservation can be fixed under Article 16(4) of the Constitution for reservation of appointments or posts in favour of any backward class of citizens "in the services under the State". The decisions fixing the percentage of reservation only up to the maximum of 50% are unsustainable."

125. Justice Thommen, Justice Kuldip Singh and Justice R.M. Sahai took the view that reservation in all cases should remain below 50% of total number of seats. Paragraph 323(8) of Justice Thommen's opinion is as follows:

> "323(8) Reservation in all cases must be confined to a minority of available posts or seats so as not to unduly sacrifice merits. The number of seats or posts reserved under Article 15 or Article 16 must at all times remain well below 50% of the total number of seats or posts."

126. Justice Kuldip Singh also in paragraph 384(i) expressed his opinion in accord with Justice R.M. Sahai which is as follows:

> "384(i) that the reservations under Article 16(4) must remain below 50% and under no circumstance be permitted to go beyond 50%. Any reservation beyond 50% is constitutionally invalid."

127. Justice R.M. Sahai in paragraph 619(i) held that reservation should in no case exceed 50%. Justice T.K. Thommen, Justice Kuldip Singh and Justice R.M. Sahai delivered dissenting opinion.

128. Now, we come to the judgment delivered by Justice P.B. Sawant who delivered concurring opinion. Two paragraphs of the judgment of Justice Sawant are relevant to notice. In paragraph 518 justice Sawant observed that there is no legal infirmity in keeping the reservations under clause(4) alone or under clause (4) and clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend upon the facts and circumstances of each case. In the same paragraph

Justice Sawant, however, observed that it would ordinarily be wise and nothing much would be lost, if the intentions of the Framers of the Constitution and the observations of Dr. Ambedkar, on the subject be kept in mind. Justice Sawant obviously referred to speech of Dr. Ambedkar dated 30.11.1948 where Dr. Ambedkar has categorically stated that reservation under Article 16(4) shall be confined to minority of seats. However, in paragraph 552 justice Sawant has recorded his answers and in answer to Question No.4 following was stated:

> *"552.....*
>
> *Question 4:*
>
> Ordinarily, the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre or service in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per cent will have to be justified on valid grounds which grounds will have to be specifically made out."

129. The above opinion of Justice Sawant is completely in accord with the opinion expressed by Justice B.P. Jeevan Reddy in paragraphs 809 and 810.

The opinion of Justice Sawant expressed in the above paragraph is that ordinarily, the reservations under Article 16(1) and 16(4) should not exceed 50% and it is only in extra-ordinary circumstances that this percentage may be exceeded which is also the opinion expressed by Justice B.P. Jeevan Reddy. Applying the principle of Constitution Bench of this Court in **Rajnarain Singh (supra)**, the opinion embodies the greatest common measure of agreement between the opinions expressed. Thus, the majority opinion, the ratio of judgment of ***Indra Sawhney*** as expressed by the majority is one which is expressed in paragraphs 809 and 810 of the judgment of Justice B.P. Jeevan Reddy. The submission of Shri Mukul Rohtagi cannot be accepted that majority opinion of ***Indra Sawhney*** is that 50% can be breached. The majority opinion as noted above is that normally reservation should not exceed 50% and it is only in extra-ordinary circumstances it can exceed 50%. What can be the extra-ordinary circumstances have been indicated in paragraph 810.

130. Alternatively if we again look to the opinion in all six judgments, we notice :

(a) Justice B.P. Jeevan Reddy (for himself and three other Judges) held in paragraph 809 that the reservation contemplated in clause (4) of Article 16 should not exceed 50%.

(b) Justice Thommen, Justice Kuldip Singh and Justice Sahai in their separate opinion held that reservation under Article 16(4) should not exceed 50%.

131. Thus greatest common measure of agreement in six separate judgments delivered in ***Indra Sawhney*** is that:

(i) Reservation under Article 16(4) should not exceed 50%.

(ii) For exceeding reservation beyond 50% extraordinary circumstance as indicated in paragraph 810 of the judgment of Justice Jeevan Reddy should exist, for which extreme caution is to be exercised.

132. The above is the ratio of ***Indra Sawhney*** judgment.

133. We, thus, do not find any good ground to revisit ***Indra Sawhney*** or to refer the same to a larger Bench on the above ground urged.

134. Now, we come to the **second ground** pressed by Shri Rohtagi is that different Judges from 1993 till date have spoken in different voices with regard to reservation under Article 15(4) and 16(4) which is a good ground to refer ***Indra Sawhney*** to a larger Bench.

135. We may notice the Constitution Bench judgment of this Court in **M.R. Balaji and others vs. State of Mysore and others, AIR 1963 SC 649,** in which this Court while considering Article 15(4) had laid down that reservation under Article 15(4) ordinarily, speaking generally and in a broad manner special provision should be less than 50%, how much less than 50% would depend upon the prevailing circumstances in each case. The Constitution Bench in the above case was considering the challenge to order passed by the State of Mysore that 68% of the seats available for admission to the Engineering and

Medical Colleges and to other technical institutions were reserved and only 32% remain available to the merit pool. The question about the extent of the special provision which would be competent to State to make under Article 15(4) was also examined by the Constitution Bench. The Constitution Bench speaking through Justice P.B. Gajendra Gadkar stated following in paragraph 34:

> "34.....A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the present prevailing circumstances in each case."

136. The Constitution Bench also after noticing the judgment of this Court in **General Manager, Southern Railway, Personnel Officer(Reservation), Southern Railway vs. Rangachari, AIR 1962 SC 36,** observed that what is true in regard to Article 15(4) is equally true in Article 16(4). Following observations were made in paragraph 37:

> "37. ….Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. …"

137. The reservation ought to be less than 50% was spoken in the above Constitution Bench judgment.

138. The next Constitution Bench judgment which noted the judgment in **M.R. Balaji (supra)** and applied the

percentage of 50% on the carry forward rule is **T. Devadasan.** The first judgment in which a discordant note with regard to 50% limit of reservation was expressed is the judgment of this Court in **State of Kerala and another vs. N.M. Thomas and others, 1976 (2) SCC 310,** In the above case the Constitution Bench had occasion to examine Rule 13-AA of Kerala State and Subordinate Services Rules, 1958 which empower the State to grant exemption for a specific period to any member or member belonging to Scheduled Castes and Scheduled Tribes from passing the test referred to in Rule 13 and Rule 13-A. The State of Kerala granted exemption to member of SC and ST from passing of the test, N.M. Thomas, respondent had filed writ petition in the High Court asking for declaration that the Rule 13-AA as unconstitutional. The grievance of the respondent was that by virtue of exemption granted to members of the SC they have been promoted earlier than the respondent, although they had not passed the test. The High Court allowed the writ petition against which judgment the State of Kerala had come up in

appeal. The appeal was allowed and Rule 13-AA was held to be valid. The Constitution Bench judgment of the Court was delivered by Chief Justice, A.N. Ray with whom Justice K.K. Mathew, Justice M.H. Beg, Justice V.R. Krishna Iyer and Justice S. Murtaza Fazal Ali concurred by delivering separate opinions. Two Judges, namely, Justice H.R. Khanna and Justice A.C. Gupta delivered dissenting opinion. With regard to extent of reservation upto 50% only two Judges, namely, Justice Fazal Ali and Justice Krishna Iyer has expressed the opinion. Justice Beg noticed the Constitution Bench judgments of this Court in **M.R. Balaji and T.Devadasan**, which had held that more than 50% reservation for backward class would violate the principle of reasonableness. No opinion of his own was expressed by Justice Beg. Justice Fazal Ali also in his judgment had noted 50% ceiling of reservation but observed that the above is only rule of caution and does not exhaust all categories. In paragraph 191 Justice Fazal Ali considered the question and following was laid down:

"191. This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as to defeat the policy contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."

139. Justice Krishna Iyer in paragraph 143 of the judgment expressed his concurrence with the opinion of Justice Fazal Ali that arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Following observations were made in paragraph 143:

> "143. ... I agree with my learned Brother Fazal Ali, J., in the view that the arithmetical limit of 50 per cent in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the "carry forward" rule.

140. With regard to 50% reservation limit, above are only observations made by two Hon'ble Judges in seven-Judge Constitution Bench. It is true that Justice Fazal Ali expressed his discordant note with the ceiling of 50% but the observations as noted above were not the decision of the seven-Judge Constitution Bench judgment.

141. In **T. Devadasn vs. Union of India and another, AIR 1964 SC 179,** a Constitution Bench of this Court had occasion to examine the carry forward rule in a recruitment under the Union of India. This Court had noticed **M.R. Balaji** and held that what was laid down in **M.R. Balaji** would apply in the above case. Referring to **M.R. Balaji** following was laid down in paragraph 16 to the following effect:

> **"16.** The startling effect of the carry forward rule as modified in 1955 would be apparent if in the illustration which we have taken there were in the third year 50 total vacancies instead of 100. Out of these 50 vacancies 9 would be reserved for the Scheduled Castes and Tribes, adding to that, the 36 carried forward from the two previous years, we would have a total of 45 reserved vacancies out of 50, that is, a percentage of 90. In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and Tribes on the basis of reservation permitted by the carry forward rule. This comes to about 64.4% of reservation. Such being the result of the operation of the carry forward rule we must, on the basis of the decision in *Balaji case* [AIR 1963 SC 649] hold that the rule is bad. Indeed, even in *General Manager Southern Railway v. Rangachari* [(1962) 2 SCR 586] which is a case in which reservation of vacancies to

be filled by promotion was upheld by this Court, Gajendragadkar, J., who delivered the majority judgment observed:

> "It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration;…."

It is clear from both these decisions that the problem of giving adequate representation to members of backward classes enjoined by Article 16(4) of the Constitution is not to be tackled by framing a general rule without bearing in mind its repercussions from year to year. What precise method should be adopted for this purpose is a matter for the Government to consider. It is enough for us to say that while any method can be evolved by the Government it must strike "a reasonable balance between the claims of the backward classes and claims of other employees" as pointed out in *Balaji case* [AIR 1963 SC 649]."

142. In the above case Justice Subba Rao has expressed dissenting opinion. Justice Subba Rao observed that what was held in **M.R. Balaji** cannot be applied in the case of reservation of appointment in the matter of recruitment. Following observation was made by Justice Subba Rao in paragraph 30:

> **"30.** In the instant case, the State made a provision; adopting the principle of "carry forward". Instead of fixing a higher percentage in the second and third selections based upon the earlier results, it directed that the vacancies reserved in one selection for the said Castes and Tribes but not filled up by them but filled up by other candidates, should be added to the quota fixed for the said Castes and Tribes in the next selection and likewise in the succeeding selection. As the posts reserved in the first year for the said Castes and Tribes were filled up by non-Scheduled Caste and non-Scheduled Tribe applicants, the result was that in the next selection the posts available to the latter was proportionately reduced. This provision certainly caused hardship to the individuals who applied for the second or the third selection, as the case may be, though the non-Scheduled Castes and non-Scheduled Tribes, taken as one unit, were benefited in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of

> reservation cannot, in my view, make the provision for reservation nonetheless a provision for reservation."

143. In **Akhil Bharatiya Sochit Karamchari Sangh (Railway) Represented by its Assistant General Secretary on behalf of the Association vs. Union of India and others, (1981) 1 SCC 246,** Justice O. Chinnappa Reddy observed that there is no fixed ceiling to reservation or preferential treatment to the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of 50%. Following words were spoken in paragraph 135:

> **"135.** There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be far in excess of fifty per cent. There is no rigidity about the fifty per cent rule which is only a convenient guideline laid down by Judges.

144. In **K.C. Vasanth Kumar and another vs. State of Karnata, 1985 (Supp) SCC 714,** O. Chinnappa Reddy, J. after noticing the **Balaji** observed that percentage

of reservations is not a matter upon which a court may pronounce with no material at hand. Following observations were made by Justice O. Chinnappa Reddy in paragraph 57:

> **"57.** The *Balaji* [*M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649,Court then considered the question of the extent of the special provision which the State would be competent to make under Article 15(4). ……
>
> We should think that that is a matter for experts in management and administration. There might be posts or technical courses for which only the best can be admitted and others might be posts and technical courses for which a minimum qualification would also serve. The percentage of reservations is not a matter upon which a court may pronounce with no material at hand. For a court to say that reservations should not exceed 40 per cent 50 per cent or 60 per cent, would be arbitrary and the Constitution does not permit us to be arbitrary. Though in the *Balaji case* [*M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439] , the Court thought that generally and in a broad way a special provision should be less than 50 per cent, and how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case, the Court confessed: "In this matter again, we are reluctant to say definitely what would be a proper provision to make." All that the Court would finally say was that in

> the circumstances of the case before them, a reservation of 68 per cent was inconsistent with Article 15(4) of the Constitution. We are not prepared to read *Balaji* [*M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439] as arbitrarily laying down 50 per cent as the outer limit of reservation. ……
>
> (emphasis supplied)"

145. In the same judgment of **K.C. Vasanth,** Justice E.S. Venkataramiah has expressed a contrary opinion to one which was expressed by Justice O. Chinnappa Reddy in paragraph 149. Justice Venkataramiah held that 50% rule has not been unsettled by the majority in **N.M. Thomas.** In paragraph 149 following was laid down:

> "149. After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50% has been unsettled by a majority on the Bench which decided this case."

146. The reference of Judges, who spoke in different voices are the judgments as noted above. It is relevant to notice that neither in **N.M. Thomas** nor

in **K C Basant** case the decision of the Court was to disapprove 50% ceiling as fixed by **M.R. Balaji.** It is although true that Justice Fazal Ali, Justice O.Chinnappa Reddy and Justice Krishna Iyer have expressed their doubt about the advisability of 50% rule. Another judgment which has been referred to is the judgment of this Court in **State of Punjab and Hira Lal and others, 1970(3) SCC 567,** where K.S.Hegde, J. speaking for a three-Judge Bench had observed that the question of reservation to be made is primarily matter for the State to decide. However, no observation was made by Justice Hegde in the above case regarding **M.R. Balaji case.**

147. The judgment of this Court in **N.M. Thomas, Akhil Bharatiya Karamchari Sangh and State of Punjab** and even dissenting judgment of Justice Krishna Iyer in **Devadasan and Akhil Bharatiya Kaamchari Sangh** have been referred to and considered by nine-Judge Constitution Bench of this Court in ***Indra Sawhney***. In ***Indra Sawhney***, Justice B.P. Jeevan Reddy while considering the question No.6 noted **M.R. Balaji,**

Devadasan, N.M. Thomas and concluded that reservation contemplated in clause (4) of Article 16 should not exceed 50%. After considering all the above cases which according to Shri Rohtagi are discordant notes, a larger nine-Judge Constitution Bench having held that the reservation contemplated in clause (4) of Article 16 should not exceed 50% of earlier doubt raised by the Judges as noted above cannot be relied any further. The larger Bench in ***Indra Sawhney*** has settled the law after considering all earlier decisions of this Court as well as reliance of opinion of few Judges as noted and as relied by Shri Rohtagi is of no avail and cannot furnish any ground to refer judgment of ***Indra Sawhney*** to a larger Bench.

148. One more judgment delivered after ***Indra Sawhney*** has been relied by Shri Rohtagi that is **S.V. Joshi and others vs. State of Karnataka and others, (2012) 7 SCC 41.** Shri Rohtagi submits that this Court in **S.V. Joshi** in paragraph 4 referring to **M.Nagaraj vs. Union of India, (2006) 8 SCC 212,** held

if a State wants to exceed 50% reservation, then it is required to base its decision on the quantifiable data. In paragraph 4 following was laid down:

> "**4.** Subsequent to the filing of the above writ petitions, Articles 15 and 16 of the Constitution have been amended vide the Constitution (Ninety-third Amendment) Act, 2005, and the Constitution (Eighty-first Amendment) Act, 2000, respectively, which Amendment Acts have been the subject-matter of subsequent decisions of this Court in *M. Nagaraj* v. *Union of India* (2006) 8 SCC 212, and *Ashoka Kumar Thakur* v. *Union of India* [(2008) 6 SCC 1] in which, inter alia, it has been laid down that if a State wants to exceed fifty per cent reservation, then it is required to base its decision on the quantifiable data. In the present case, this exercise has not been done."

149. The observation was made in paragraph 4, as noted above, that the Constitution Bench in M. **Nagaraj** has laid down that if a State wants to exceed 50% reservation, then it is required to base its decision on a quantifiable data, which is clear misreading of judgment of the Constitution Bench in **M. Nagaraj**. In **M. Nagaraj**, the Constitution Bench has not laid down any proposition to the effect that

if a State wants to exceed 50% reservation, then it is required to base its decision on the quantifiable data. To the contrary the Constitution Bench of this Court in **M. Nagaraj** has reiterated the numerical bench mark like 50% rule in ***Indra Sawhney's case***. Following observation was made by the Constitution Bench in paragraphs 120 and 122:

> "120.....In addition to the above requirements this Court in ***Indra Sawhney*** [1992 Supp (3) SCC 217] has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.
>
> **122.** We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."

150. The Constitution Bench judgment of this Court in **Ashok Kumar Thakur** has also not laid down any proposition which has been referred in paragraph 4

of **S.V. Joshi.** This Court's judgment of three-Judge Bench in **S.V. Joshi case** does not support the contention of Shri Rohtagi.

151. In view of the foregoing discussion, we do not find any substance in the second ground of Shri Rohtagi that this Court's judgment of ***Indra Sawhney*** to be referred to a larger Bench.

152. The judgment of ***Indra Sawhney*** has been followed by this Court in a number of cases including at least in the following four Constitution Bench judgments:

(1) Post Graduate Institute of Medical Education & Research, Chandigarh and others vs. Faculty Association and others;

(2) M. Nagaraj and others vs. Union of India and others, 2006(8) SCC 212;

(3) Krishna Murthy (Dr.) and others vs. Union of India and anoter 2010 (7) SCC 202

Which judgment though was considering reservation under Article 243D and 243T has applied 50% ceiling as laid down in **Balaji.**

(4) The Constitution Bench judgment of this Court in **Chebrolu Leela Prasad Rao & Ors. vs. State of A.P. & Ors., 2020(7) Scale 162,** reiterated the principle as referred and reiterated that outer limit is 50% as specified in ***Indra Sawhney***'s case.

153. We move to **ground Nos.3 and 4** as formulated by Shri Mukul Rohtagi to make a reference to the larger Bench.

154. The Constitution, the paramount law of the country has given to the Indian citizens the basic freedom and equality which are meant to be lasting and permanent. The Constitution of India is the vehicle by which the goals set out in it are to be achieved. The right from primitive society upto the organised nations the most cherished right which all human beings sought was the right to equality. The Preamble of our Constitution reflects a deep deliberations and precision in choosing ideal and aspirations of people which shall guide all those who have to govern. Equality of status and opportunity is one of the noble objectives of the framers of the Constitution. The doctrine of equality before law is part of rule of law which

pervades the Indian Constitution. Justice Y.V. Chandrachud in **Smt. Indira Nehru Gandhi vs. Raj Narain, (1975) Supp.SCC 1** has referred to equality of status and opportunity as forming part of the basic structure of the Constitution. In paragraph 664 following was observed:

> **"664.**I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (*i*) Indian sovereign democratic republic; (*ii*) Equality of status and opportunity shall be secured to all its citizens; (*iii*) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (*iv*) the nation oil all be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

155. Articles 15 and 16 of the Constitution which are facets of right of equality were incorporated as fundamental rights to translate the ideals and objectives of the Constitution and to give

opportunities to the backward class of the society so as to enable them to catch up those who are ahead of them. Article 15(1) and Article 16(1) of the Constitution are the provisions engrafted to realise substantive equality where Articles 15(4) and 16(4) are to realise the protective equality. Articles 15(1) and 16(1) are the fundamental rights of the citizens whereas Articles 15(4) and 16(4) are the obligations of the States. Justice B.P. Jeevan Reddy in ***Indra Sawhney*** in paragraph 641 has said that the equality has been single greatest craving of all human beings at all points of time. For finding out the objectives and the intention of the framers of the Constitution we need to refer to Constituent Assembly debates on draft Article 10 (Article 16 of the Constitution) held on 30.11.1948 (Book 2 Volume No,VII), Dr. Ambedkar's reply on draft Article 10 has been referred to and quoted in all six judgments delivered in Indra Sahwney case. What was the objective of Article 10, 10(1) and 10(3) has been explained by Dr. Ambedkar which speech has been time

and again referred to remind us the objective of the above fundamental right.

156. Dr. Ambedkar referred to Article 10(1) as a generic principle. Dr. Ambedkar observed that if the reservation is to be consistent on the sub-clause (1) of Article 10 it must confine to the reservation of minority of seats. Following are the part of speech of Dr. B.R. Ambedkar in the Constituent Assembly:

> " If honourable Members will bear these facts in mind--the three principles, we had to reconcile,--they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now--for historical reasons--been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen

> is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent. of the total posts under the State and only 30 per cent. are retained as the unreserved. Could anybody say that the reservation of 30 per cent. as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation."

157. The above views of Dr. Ambedkar expressed in the Constituent Assembly for balancing the draft Articles 10(1) and 10(3) equivalent to Articles 16 and 16(4) have been referred to and relied by this Court in ***Indra Sawhney*** as well as in other cases.

158. Shri Rohtagi submits that this Court in **Balaji** has held sub-clause (4) of Article 16 as exception to Article 16(1) which was the premise for fixing 50%. In **N.M. Thomas and *Indra Sawhney*** now it is held

that Article 16 sub-clause (4) is not exception to Article 16(1), the submission is that in view of the above holding in **N.M. Thomas and *Indra Sawhney*** the ceiling of 50% has to go. It is true that seven-Judge Constitution Bench in **N.M. Thomas** held that Article 16(4) is not an exception to Article 16(1) which was noticed in paragraph 713 of the judgment of ***Indra Sawhney***. Justice B.P. Jeevan Reddy in paragraph 733 said "At this stage, we see to clarify one particular aspect. Article 16(1) is a facet of Article 14, just as Article 14 permits reasonable classification, so does Article 16(1)". In paragraph 741 following was laid down:

> "741. ....In our respectful opinion, the view taken by the majority in *Thomas* [(1976) 2 SCC 310, 380] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in

> the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1).……"

159. As laid down by the Constitution Bench in ***Indra Sawhney***, we proceed on the premise that Article 16(4) is not an exception to Article 16(1). It is also held that Article 16(4) is a facet to Article 16(1) and permits reasonable classification as is permitted by Article 14.

160. In **Balaji**, the Constitution Bench did not base its decision only on the observation that Article 15(4) is exception and proviso to Article 15(1). Article 15(4) was referred to as a special provision. In paragraph 34 of **Balaji** it is also laid down that special provision contemplated by Article 15(4) like reservation of posts by Article 16(4) must be within the reasonable limitation. We again quote the relevant observation from paragraph 34:

> **"34.** ...That is not to say that reservation should not be adopted;

> reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities. A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the present prevailing circumstances in each case...”

161. Both Shri Mukul Rohtagi and Shri Kapil Sibal submits that constitutional provisions contained in Articles 15 and 16 do not permit laying down any percentage in measures to be taken under Articles 15(4) and 16(4). It is submitted that fixation of

percentage of 50% cannot be said to be constitutional. We need to answer the question from where does 50% rule come from?

162. The 50% rule spoken in **Balaji** and affirmed in ***Indra Sawhney*** is to fulfill the objective of equality as engrafted in Article 14 of which Articles 15 and 16 are facets. The ***Indra Sawhney*** itself gives answer of the question. In paragraph 807 of ***Indra Sawhney*** held that what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointment. 50% has been said to be reasonable and it is to attain the objective of equality. In paragraph 807 Justice Jeevan Reddy states:

> **"807.** We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. *Adequate representation* cannot be read as *proportionate representation*. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled

> Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits — and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations
>
> as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in *V. Narayana Rao* v. *State of A.P.* [AIR 1987 AP 53 : 1987 Lab IC 152 : (1986) 2 Andh LT 258] , striking down the enhancement of reservation from 25% to 44% for OBCs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%."

163. In paragraph 808, Justice Jeevan Reddy referred to speech of Dr. Ambedkar where he said that the reservation should be confined (to a minority of seats). The expression minority of seats". When

translated into figure the expression less than 50% comes into operation.

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

165. We may notice one more submission of Shri Rohtagi in the above context. Shri Rohtagi submits that the Constitution of India is a living document, ideas cannot remain frozen, even the thinking of the framers of the Constitution cannot remain frozen for time immemorial. Shri Rohtagi submits that due to change in need of the society the law should change.

166. Justice J.M. Shalet and Justice K.N. Grover,JJ. Speaking in **His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala and another, (1973) 4 SCC 225,** laid down following in paragraph 482 and 634:

> **"482.** These petitions which have been argued for a very long time raise momentus issues of great constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation.
>
> **634.** Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a straightjacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of

> the generation to come. Hence every Constitution, wisely drawn up, provides for its own amendment."

167. Shri Rohtagi has placed reliance on the judgment of this Court in **K.S. Puttaswamy and another vs. Union of India and others, 2017(10)SCC 1,** wherein in paragraph 476 following was laid down:

> **"476.** However, the learned Attorney General has argued in support of the eight-Judge Bench and the six-Judge Bench, stating that the Framers of the Constitution expressly rejected the right to privacy being made part of the fundamental rights chapter of the Constitution. While he may be right, Constituent Assembly Debates make interesting reading only to show us what exactly the Framers had in mind when they framed the Constitution of India. As will be pointed out later in this judgment, our judgments expressly recognise that the Constitution governs the lives of 125 crore citizens of this country and must be interpreted to respond to the changing needs of society at different points in time."

168. Another judgment relied by Shri Rohtagi is in **Supreme Court Advocates-on-Record Association and others vs. Union of India, 1993(4) SCC 441,** wherein in paragraph 16 following has been laid down:

> **"16.** The proposition that the provisions of the Constitution must be confined only to the interpretation which the Framers, with the conditions and outlook of their time would have placed upon them is not acceptable and is liable to be rejected for more than one reason — firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the Framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time."

169. The time fleets, generations grow, society changes, values and needs also change by time. There can be no denial that law should change with the changing time and changing needs of the society. However, the proposition of law as noted above does not render any help to the submission of Shri Rohtagi that in view of needs of the society which are changing 50% rule should be given up.

170. The constitutional measures of providing reservation, giving concessions and other benefits to backward classes including socially and educationally backward class are all affirmative measures. We have completed more than 73 years of independence, the Maharashtra is one of the developed States in the country which has highest share in the country's GST i.e. 16%, higher share in Direct Taxes-38% and higher contribution to country's GDP, 38.88%. The goal of the Constitution framers was to bring a caste-less society. The directive principles of the State Policy cast onerous obligation on the States to promote welfare of the people by securing and protecting as effectively as it may social order in which social justice, economic and political shall inform all the institutions of the national life. Providing reservation for advancement of any socially and educationally backward class in public services is not the only means and method for improving the welfare of backward class. The State ought to bring other measures including providing educational

facilities to the members of backward class free of cost, giving concession in fee, providing opportunities for skill development to enable the candidates from the backward class to be self-reliant.

171. We recall the observation made by Justice R.V. Raveendran in **Ashoka Kumar Thakur vs. Union of India and others, 2008(6) SCC 1,** where His Lordship held that any provision for reservation is a temporary crutch, such crutch by unnecessary prolonged use, should not become a permanent liability. In words of Justice Raveendran paragraph 666 is as follows:

> **"666.** Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realisation of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag—either social or economical. But post reservation, there is a tendency even among those who are considered as "forward", to seek the "backward" tag, in the hope of enjoying the benefits of reservations. When more and more people

> aspire for "backwardness" instead of "forwardness" the country itself stagnates. Be that as it may. Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that the Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society."

172. We have no doubt that all Governments take measures to improve the welfare of weaker sections of the society but looking to the increased

requirement of providing education including higher education to more and more sections of society other means and measures have to be forged. In view of the privatisation and liberalisation of the economy public employment is not sufficient to cater the needs of all. More avenues for providing opportunities to members of the weaker sections of the society and backward class to develop skills for employment not necessary the public service. The objectives engrafted in our Constituted and ideals set by the Constitution for the society and the Governments are still not achieved and have to be pursued. There can be no quarrel that society changes, law changes, people changes but that does not mean that something which is good and proven to be beneficial in maintaining equality in the society should also be changed in the name of change alone.

173. In **Ashoka Kumar Thakur vs. Union of India, (supra),** Justice Dalveer Bhandari has also laid down that the balance should be struck to ensure that reservation would remain reasonable. We are of

the considered opinion that the cap on percentage of reservation as has been laid down by Constitution Bench in ***Indra Sawhney*** is with the object of striking a balance between the rights under Article 15(1) and 15(4) as well as Articles 16(1) and 16(4). The cap on percentage is to achieve principle of equality and with the object to strike a balance which cannot be said to be arbitrary or unreasonable.

174. The judgment of ***Indra Sawhney*** is being followed for more than a quarter century without there being any doubt raised in any of the judgments about the 50%, the 50% rule has been repeatedly followed.

175. We may notice one more aspect in the above respect. **Granville Austin in "The Indian Constitution: Cornerstone of a Nation"** while discussing the topic "The judiciary and the social revolution" states:

> "The members of the Constituent Assembly brought to the framing of the Judicial provisions of the Constitution an idealism equalled only by that shown towards the Fundamental Rights. Indeed, the Judiciary

> was seen as an extension of the Rights, for it was the courts that would give the Rights force. The Judiciary was to be an arm of the social revolution, upholding the equality that Indians and longed for during colonial days, but had not gained- not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule."

176. The Constitution enjoins a constitutional duty to interpret and protect the Constitution. This Court is guardian of the Constitution.

177. We may also quote Justice Mathew, in ***Keshavananda Bharati(Supra),*** where he reiterated that judicial function is both creation and application of law. The principle of ***Indra Sawhney*** is both creation application of law. In paragraph, 1705, Justice Mathew says: -

> "**1705.** The judicial function is, like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norms both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the Constitution only in the former respect. But that is a difference in degree only. From a dynamic point of view, the individual norm created by the judicial

> decision is a stage in a process beginning with the establishment of the first Constitution, continued by legislation and customs, and leading to the judicial decisions. The Court not merely formulates already existing law although it is generally asserted to be so. It does not only 'seek' and 'find' the law existing previous to its decision, it does not merely pronounce the law which exists ready and finished prior to its pronouncement. Both in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character. The law-creating function of the courts is especially manifest when the judicial decision has the character of a precedent, and that means when the judicial decision creates a general norm. Where the courts are entitled not only to apply pre-existing substantive law in their decisions, but also to create new law for concrete cases, there is a comprehensible inclination to give these judicial decisions the character of precedents. Within such a legal system, courts are legislative organs in exactly the same sense as the organ which is called the legislator in the narrower and ordinary sense of the term…""

178. In **All India Reporter Karamchari Sangh and others vs. All India Reporter Limited and others, 1988 Supp SCC 472,** a three-Judge Bench speaking through Justice Venkataramiah held that the decisions of the Supreme Court which is a Court of record, constitute a source of law apart from being a binding precedent under Article 141. Following was laid down in paragraph 11:

> "11. .... Article 141 of the Constitution provides that the law declared by Supreme Court shall be binding on all courts within the territory of India. Even apart from Article 141 of the Constitution the decisions of the Supreme Court, which is a court of record, constitute a source of law as they are the judicial precedents of the highest court of the land. …."

179. This Court again in **Nand Kishore vs. State of Punjab, 1995(6) SCC 614,** laid down that under Article 141 law declared by this Court is of a binding character and as commandful as the law made by legislative body or authorized delegate of such body. In paragraph 17 following was laid down:

> "17. …Their Lordships' decisions declare the existing law but do not enact any fresh law", is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is. Patently the High Court fell into an error in its appreciation of the role of this Court."

180. When the Constitution Bench in ***Indra Sawhney*** held that 50% is upper limit of reservation under

Article 16(4), it is the law which is binding under Article 141 and to be implemented.

181. The submission of Shri Kapil Sibal that the judgment of ***Indra Sawhney*** is shackle to the legislature in enacting the law does not commend us. When the law is laid down by this Court that reservation ought not to exceed 50% except in extra-ordinary circumstances all authorities including legislature and executive are bound by the said law. There is no question of putting any shackle. It is the law which is binding on all.

182. This Court has laid down in a large number of cases that reservation in super-specialties and higher technical and in disciplines like atomic research etc. are not to be given which is law developed in the national interest. In paragraph 838, ***Indra Sawhney*** has noticed certain posts where reservations are not conducive in public interest and the national interest. Following has been held in paragraph 838:

> **"838.** While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/ institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable."

182(a). If we accept the submission of the learned counsel for the respondent to the logical extent that since there is no indication in Articles 15 and 16 certain posts cannot be reserved, no such exclusion could have been made. The law as existing today is one which has been laid down in ***Indra Sawhney*** in paragraph 838 which is a law spelt out from the constitutional provisions including Article 15 and 16.

183. What has been laid down by the Constitution Bench in ***Indra Sawhney*** in paragraphs 839, 840 and 859(8) is law declared by this Court and is to be implemented also by all concerned. The Parliament has passed the Central Educational Institutions Reservation and Appointment Act, 2006 providing for reservation- 15% for SC, 7-1/2%, 15%, 27% for other classes in Central Educational Institutions (Reservation in Admission) Act, 2006. Section 4 provides that Act not to apply in certain cases which is to the following effect:

> "Section 4 of the Act specifically says that the provisions of Section 3 shall (*sic*/not) apply to certain institutions. Section 4 reads as under:
>
> "4. *Act not to apply in certain cases*.— The provisions of Section 3 of this Act shall not apply to—
>
> (a) a Central Educational Institution established in the tribal areas referred to in the Sixth Schedule to the Constitution;
>
> (b) the institutions of excellence, research institutions, institutions of

national and strategic importance specified in the Schedule to this Act:

Provided that the Central Government may, as and when considered necessary, by notification in the Official Gazette, amend the Schedule;

(c) a Minority Educational Institution as defined in this Act;

(d) a course or programme at high levels of specialisation, including at the post-doctoral level, within any branch or study or faculty, which the Central Government may, in consultation with the appropriate authority, specify."

184. Exclusion of reservation in above Parliamentary enactment clearly indicates that law declared by ***Indra Sawhney*** in paragraphs 839, 840 and 859 as noted above is being understood as a law and being implemented, this reinforces our view that ceiling limit of 50% for reservation as approved by ***Indra Sawhney's*** case is a law within the meaning of Article 141 and is to be implemented by all concerned.

185. In view of the above discussion, ground Nos. 3 and 4 as urged by Shri Mukul Rohtagi do not furnish

any ground to review ***Indra Sawhney*** or to refer the said judgment to the larger Constitution Bench.

REASON NO.5

186. Shri Rohtagi submits that ***Indra Sawhney*** judgment being judgment on Article 16(4), its ratio cannot be applied with regard to Article 15(4). **Justice Jeevan Reddy** before proceeding to answer the questions framed clearly observed that the debates of the Constituent Assembly on Article 16 and the decision of this Court on Articles 15 and 16 and few decisions of US Supreme Court are helpful. The observations of the Court that decision of this Court on Article 16 and Article 15 are helpful clearly indicate that principles which have been discerned for interpreting Article 16 may also be relevant for interpretation of Article 15. **Justice Jeevan Reddy** has noted two early cases on Article 15 namely ***The State of Madras versus Champakam Dorairajan, AIR 1951 SC 226 and B.Venkataramana versus State of Tamil Nadu and Another, AIR 1951 SC 229.*** **Justice Jeevan Reddy** in paragraph 757 has

observed that although ***Balaji*** was not a case arising under Article 16(4) but what is said about Article 15(4) came to be accepted as equally good and valid for the purposes of Article 16(4). **Justice Jeevan Reddy** said in paragraph 757:-

> "757. Though Balaji was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is, therefore, necessary to notice precisely the formulations in Balaji relevant in this behalf. ...
>
> *(underlined by us)"*

187. It was further held in paragraph 808 that clause (4) of Article 16 is a means of achieving the objective of equality and it is nothing but reinstatement of principle of equality enshrined in Article 14. The relevant observation by **Justice Jeevan Reddy** in paragraph 808 is as follows:

> "808. It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means

> of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) -conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.
>
> *(underlined by us)"*

188. Clause (4) of Article 15 is also a special provision which is nothing but reinstatement of the principles of equality enshrined in Article 14. The principles which have been laid down in paragraph 808 with respect to Article 16(4) are clearly applicable with regard to Article 15(4) also. In the majority judgment of this Court in ***Indra Sawhney***, the ***Balaji*** principle i.e. the 50 percent rule has

been approved and not departed with. The 50 percent principle which was initially spoken of in ***Balaji*** having been approved in ***Indra Sawhney***. We failed to see as to how prepositions laid down by this Court in ***Indra Sawhney*** shall not be applicable for Article 15. It has been laid down in ***Indra Sawhney*** that expression "Backward Class" used in Article 16(4) is wider that the expression "Socially and Educationally Backward Class" used in Article 15(5).

189. We thus do not find any substance in submissions of Mukul Rohtagi that the judgment of this Court in ***Indra Sawhney*** need not be applied in reference to Article 15.

REASON -6

190. Shri Rohtagi submits that in ***Indra Sawhney*** judgment, the impact of Directive Principles of State Policy such as Article 39(b)(c) and Article 46 have not been considered while interpreting Article 14, 16(1) and 16(4). The Directive Principles of State Policy enshrined in Part-IV of the

Constitution are fundamental in governance of the country. The State while framing its policy, legislation, had to take measures to give effect to the Constitutional Objective as contained in Part-IV of the Constitution. The Fundamental Rights are rights which the Constitution guarantees to the Citizen whereas Part-IV of the Constitution is the obligation of the State which it has to discharge for securing Constitutional objective. In the most celebrated judgment of this Court i.e. ***Keshavananda Bharati Sripadagalvaru and others versus State of Kerala and another, (1973) 4 SCC 225,*** in several of the opinions, the Part-III and Part-IV of the Constitution has been dealt with. **Chief Justice S.M. Sikri**,in paragraph 147 of the judgment, stated that: -

> "147. It is impossible to equate the directive principles with fundamental rights though it cannot be denied that they are very important. But to say that the directive principles give a directive to take away fundamental rights in order to achieve what is directed by the directive principles seems to me a contradiction in terms."

191. In the same judgment, **Justice Hegde and Mukherjea J.J,** held that Fundamental Rights and the Directive Principles of State Policy constitute the conscience of our Constitution. Following was stated in paragraph 712: -

> "712. No one can deny the importance of the Directive Principles. The Fundamental Rights and the Directive Principles constitute the 'conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of bur society. It aims at making the Indian masses free in the positive sense."

192. The Constitution Bench of this Court in ***Minerva Mills limited and others versus Union of India and others, (1980) 3 SCC 625,*** has also elaborately dealt both Fundamental Rights and Directive Principles of State Policy. The question which arose before the Constitution bench in context

of Fundamental Rights and Directive Principles of State Policy was noticed by **Justice Chandrachud, C.J.,** in paragraph 40 as:-

> "40. The main controversy in these petitions centres round the question whether the directive principles of State policy contained in Part IV can have primacy over the fundamental rights conferred by Part III of the Constitution. That is the heart of the matter. Every other consideration and all other contentions are in the nature of by-products of that central theme of the case. The competing claims of parts III and IV constitute the pivotal point of the case because, Article 31C as amended by section 4 of the 42nd Amendment provides in terms that a law giving effect to any directive principle cannot be challenged as void on the ground that it violates the rights conferred by Article 14 or The 42nd Amendment by its section 4 thus subordinates the fundamental rights conferred by Articles 14 and 19 to the directive principles."

193. It was held that both Part-III and Part-IV of the Constitution are two kinds of State's obligation i.e. negative and positive. The harmony and balance between Fundamental Rights and Directive Principles of State Policy is an essential feature of the Basic Structure of the Constitution. **Justice**

Chandrachud elaborating the relation between Part-III and Part-IV stated in paragraph 57: -

> "57. This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part, III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Art III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death in the

> exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution."

194. Article 38 of Directive Principles of State Policy oblige the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political shall inform all the institutions of national life. Article 15(4) and Article 16(4) of the Constitution are nothing but steps in promoting and giving effect to policy under Article 38 of the Constitution. **Justice Jeevan Reddy** in his judgment of ***Indra Sawhney*** has noted Article 38 and Article 46 of Part-IV of the Constitution. In paragraph 647, Article 38 and 46 has been notice in following words: -

> "647. The other provisions of the Constitution having a bearing on Article 16 are Articles 38, 46 and the set of articles in Part XVI. Clause (1) of Article 38 obligates the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

195. The criticism mounted by Mr. Rohtagi that ***Indra Sawhney*** judgment does not consider the impact of Directive Principles of State Policy while interpreting Article 16 is thus not correct. Further in paragraph 841, it has been held that there is no particular relevance of Article 38 in context of Article 16(4). In paragraph 841, following has been observed: -

> "841. We may add that we see no particular relevance of Article 38(2) in this context. Article 16(4) is also a measure a measure to ensure equality of status besides equality of opportunity."

196. Mr. Rohtagi has referred to Article 39(b) and Article 39(c) of the Constitution and has submitted that there is no consideration in ***Indra***

Sawhney judgment. Article 39 of the Constitution enumerates certain principles of policy to be followed by the State. Article 39 (b) and 39(c) which are relevant for the present case are as follows: -

> "**39. Certain principles of policy to be followed by the State: -**
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and
>
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"

197. We fail to see that how the measures taken under Article 15(4) and 16(4) shall in any manner can be read to breach Directive Principles of State Policy. Article 16(4) and 15(4) are also measures to ensure equality of status besides the equality of opportunity.

198. We thus do not find any substance in the above submission of Mr. Mukul Rohtagi.

Ground NO.7

199. Shri Rohtagi submits that an Eleven-Judge Bench of this Court in ***T.M.A. Pai foundation and others versus State of Karnataka and others, (2002) 8 SCC 481,*** has struck down the law laid down by this Court in ***St. Stephen's College case*, (1992) 1 SCC 558** which had held that aided minority educational institutions although entitled to preferably admit their community candidate but intake should not be more than 50 percent. Shri Rohtagi submits that ***St. Stephen's College*** case has put a cap of 50 percent which was nothing but recognition of ***Indra Sawhney*** Principle. Shri Rohtagi submits that the Eleven-Judge Bench in ***T.M.A. Pai Foundation case*** has set aside the aforesaid cap of 50 percent. Mr. Rohtagi r**elies on paragraph 151 of Kirpal,C.J. and paragraph 338 by Rumapal, J. of the judgment, which is to the following effect: -**

> "151. The right of the aided minority institution to preferably admit students of its community, when Article 29(2) was applicable, has been clarified by this Court

over a decade ago in the St. Stephen's College case. While upholding the procedure for admitting students, this Court also held that aided minority educational institutions were entitled to preferably admit their community candidates so as to maintain the minority character of the institution, and that the state may regulate the intake in this category with due regard to the area that the institution was intended to serve, but that this intake should not be more than 50% in any case. Thus, St. Stephen's endeavoured to strike a balance between the two Articles. Though we accept the ratio of St. Stephen's, which has held the field for over a decade, we have compelling reservations in accepting the rigid percentage stipulated therein. As Article 29 and Article 30 apply not only to institutions of higher education but also to schools, a ceiling of 50% would not be proper. It will be more appropriate that depending upon the level of the institution, whether it be a primary or secondary or high school or a college, professional or otherwise, and on the population and educational needs of the area in which the institution is to be located the state properly balances the interests of all by providing for such a percentage of students of the minority community to be admitted, so as to adequately serve the interest of the community for which the institution was established.

388. I agree with the view as expressed by the Learned Chief Justice that there is no question of fixing a percentage when the need may be variable. I would only add that in fixing a percentage, the Court in St. Stephens in fact "reserved" 50% of available seats in a minority institution for the

> general category ostensibly under Article 29(2). pertains to the right of an individual and is not a class right. It would therefore apply when an individual is denied admission into any educational institution maintained by the State or receiving aid from the State funds, solely on the basis of the ground of religion, race, caste, language or any of them. It does not operate to create a class interest or right in the sense that any educational institution has to set apart for non-minorities as a class and without reference to any individual applicant, a fixed percentage of available seats. Unless Articles 30(1) and 29(2) are allowed to operate in their separate fields then what started with the voluntary 'sprinkling' of outsiders, would become a major inundation and a large chunk of the right of an aided minority institution to operate for the benefit of the community it was set up to serve, would be washed away."

200. ***T.M.A. Pai foundation case*** was a judgment of this Court interpreting Article 29 and 30 of the Constitution. Article 30 of the Constitution gives a Fundamental Right to the minorities to establish and administer educational institutions. The Right of minority is different and distinct right as recognized in the Constitution. The 93rdConstitutional Amendment Act, 2005, by which

sub-clause (5) has been added in Article 15 excludes the minority educational institutions referred to in clause (1) of Article 30. Sub-clause (5) of Article 15 is clear constitutional indication that with regard to rights of minority regarding admission to educational institutions, the minority educational institutions referred to in clause (1) of Article 30 are completely excluded. What was laid down by this Court in ***T.M.A. Pai foundation case,*** finds clear epoch in the 93rd Constitutional Amendment.

201. We may refer to a Three-Judge Bench judgment of this Court in ***Society for Un-aided Private Schools of Rajasthan versus Union of India and another,(2012) 6 SCC 1,*** where this Court had occasion to consider Article 14, 15 & 16 as well as 21A of the Constitution. **Shri Kapadia, C.J.,** speaking for majority, held that reservation of 25 percent in unaided minority schools result in changing character of schools holding that Section 12(1)(c) of Right to Education Act, 2009 violates right conferred under minority school under Article

31. Paragraphs 61 and 62 of the judgment are as follows: -

> "61. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation except in the case of minority educational institutions referred to in Article 30(1). The intention of the Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes [See: Article 26].
>
> 62. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1). "

202. From the law as laid down in ***T.M.A. Pai foundation Case (supra)***as well as ***Society for Un-aided Private Schools of Rajasthan*****(supra),** it is clear that there can be no reservation in unaided minority schools referred in Article 30(1).

203. The 50 percent ceiling as put by this Court in **St. Stephen's College case** was struck off by ***T.M.A. Pai Foundation case*** to give effect to content and meaning of Article 30. The striking of the cap of 50 percent with regard to minority institutions is an entirely different context and can have no bearing with regard to 50 percent cap which has been approved in the reservation under Article 16(4) in the ***Indra Sawhey's case.***

204. We thus are of the view that judgment of this Court in ***T.M.A. Pai Foundation case*** has no bearing on the ratio of ***Indra Sawhney's case.***

Ground – 8

205. Shri Rohtagi relying on Constitutional 77th and 81st Amendment Acts submits that these amendments have the effect of undoing in part the judgment of

Indra Sawhney which necessitates revisiting of the judgment. By the 77thConstitutional Amendment Act, 1995, sub-clause (4A) was inserted in Article 16 of the Constitution. The above Constitutional Amendment was brought to do away the law laid down by this Court in ***Indra Sawhney*** that no reservation in promotion can be granted. By virtue of sub-clause 4A of Article 16 now, the reservation in promotion is permissible in favour of Scheduled Caste, Scheduled Tribe. The ratio of ***Indra Sawhney*** to the above effect no longer survives and the Constitutional provisions have to be give effect to. There can be no case for revisiting the ***Indra Sawhney*** judgment on this ground. Now coming to 81stConstitutional Amendment Act, 2000, by which sub-clause (4B) was inserted in Article 16. The above provision was also to undo the ratio laid down by the ***Indra Sawhney*** judgment regarding carry forward vacancies. The Constitutional Amendment laid down that in unfilled vacancies of year which was reserved shall be treated as separate class of vacancies to be filled up in any succeeding year or years and such class of

vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determine the ceiling of 50 percent. Article (4B) is for any reference is quoted as below: -

> "16(4B). Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

206. The above Constitutional Amendment makes it very clear that ceiling of 50 percent "has now received Constitutional recognition." Ceiling of 50 percent is ceiling which was approved by this Court in ***Indra Sawhney's case***, thus, the Constitutional Amendment in fact recognize the 50 percent ceiling which was approved in ***Indra Sawhney's case*** and on

the basis of above Constitutional Amendment, no case has been made out to revisit ***Indra Sawhney.***

Ground-9

207. Shri Rohtagi submits that judgment of ***Indra*** held that the States cannot identify the backward classes solely on the basis of economic criteria as ***Indra Sawhney*** has set aside the O.M. dated 13.08.1990 which provided 10 percent reservation to economically weaker section. The submission of Shri Rohtagi is that by 103rdConstitutional Amendment, Parliament has inserted Article 15(6) and 16(6) whereby 10 percent reservation is granted to economically weaker section.

208. It is submitted that in view of the 10 percent reservation as mandated by 103rdConstitutional amendment, 50 percent reservation as laid down by ***Indra Sawhney*** is breached. Shri Rohtagi has further submitted that the issue pertaining to 103rdConstitutional Amendment has been referred to a larger Bench in **W.P. (Civil) No.55 of 2019, Janhit Abhiyan versus Union of India.** In view of above, We

refrain ourselves from making any observation regarding effect and consequence of 103rd Constitutional Amendment.

Ground– 10

209. Shri Rohtagi submits that in paragraph 810 of judgment of ***Indra Sawhney***, certain extraordinary circumstances have been referred to which cannot be said to be cast in stone. The extra-ordinary circumstances provided in paragraph 810 i.e. of far-flung and remote area cannot be cast in stone and forever unchanging. He submits that the same was given only by way of example and cannot be considered exhaustive. Morever, it is geographical test which may not apply in every State. In paragraph 810 of ***Indra Sawhney***, **Justice Jeevan Reddy** provided: -

> "810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being put of the mainstream of

> national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

210. We fully endorse the submission of Shri Rohtagi that extraordinary situations indicated in paragraph 810 were only illustrative and cannot be said to be exhaustive. We however do not agree with Mr. Rohtagi that paragraph 810 provided only a geographical test. The use of expression "on being out of the main stream of national life", is a social test, which also needs to be fulfilled for a case to be covered by exception.

211. We may refer to a Three-Judge Bench judgment of this Court in ***Union of India and others versus Rakesh Kumar and others,(2010) 4 SCC 50,*** this Court had occasion to consider the provisions of Fifth Schedule of the Constitution. Article 243B and provisions of Part-IX of the Constitution inserted by 73rdConstitutional Amendment Act, 1992.

Reservation of seats was contemplated in the statutory provisions. The judgment of ***Indra Sawhney*** especially paragraph 809 and 810 were also noted and extracted by this Court. This Court noted that even the judgment of ***Indra Sawhney*** did recognize the need for exception treatment in such circumstances. In paragraph 44, this Court held that the case of Panchayats in Scheduled Areas is a fit case that warrant exceptional treatment with regard to reservation and the rationale of upper ceiling of 50 percent for reservation in higher education and public employment can be readily extended to the domain of vertical representation at the Panchayat level in the Scheduled Area. Paragraphs 43 and 44 are extracted below: -

> "43. For the sake of argument, even if an analogy between Article 243-Dand Article 16(4)was viable, a close reading of the ***Indra Sawhney*** decision will reveal that even though an upper limit of 50% was prescribed for reservations in public employment, the said decision did recognise the need for exceptional treatment in some circumstances. This is evident from the following words (at Paras. 809, 810):

> "809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.
>
> 810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being put of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

44. We believe that the case of Panchayats in Scheduled Areas is a fit case that warrants exceptional treatment with regard to reservations. The rationale behind imposing an upper ceiling of 50% in reservations for higher education and public employment cannot be readily extended to the domain of political representation at the Panchayat-level in Scheduled Areas. With respect to education and employment, parity is maintained between the total number of reserved and unreserved seats in order to maintain a pragmatic balance between the affirmative action measures and considerations of merit."

212. This Court carved out one more exceptional circumstance which may fit in extraordinary situations as contemplated by paragraph 810 in the ***Indra Sawhney's case***. We may also notice that the Constitution Bench of this Court in ***K. Krishna Murthy and others versus Union of India and another, (2010) 7 SCC 202.*** In paragraph 82(iv) applied 50 percent ceiling in vertical reservation in favour of Scheduled Caste/Scheduled Tribe/ Other Backward Class in context of local self government. However, it was held that exception can be made in order to safeguard the interest of Scheduled Tribes located in Scheduled Area. Paragraph 82(iv) is as follows: -

> "82.(iv) The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas."

213. The judgment of the Constitution Bench in the above case had approved the Three-Judge Bench

judgment of this Court in ***Union of India and others Rakesh Kumar(supra)*** in paragraph 67, which is to the following effect: -

> "67. In the recent decision reported as Union of India v. Rakesh Kumar, (2010) 4 SCC 50, this Court has explained why it may be necessary to provide reservations in favour of Scheduled Tribes that exceed 50% of the seats in panchayats located in Scheduled Areas. However, such exceptional considerations cannot be invoked when we are examining the quantum of reservations in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SC/ST/OBCs cannot exceed the upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs."

214. We thus are of the view that extraordinary situations indicated in paragraph 810 are only illustrative and not exhaustive but paragraph 810 gives an indication as to which may fit in extra ordinary situation.

215. In view of foregoing discussions, we do not find any substance in grounds raised by Shri Rohtagi for re-visiting the judgment of ***Indra Sawhney*** and referring the judgment of ***Indra Sawhney*** to a larger Bench.

The judgment of ***Indra Sawhney*** has been repeatedly followed by this Court and has received approval by at least four Constitution Benches of this Court as noted above. We also follow and reiterate the prepositions as laid down by this Court in ***Indra Sawhney*** in paragraphs 809 and 810. We further observe that ratio of judgment of ***Indra Sawhney*** is fully applicable in context of Article 15 of the Constitution.

(8) Principle of Stare Decisis

216. The seven-Judge Constitution Bench judgment in **Keshav Mills [Keshav Mills Co. Ltd. v. CIT, AIR 1965 SC 1636** has unanimously held that before reviewing and revising its earlier decision the Court must itself satisfy whether it is necessary to do so in

the interest of public good or for any other compelling reason and the Court must endeavour to maintain a certainty and continuity in the interpretation of the law in the country.

217. In **Jarnail Singh and others vs. Lachhmi Narain Gupta and others, 2018(10) SCC 396,** the prayer to refer the Constitution Bench judgment in **M.Nagaraj (supra)** was rejected by the Constitution Bench relying on the law as laid down in **Keshav Mills' case**. In paragraph 9 following has been laid down:

> **"9.** Since we are asked to revisit a unanimous Constitution Bench judgment, it is important to bear in mind the admonition of the Constitution Bench judgment in *Keshav Mills* [*Keshav Mills Co. Ltd.* v. *CIT*, (1965) 2 SCR 908 : AIR 1965 SC 1636] . This Court said: (SCR pp. 921-22 : AIR p. 1644, para 23)
>
> > "*23*. … [I]n reviewing and revising its earlier decision [**Ed.:** The reference is to *New Jehangir Vakil Mills Ltd.* v. *CIT*, AIR 1959 SC 1177 and *Petlad Turkey Red Dye Works Co. Ltd.* v. *CIT*, 1963 Supp (1) SCR 871, this Court should ask itself whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier

decision should be revised. When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: — What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was

> any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

218. The principle of *stare decisis* also commends us not to accept the submissions of Shri Rohtagi. The Constitution Bench of this Court in ***State of Gujarat versus Mirzapur, Moti Kureshi Kassab Jamat and others, (2005) 8 SCC 534,*** *explaining the principle of Stare decisis laid down following in paragraphs 111 and 118:-*

> "*111. Stare decisis* is a Latin phrase which means "stand by decided cases; to uphold precedents; to maintain former adjudication". This principle is expressed

> in the maxim "*stare decisis et non quieta movere*" which means to stand by decisions and not to disturb what is settled. This was aptly put by Lord Coke in his classic English version as "Those things which have been so often adjudged ought to rest in peace". However, according to Justice Frankfurter, the doctrine of stare decisis is not "an imprisonment of reason" (Advanced Law Lexicon, P. Ramanatha Aiyer, 3rd Edn. 2005, Vol.4, P.4456). The underlying logic of the doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.
>
> *118.* The doctrine of *stare decisis* is generally to be adhered to, because well-settled principles of law founded on a series of authoritative pronouncements ought to be followed. Yet, the demands of the changed facts and circumstances, dictated by forceful factors supported by logic, amply justify the need for a fresh look."

219. The Constitution Bench in ***Indra Sawhney*** speaking through Justice Jeevan Reddy has held that the relevance and significance of the principle of *stare decisis* have to be kept in mind. It was reiterated that in law certainty, consistency and

continuity are highly desirable features. Following are the exact words in paragraph 683:-

> "683... Though, we are sitting in a larger Bench, we have kept in mind the relevance and significance of the principle of Stare decisis. We are conscious of the fact that in law certainty, consistency and continuity are highly desirable features. Where a decision has stood the test of time and has never been doubted, we have respected it unless, of course, there are compelling and strong reasons to depart from it. Where, however, such uniformity is not found, we have tried to answer the question on principle keeping in mind the scheme and goal of our Constitution and the material placed before us."

220. What was said by Constitution Bench in ***Indra Sawhney*** clearly binds us. Judgment of ***Indra Sawhney*** has stood the test of time and has never been doubted. On the clear principle of *stare decisis*, judgment of ***Indra Sawhney*** neither need to be revisited nor referred to larger bench of this Court.

221. The principle laid down in **Keshav Mills** when applied in the facts of the present case, it is

crystal clear that no case is made out to refer the case of ***Indra Sawhney*** to a larger Bench.

(9) ***Whether Gaikwad Commission Report has made out a case of extra-ordinary situation for grant of separate reservation to Maratha community exceeding 50% limit ?***

222. We have noticed above that majority judgment in ***Indra Sawhney*** has laid down that reservation shall not exceed 50% as a rule. In the majority opinion, however, it was held that looking to the diversity of the country there may be some extra-ordinary situations where reservation in exceptional cases is made exceeding 50% limit. In this respect, We may again refer to paragraphs 809 and 810 of the judgment of ***Indra Sawhney*** by which the above proposition of law was laid down. Paragraphs 809 and 810 are to the following effect:

> **"809.** From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.
>
> **810.** While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent

> in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

223. The second term of reference to the State Backward Classes Commission included a specific reference, i.e., "to define exceptional circumstances and/or extra-ordinary situations to be applied for the benefit of reservation in the present context". The Gaikwad Commission has separately and elaborately considered the above term of reference. A separate Chapter, Chapter-X has been devoted in the Commission's Report. The heading of the Chapter-X is **"EXCEPTIONAL CIRCUMSTANCES AND/OR EXTRA ORDINARY SITUATIONS".**

224. We have already noticed the submission of Shri Mukul Rohtagi with reference to exceptional circumstances while considering the Ground No.10 as

emphasized by him for referring the case to a larger Bench. We have observed that the exceptional circumstances as indicated in paragraph 810 of ***Indra Sawhney*** were not exhaustive but illustrative. The Constitution Bench, however, has given indication of what could be the extra-ordinary circumstances for exceeding the limit of 50%. The Commission has noticed the majority opinion in ***Indra Sawhney***. We may notice paragraph 234-Chapter X of the Report which is to the following effect:

> "234. The Constitutional provisions relating to the reservations, either under Article 15 or Article 16 of the Constitution do not prescribe percentage of reservation to be provided to each of the backward classes i.e. Scheduled Castes, Scheduled Tribes and Backward Classes. However, reservations to be provided to the Scheduled Castes and Scheduled Tribes has already been provided by the Government of India, i.e. 15% Scheduled Castes and 7.5% for Scheduled Tribes. Excluding that 22.5% reservations, the existing Bus provisions for reservation for Backward Classes is 27%. Though originally Article 15 and Article 16 of the 997 Constitution did not specify the percentage of the reservation for different classes, the amended provisions of Article 16(4A) and (4B) specify that the State Government is not prevented from considering any unfilled vacancies of a year which are

reserved for being filled up in that year in accordance with any provision for reservation made under Article 16(4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year. In ***Indra Sawhney*** 's case (supra), the Honourable the Supreme Court for the first time, by majority, specified a ceiling for total reservation of 50%. The Honourable the Supreme Court considered this issue while answering question Nos. 6(a), 6(b) and 6(c) formulated by it in the Judgment. The questoins are produced herein under:-

"6(A) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

6(b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

6(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?"

The Honourable the Supreme Court in para 94A in answered the questions ***Indra Sawhney*** 's case formulated by it stating that reservation contemplated in clause (4) of Article 16 of the Constitution shall not exceed 50%. In the same para the Honourable the Supreme Court has ruled that some

> relaxation in this TIRNITURE DIVIST strict rule may become imperative with a caution. "In doing so extreme caution is to be exercised and a special case is to be made out". The relevant passage from para 94A (of AIR) the judgment of the Honourable the Supreme Court in ***Indra Sawhney*** 's case majority view is reproduced and that runs as under:
>
> "While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

225. After noticing the above proposition of law the Commission proceeded to deal with the subject. In paragraph 234 the Commission has noted the Constitution Bench judgment in **M. Nagaraj & Ors. vs. Union of India & Ors. (supra)** observing that this Court has again considered the aspect of ceiling of 50% reservation. The Commission, however, proceeded with an assumption that in **Nagaraj** this Court has

ruled that for relaxation, i.e., 50%, there should be quantifiable and contemporary data. We may notice the exact words of the Commission in paragraph 234 which is to the following effect:

> "The Honourable the Supreme Court has again considered this aspect of ceiling of 50% reservation in its next decision in **M. Nagaraj & Ors. v. Union of India & Ors. Reported in (2006) 8 SCC 212**, wherein the Honourable the Supreme Court considered the validity of inserted clauses (4A) and (4B) by way of amendment to Article 16 of the Constitution. However, in **Nagaraj**, the Honourable the Supreme Court has ruled that for the relaxation i.e. a ceiling of 50% there should be quantifiable and contemporary data (Emphasis supplied)."

226. The above view has again been reiterated by the Commission n paragraph 235 to the following effect:

> "235.....However, it is seen from **Nagaraj** that ceiling of 50% reservation may be exceeded by showing quantifiable contemporary data relating to backwardness as required by Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution."

227. From the above, it is clear that the Commission read the Constitution Bench judgment of this Court

in **Nagaraj** laying down that ceiling of 50% reservation may be exceeded by showing quantifiable contemporary data relating to the backwardness. The above reading of Constitution Bench judgment by the Commission was wholly incorrect. We may again notice the judgment of **M. Nagaraj** in the above respect. **M. Nagaraj** was a case where Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4A) was challenged on the ground that the said provision is unconstitutional and violative of basic structure. Article 16(4A) which was inserted by the above Amendment provides:

> "**Article 16**(**4A**). Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

228. The Constitution Bench proceeded to consider the submission raised by the petitioner challenging the constitutional validity of the constitutional provision. The Constitution Bench in **Nagaraj** has

noticed the maximum limit of reservation in paragraphs 55 to 59. The Constitution Bench held that majority opinion in ***Indra Sawhney*** has held that rule of 50% was a binding rule and not a mere rule of prudence. Paragraph 58 of the Constitution Bench judgment in **Nagaraj** is as follows:

> "**58.** However, in ***Indra Sawhney*** [1992 Supp (3) SCC 217 the majority held that the rule of 50% laid down in *Balaji* [AIR 1963 SC 649] was a binding rule and not a mere rule of prudence."

229. In paragraph 107, the Constitution Bench observed:

> "107....If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. "

230. The Constitution Bench noted its conclusion in paragraphs 121, 122 and 123. In paragraph 123 following has been laid down:

> **"123.** However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

231. The Constitution Bench in paragraph 123 held that provision of Article 16(4A) is an enabling provision and State is not bound to make reservation for Scheduled Castes and Scheduled Tribes in the

matters of promotion and however, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation.

232. The above observation regarding quantifiable data was in relation to enabling power of the State to grant reservation in promotion to the Scheduled Caste and Scheduled Tribes. It is further relevant to notice that in the last sentence of paragraph 123 it is stated: "It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely".

233. The Constitution Bench, thus, in the above case clearly laid down that even reservation for promotion, ceiling of 50% limit cannot be breached. The Commission has completely erred in understanding

the ratio of the judgment, when the Commission took the view that on the quantifiable data ceiling of 50% can be breached. There is no such ratio laid down by this Court in **M. Nagaraj**. Hence, the very basis of the Commission to proceed to examine quantifiable data for exceeding the limit of 50% is unfounded.

234. Paragraph 236 of the Report of the Commission contains a heading **"QUANTIFIABLE DATA"**. It is useful to extract the entire paragraph 236 which is to the following effect:

> "**QUANTIFIABLE DATA:**
>
> 236. As per the Census of the year 2011 population of Scheduled Castes and Scheduled Tribes in the State of Maharashtra is 11,81% and 9.35% respectively. The percentage of Backward Classes, Maratha and Kunbi, have not been found to have been specified in the Census of the year 2011. On the instructions of the Government of Maharashtra, the Gokhale Institute of Politics and Economics, Pune, conducted Socio- Economic Caste Census. It was the survey of rural population in the State of Maharashtra. On the detailed survey the Gokhale Institute of Politics and Economics recorded the findings on specific percentage of the Maratha

> community with Kunbi community as 35.7%. Percentage of all the reserved Backward Classes to be 48.6%. The percentage of other Classes or the population, who have not disclosed their castes, is shown to be 15.7%, From this survey report though it relates to the rural area, total percentage of the exiting Backward Classes, Maratha and Kunbi, who claim to be backward, comes to 48.6% plus 35.7% equivalent to 84.3% of the total population. There is no dispute that large population of the Maratha and Kunbi castes as well as existing Backward Classes are inhabitants of the rural areas. 48.6% population of the existing reserved category including Scheduled Castes, Scheduled Tribes and all Backward Classes have been already identified as socially and educationally backward. The Maratha caste has been identified socially, educationally and economically backward by this Commission. So as total 84.3% population can be said to be of backward classes."

235. Regarding the above noted quantifiable data, the Commission has recorded its reasons for reservation under Article 15(4) and 16(4) in paragraph 259. We extract here paragraph 259 to the following effect:

> "259. To sum up this Commission already found above on appreciation of evidence collected/produced before it that 80% to 85% of the population in the State of Maharashtra is backward. According to this Commission to accommodate the 80% to

> 85% backward Population within a ceiling of 50% will be injustice to them and as such it would frustrate the very purpose of the reservation policy arising out of Article 15 and Article 16 of the Constitution. In the considered opinion of this Commission, this is the extra ordinary situation, which has been mentioned in the 2nd Term of Reference and as required by ***Indra Sawhney*** . 80% to 85% backward population adverted to above speaks about quantifiable contemporary data, vide Nagaraj. If, accordingly, ceiling of 50% increased efficiency in administration could not be affected because all of them would compete. This Commission record facts findings that as required by the 2nd Term of Reference there are not only exceptional circumstances but also extra ordinary situations, which need to be applied for the grant of the reservation in the present context in view of Clause (4) of Article 15 and Clause (4) of Article 16 of the Constitution.) This will enable the Government of Maharashtra to make special provision for the advancement of the Maratha community, which is certainly socially and educationally backward class and ultimately that will enable the Government of Maharashtra to make provision for reservation of appointment or posts in favour of the Maratha community in the services under the State."

236. It is clear that the entire basis of the Commission to exceed 50% limit is that since the population of backward class is between 80% to 85%,

reservation to them within the ceiling 50% will be injustice to them.

237. We may revert back to paragraph 810 where ***Indra Sawhney*** has given illustration which illustration is regarding certain extra-ordinary situations. The exact words used in paragraph 810 are:

> "It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

238. Shri Rohtagi had submitted that the test laid down in paragraph 810 is only geographical test which was an illustration. It is true that in ***Indra Sawhney*** the expression used was "far flung and remote areas" but the social test which was a part of the same sentence stated "the population inhabiting those areas might, on account of their

being out of the main stream of national life and in view of conditions peculiar to and characteristical to them". Thus, one of the social conditions in paragraph 810 is that being within the main stream of National Life, the case of Maratha does not satisfy the extra-ordinary situations as indicated in paragraph 810 of ***Indra Sawhney*** . The Marathas are in the main stream of the National Life. It is not even disputed that Marathas are politically dominant caste.

239. This Court in several judgments has noticed that what can be the extra-ordinary situations as contemplated in paragraph 810 in few other cases. We have referred above the three-Judge Bench judgment in **Union of India and others vs. Rakesh Kumar and others, (2010) 4 SCC 50,** where three-Judge Bench held that exceptional case of 50% ceiling can be in regard to Panchayats in **scheduled areas.** The above three-Judge Bench has also been approved and reiterated by the Constitution Bench of this Court in **K.K. Krishnamurthi (supra).** In the above cases

this Court was examining the reservation in Panchayats. In the context of Part IX of the Constitution, 50% ceiling principle was applied but exception was noticed.

240. In the above context, we may also notice the paragraph 163 of the impugned judgment of the High Court where the High Court has also come to the conclusion that the Maratha has made out a case of extra-ordinary situation within the meaning of paragraph 610 of ***Indra Sawhney***'s case. The High Court in paragraph 163 of judgment made following observation:

> "163...We would curiously refer to the reports, which would disclose that it is for the first time in form of Gaikwad Commission the quantifiable data has been collected and in terms of Nagaraj, the quantifiable data, inadequacy of representation are two key factors which would permit exceeding of reservation of 50% by the State. …."

241. The High Court has endorsed the opinion of the Commission that when the population of backward class is 85% if they would get only 50%, it would

not be valid. In paragraph 165 of the impugned judgment following is the opinion of the High Court:

> "165....The percentage of other classes of population who have not disclosed their caste have been shown to be 15.7%. The Commission therefore concludes that though the survey report relates to rural area, the total percentage of existing backward classes, Maratha and kunbi, who claim to be backward comes to 48.6% + 35.7%, equivalent to 84.3% of the total population. The Commission has also made a reference to the census of the year 1872 which calculates the population of Shudras and the census report of 1872 from which the position emerge that more than 80% population was found backward in the census of 1872. The commission categorizes this as an extra-ordinary situation since the majority of the unequals are living with the minority of the equals. The figures available on record on the basis of 2011 census disclose that the State population is about 11.24 crores out of which 3,68,83,000 is the population of OBC (VJNT, OBC SBC) The statistics of Ministry of Social Justice and Empowerment, Government of India has given the State wise percentage of OBCs in India and for Maharashtra it is 33.8% whereas SC-ST is 22%. The Gaikwad commission has patil-sachin. ::: Uploaded on - 27/06/2019 ::: Downloaded on - 05/04/2021 16:43:36 ::: 433 Marata(J) final.doc therefore deduced that the population of Marathas is 30%. Therefore, in terms of the population, if we look at the figures then the situation which emerges is that almost 85% of the

> population is of the backward classes and to suggest that if 85% of people are backward and they get only a reservation of 50%, it would be traversity of justice. When we speak of equality – equality of status and opportunity, then whether this disparity would be referred to as achieving equality is the moot question. The situation of extra-ordinary circumstances as set out though by way of illustration in ***Indra Sawhney*** would thus get attracted and the theme of the Indian Constitution to achieve equality can be attained. Once we have accepted that the Maratha community is a backward class, then it is imperative on the part of the State to uplift the said community and if the State does so, and in extra ordinary circumstances, exceed the limit of 50%, we feel that this is an extra ordinary situation to cross the limit of 50%."

242. Again at page 453 of the judgment, the High Court reiterated that extra-ordinary situations have been culled out by the report since backward class is 85%, Maratha being 30%. Treating above to be extra-ordinary situation following observations have been made in paragraph 170:

> "170...The extra-ordinary situations have been culled out as the report has declared that Maratha community comprise 30% of the population of the State and this figure is derived on the basis of quantifiable data. The extra-ordinary situation is therefore carved out for awarding an adequate representation to the

> Maratha community who is now declared socially, educationally and economically backward. Based on the population of 30%, Commission has arrived at a conclusion that the total percentage of State population which is entitled for the constitutional benefits and advantages as listed under Article 15(4) and Article 16(4) would be around 85% and this is a compelling extra-ordinary situation demanding extra-ordinary solution within the constitutional framework. ”

243. From the above, it is clear that both the Commission and the High Court treated the extra-ordinary situations with regard to exceeding 50% for granting separate reservation to Maratha, the fact that population of backward class is 85% and reservation limit is only 50%. The above extra-ordinary circumstances as opined by the Commission and approved by the High Court is not extra-ordinary situation as referred to in paragraph 810 of ***Indra Sawhney*** judgment. The Marathas are dominant forward class and are in the main stream of National life. The above situation is not an extra-ordinary situation contemplated by ***Indra Sawhney*** judgment and both Commission and the High Court fell in error in

accepting the above circumstances as extra-ordinary circumstance for exceeding the 50 % limit. At this stage, we may notice that what was said by Dr. Ambedkar in the Constituent Assembly debates dated 30.11.1948 while debating draft Article 10/3 (Article 16(4) of the Constitution). Dr. Ambedkar by giving an illustration said :

> "Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent,what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent. of the total posts under the State and only 30 per cent. are retained as the unreserved. Could anybody say that the reservation of 30 per cent. As open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation."

244. The illustration given by Dr. Ambedkar that supposing 70% posts are reserved and 30% may retain as unreserved, can anybody say that 30% as open to general competition would be satisfactory from point of view of giving effect to the first principle of equality, the answer given by Dr. Ambedkar was in negative. Thus, Constituent Assembly by giving illustration has already disapproved principle which is now propounded by the High Court. We cannot approve the view of the High court based on the same view taken by the Commission.

245. In view of the foregoing discussion, we are of the considered opinion that neither the Gaikwad Commission's report nor the judgment of the High Court has made out an extra-ordinary situation in the case of Maratha where ceiling of 50% can be exceeded. We have already noticed the relevant discussion and conclusion of the Commission in the above regard and we have found that the conclusions

of the Commission are unsustainable. We, thus, hold that there is no case of extra-ordinary situation for exceeding the ceiling limit of 50% for grant of reservation to Maratha over and above 50% ceiling of reservation.

(10) Whether the Act, 2018, as amended in 2019 granting separate reservation for Maratha Community by exceeding ceiling of 50 percent makes out exceptional circumstances as per the judgment of Indra Sawhney case?

246. We have noticed above the provisions of the 2018 Act. In Section 2(j), the Maratha Community has been declared and included in the educationally and socially backward category and under Section 4(1), 16 percent (12 percent as per 2019 Amendment Act) of the total seats in educational institutions including private educational institutions, other than minority educational institutions are reserved and 16 percent (13 percent as amended by 2019 Act) of total appointment in direct recruitment in public services and posts. Section 3(4) has further made it clear that nothing in the Act shall effect the

reservation provided to other backward classes under 2001 Act and 2006 Act. The legislative history of 2018 enactment is necessary to be noticed to find out the objects and reasons for the enactment.

247. We have noted in detail various reports of National Backward commissions as well as State Backward Commissions which have repeatedly rejected the claim of Maratha to be included in Other Backward Communities. After receipt of Bapat Commission Report which rejected the claim of Maratha to be Other Backward Classes, the State Government appointed a Committee under the chairmanship of a sitting Minister i.e. Narayan Rane Committee. On the basis of said Rane Committee report, the State enacted 2014, Act, constitutional validity of which Act was challenged in the High Court and was stayed by the High Court vide its order dated 07.04.2015. During pendency of the writ petition, the State Government made a reference to the Maharashtra Backward Class Commission in June,

2017 and one of the term of the Reference was to the following effect: -

> "ii) defines the exceptional circumstances and extraordinary situations applied for the benefits of the reservation in the contemporary scenario."

248. The Maharashtra Backward Class Commission submitted its report in 15.11.2018, which report became the basis for 2018 enactment.

249. The Statements of objects and reasons for 2018 enactment have been published in the Maharashtra Government Gazette dated 29.11.2018 publishing the bill No. 78(LXXVIII) of 2018. Paragraph 6 of the Statement of object and reasons notices the earlier 2014 Act and the stay by the High Court and further reference to the Commission. Paragraph 6 of the Statement of objects and reasons is as follows:-

> "6. Thereafter, the Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments or posts in the public services under the State) for Educationally and Socially Backward Category (ESBC) Act, 2014 (Mah.I of 2015), for converting the said Ordinance into an Act of the State Legislature, was enacted on 9th January 2015. However, the

Constitutional validity of the said Act has been challenged before the Hon'ble High Court. The Hon'ble High Court has stayed the implementation of the said Act on 7th April, 2015.

Thereafter, the State Government has requested the Maharashtra Backward Classes Commission in june 2017, to,-

(i) Determine Contemporary Criteria and parameters to be adopted in ascertaining the social, educational and economic backwardness of Marathas for extending benefit of reservation under the constitutional provision keeping in focus the various judgments of the courts, reservation laws and constitutional mandate;

(ii) Define the exceptional circumstances and extra ordinary situation applied for the benefits of reservation in the contemporary scenario;

(iii) Scrutinize and inspect the quantifiable data and other information which the State has submitted to Hon. Court to investigate the backwardness of Maratha Community;

(iv) Determine the representation of Marathas in the State Public Employment;

(v) Ascertain the proportion of the population of the Maratha Community in the State by collect-

> ing the information available under various sources.”

250. Paragraph 8 of the Statement of objects and reasons further states that the Commission has submitted its report to the State Government on 15.11.2018. Paragraph 8 refers to the conclusion and the findings of the Commission. The conclusions and findings of the Commission have been noticed in paragraph 8 of the Statement of Objects and reasons.

251. The report of the Maharashtra State Backward Class Commission dated 15.11.2018 became the basis for granting separate reservation to the Maratha community by exceeding the 50 percent ceiling limit. We have already in detail has dealt the report of the Commission especially Chapter 10 where Commission dealt with extraordinary situation.

252. The Government after considering the report, its conclusion and findings and recommendations formed the opinion for giving separate reservation to the Maratha community as socially and educationally backward classes (SEBC). Paragraph 9

of the statement of objects and reasons is as follows: -

> "9. The Government of Maharashtra has considered the report, conclusions, findings and recommendations of the said Commission. On the basis of the exhaustive study of the said Commission on various aspects regarding the Marathas, like public employment, education, social status, economical status, ratio of population, living conditions, small size of land holdings by families, percentage of suicide of farmers in the State, type of works done for living, migration of families, etc., analysed by data, the Government is of opinion that,-
>
> (a) The Maratha Community is socially and educationally backward and a backward class for the purposes of Article 15(4) and (5) and Article 16(4), on the basis of quantifiable data showing backwardness, inadequacy in representation by the said Commission;
>
> (b) Having regard to the exceptional circumstances and extraordinary situation generated on declaring Maratha as socially and educationally backward and their consequential entitlement to the reservations benefits and also having regard to the backward class communities already included in the OBC list, if abruptly asked to share their well established entitlement of reservation with a 30% of Maratha

citizenry, it would be a catastrophic scenario creating an extraordinary situation and exceptional circumstances, which if not swiftly and judiciously addressed, may lead to unwarranted repercussions in the well harmonious co-existence in the State, it is expedient to relax for the percentage of reservation by exceeding the limit of 50%, for advancement of them, without disturbing the existing fifty-two percent reservation currently applicable in the State, only for those who are not in creamy layer;

(c) It is expedient to provide for 16 percent of reservation to such category;

(d) It is expedient to make special provision, by law, or the advancement of any Socially and Educationally Backward Classes of Citizens, in so far as admission to educational institutions, other than the minority educational institutions, is concerned but such special provisions shall not include the reservation of seats for election to the Village Panchayat Samitis, Zilla Parishads, Municipal Councils, Municipal Corporations, etc;

(e) It is expedient to provide for reservation to such classes in admissions to educational institutions including private educational institutions whether aided or unaided by the

State, other than minority educational institutions referred to in clause (1) of Article 30 of the Constitution; and in appointments in public services and posts under the State, excluding reservations in favour of Scheduled Tribes candidates in the Scheduled Areas of the State under the Fifth Schedule to the Constitution of India, as per the notification issued on the 9th June 2014 in this behalf;

(f) By providing reservation to the Maratha Community, the efficiency in administration will not be affected, since the Government is not diluting the standard of educational qualification for direct recruitment for this classes and there will definitely be competition amongst them for such recruitment; and

(g) To enact a suitable law for the above purposes.

In view of the above, the State Government is of the opinion that the persons belonging to such category below the Creamy layer need special help to advance further, in the contemporary period, so that they can move to a stage of equality with the advanced sections of the society, wherefrom they can proceed on their own."

253. The statement and object of the bill clearly indicates that the State has formed the opinion on the basis of the report of the Commissions and had accepted the reasons given by the Commission holding that extraordinary circumstances for exceeding the ceiling limit is made out. We have already in detail analyze and noticed the report of the Commission and have held that no extraordinary circumstances have been made out on the basis of reasoning given in the report. While the foundation itself is unsustainable, the formation of opinion by the State Government to grant separate reservation to the Marathas exceeding 50 percent limit is unsustainable.

254. It is well settled that all legislative Act and executive acts of the Government have to comply with the Fundamental Rights. The State's legislative or any executive action passed in violation of Fundamental Rights is ultra vires to the Constitution. The 50 percent ceiling limit for reservation laid down by ***Indra Sawhney*** case is on

the basis of principle of equality as enshrined in Article 16 of the Constitution. In paragraph 808, ***Indra Sawhney*** laid down: -

> "808. It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept."

255. The Constitution Bench of this Court in ***M. Nagaraj(Supra)*** has reiterated that ceiling limit on

reservation fixed at 50 percent is to preserve equality. In paragraphs 111 and 114, following was laid down: -

> "111. The petitioners submitted that equality has been recognized to be a basic feature of our Constitution. To preserve equality, a balance was struck in ***Indra Sawhney*** so as to ensure that the basic structure of Articles 14, 15 and 16 remains intact and at the same time social upliftment, as envisaged by the Constitution, stood achieved. In order to balance and structure the equality, a ceiling limit on reservation was fixed at 50% of the cadre strength; reservation was confined to initial recruitment and was not extended to promotion...
>
> 114. In ***Indra Sawhney,*** the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-à-vis the rights of BCs en bloc consisting of OBCs, SCs and STs..."

256. We have found that no extraordinary circumstances were made out in granting separate reservation of Maratha Community by exceeding the 50 percent ceiling limit of reservation. The Act, 2018 violates the principle of equality as enshrined in Article 16. The exceeding of ceiling limit without there being any exceptional circumstances clearly

violates Article 14 and 16 of the Constitution which makes the enactment *ultra vires.*

257. We thus conclude that the Act, 2018 as amended in 2019, granting separate reservation for Maratha community has not made out any exceptional circumstances to exceed the ceiling of 50 percent reservation.

(11) Gaikwad Commission Report – a scrutiny

258. Shri Pradeep Sancheti, learned senior counsel, appearing for the appellant elaborating his submissions has questioned the Gaikwad Commission's Report on numerous grounds. Shri Patwalia, learned senior counsel, appearing for the State of Maharashtra has refuted the challenge.

259. Shri Sancheti submits that judicial scrutiny of a quantifiable data claimed by the State is an essential constitutional safeguard. He submits that though the Court has to look into the report with judicial deference but judicial review is permissible on several counts. A report which

violates the constitutional principle and rule of law can very well be interfered with in exercise of judicial review. Shri Sancheti submits that three National Backward Classes Commissions as well as three State Backward Classes Commissions for the last 60 years have considered the claim of Marathas to be included in Other Backward Community which claim was repeatedly negatived. He submits that the report of National Backward Classes Commissions and State Backward Classes Commissions could not have been ignored by Gaikward Commission in the manner it has dealt with the earlier reports. Shri Sancheti submits that the National Backward Classes Commission as well as the State Backward Classes Commission considered the contemporaneous data and came to a conclusion at a particular time. Gaikward Commission which was appointed in 2017 had no jurisdiction to pronounce that Maratha was backward community from the beginning and all earlier reports are faulty. Shri Sancheti submits that Maratha community is a most dominant community in the State of Maharashtra weilding substantial political power.

The majority of Legislature belongs to Maratha community, out of 19 Chief Ministers of the Maharashtra State, 13 Chief Ministers were from Maratha community. Out of 25 Medical Colleges in Maharashtra 17 Medical Colleges are founded/owned by the people belonging to Maratha community. In 24 of the 31 District Central Cooperative Banks are occupied by the persons from Martha community. Out of the functioning 161 Cooperative Sugar Factories in Maharashtra, in 86 Sugar Factories persons from Maratha community are the Chairman. The Class which is politically so dominant, cannot be said to be suffering from social backwardness.

260. Shri Sancheti further submits that survey by the Commission, data result, analysis therein suffers from various inherent flaws. The sample survey conducted by the Commission is unscientific and cannot be taken as respective sample. The sample size is very small. Only 950 persons were surveyed from Urban areas. He submits that Commission was loaded with members belonging to the Maratha

community. The Agency for survey (Data collections) was selected without tendering process. Out of five organisations that conducted the survey two were headed by persons from Maratha community. The Maratha community has adequate representation in public service which fact is apparent from data collected by the Commission itself. On the basis of data collection by the Commission no conclusion could have been arrived that Maratha community is not adequately represented in services in the State.

261. Shri Patwalia refuting the submissions of the learned counsel for the appellant submits that Gaikwad Commission has considered conclusions arrived by all earlier Commissions and thereafter it had recorded its conclusion. The Commission before proceeding further has laid down procedure for investigation. The Commission decided to conduct survey as to collect information in respect of the social and educational backwardness. The Commission has surveyed to collect information of all families in two villages in each District and the Commission decided to collect information by selecting one

Municipal Corporation and one Municipal Council from each of six regions of the State of Maharashtra. For the purpose of sample survey five different Agencies have been nominated. The Commission also conducted public hearing, collected representations from persons, numbering 195174. Out of representations, 193651 persons are in favour of reservation to Maratha whereas 1523 were in favour of reservation of Maratha community by creating separate percentage. The Commission also recorded evidence, obtained information from the Government departments and other organisations, Universities and after fixing parameters allocated 10 marks for socially backward class, 8 marks out of 25 marks has been allocated for educational backwardness, 7 marks to the economically backward class and after following the marking system held that Maratha community has obtained more that 12.5 marks and has satisfied that it is socially, educationally and economically backward class. 784 resolutions of Gram Panchayats were in favour of granting reservation of OBC. It is submitted that the representation of Maratha

community in the public services is not equivalent to their population which is 30%. Hence, they were entitled to separate reservation to make their representation as per their population.

262. Shri Patwalia further submits that scope of judicial review of a report of the Commission is too limited. This Court shall not substitute its opinion in place of the opinion arrived by the Commission. He submits that parameters of judicial review have been laid down in ***Indra Sawhney*'s case.** The Court shall not sit in appeal over the opinion of experts. The report of Gaikwad Commission is based on sample study of Maratha community. It is on the basis of the report of the Gaikwad Commission that State Government formed opinion that Maratha community is a socially and educationally backward class and deserves a separate reservation in recognition of their legitimate claim. Inclusion of Maratha community in already existing OBC community for whom 19% reservation is allowed shall have adverse effect on the OBC who are already enjoying the reservation,

hence decision was taken to grant separate reservation.

263. We have considered the submissions of the parties and perused the records. Before proceeding further, we need to notice the parameters of judicial review in such cases.

264. We may first notice the Constitution Bench judgment of this Court in ***M.R. Balaji vs. The State of Mysore and others, AIR (1963) SC 649***. In the above case, this Court had occasion to consider Nagan Gowda Committee which has submitted a report in 1961 and made a recommendation for reservation. In pursuance of the report, the State of Mysore had issued an order dated 31.07.1961 deciding to reserve 15% seats for Scheduled Castes and 3% for Scheduled Tribes and 50% for backward class totaling to 68% of seats available for admission to the Engineering and Medical Colleges and to other technical institutions in the State. The Constitution Bench elaborated the extent of judicial review to an executive action. In

paragraph 35 of the judgment, the Constitution Bench laid down following:

> **"35.** The petitioners contend that having regard to the infirmities in the impugned order, action of the State in issuing the said order amounts to a fraud on the Constitutional power conferred on the State by Article 15(4). This argument is well-founded, and must be upheld. When it is said about an executive action that it is a fraud on the Constitution, it does not necessarily mean that the action is actuated by mala fides. An executive action which is patently and plainly outside the limits of the constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If, on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action is struck down as being a fraud on the relevant constitutional power. It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinized and if it appears that notwithstanding the appearance, the cloak or the veil of the executive action, in substance and in truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution. …."

264(a). From the above, it is clear that what was emphasised by the Court is that it is the substance of the matter which has to be examined and not its form, appearance, or the cloak, or the veil of the executive action has to be carefully scrutinised.

265. The next judgment which we need to notice is the judgment of this Court in ***The State of Andhra Pradesh and others vs. U.S.V. Balram, etc., (1972) 1 SCC 660***. **T**he above case is also on basis of the Commission's report. The Commission for the backward classes in the State of Andhra Pradesh appointed by the State Government submitted a report. The High Court held the enumeration of the backward classes as well as reservation invalid. The State of Andhra Pradesh filed the appeal. The grounds of challenge were noticed in Paragraph 77 of the judgment. In paragraph 83-A of the judgment this Court observed: that the question to be answered is whether the materials relied in the report are not adequate or sufficient to support its conclusion. Following have been laid down in paragraph 83-A:

> "83-A. … But, in our opinion, the question is whether on the materials collected by the Commission and referred to in its report, can it be stated that those materials are not adequate or sufficient to support its conclusion that the persons mentioned in the list as Backward Classes are socially and educationally backward? ....
>
> ...Therefore, the proper approach, in our opinion, should be to see whether the relevant data and materials referred to in the report of the Commission justify its conclusions. ”

266. Thus, one of the parameters of scrutiny of a Commission's report is that whether on the basis of data and materials referred to in the report whether conclusions arrived by the Commission are justified.

267. In ***Indra Sawhney***, one of the questions framed by the Constitution Bench to answer was question No.9, which is to the following fact:

> "9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?”

268. In paragraph 842 of ***Indra Sawhney*** following was laid down:

> **"842.** It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive — a co-equal wing — in these matters. ……"

269. In paragraph 798, it was held by the Constitution Bench in ***Indra Sawhney*** that opinion formed with respect to grant of reservation is not beyond judicial scrutiny altogether. The Constitution Bench referred to an earlier judgment of this Court in **Barium Chemicals v. Company Law Board, AIR 1967 SC 295.** In the above regard paragraph 798 is extracted for ready reference:

> "798. …It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within

> subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals* v. *Company Law Board* [1966 Supp SCR 311 : AIR 1967 SC 295] which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive."

270. ***Indra Sawhney*** having referred to the judgment of this Court in **Barium Chemicals (supra)** for the scope and reach of judicial scrutiny. We need to refer the test enunciated in **Barium Chemicals.** The Constitution Bench in **Barium Chemicals** had occasion to consider the expression "if in the opinion of the Central Government occurring in Section 237 of Companies Act, 1956". Justice Hidayatullah laid down that no doubt the formation of opinion is subjective but the existence of the circumstances relevant to the inference as the sine quo non for action must be demonstrable. Following observations were made in paragraph 27:

> "27. …No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be

> demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:
>
> "It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist…."
>
> Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie."

271. Justice Shelat with whom Justice Hidayatullah has agreed in paragraph 63 laid down following:

> "63. .....Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Redcliff and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

272. Dr. Rajiv Dhavan, learned senior counsel, during his submission has contended that ***Indra Sawhney*** in its judgment has relied on a very weak test. He contended that the constitutional reservations are required to be subjected to strict scrutiny tests.

273. We may also notice two-Judge Bench judgment of this Court in **B.K. Pavitra and others vs. Union of India and others, (2019) 16 SCC 129,** where this Court had after referring to earlier judgment laid down that Committee/commission has carried out an exercise for collecting data, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.

274. We may also notice a recent judgment of this Court in ***Mukesh Kumar and another vs. State of Uttarakhand and others, (2020) 3 SCC 1***, in which one of us **Justice L. Nageswara Rao** speaking for the Bench laid down following in paragraph 13:

> "13. .....The Court should show due deference to the opinion of the State which does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within the subjective satisfaction of the executive are extensively stated in *Barium Chemicals Ltd.* v. *Company Law Board* [*Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295] , which need not be reiterated."

275. The grant of reservation under Article 15(4) or 16(4) either by an executive order of a State or legislative measures are Constitutional measures which are contemplated to fulfill the principle of equality. The measures taken under Article 15(4) and 16(4) thus, can be examined as to whether they violate any constitutional principle, are in conformity with the rights under Article 14, 15 and 16 of the Constitution. The scrutiny of measures taken by the State either executive or legislative, thus, has to pass test of the constitutional scrutiny. It is true that the Court has to look into the report of the Commission or Committee with deference but scrutiny to the extent as to whether any constitutional principle has been violated or

any constitutional requirement has not been taken into consideration is fully permissible. As laid down in ***V. Balram case (supra)*** the judicial scrutiny is also permissible as to whether from the material collected by the Commission or committee the conclusion on which the Commission has arrived is permissible and reasonable. We are conscious of the limitation on the Court's scrutiny regarding factual data and materials collected by the Court. We without doubting the manner and procedure of collecting the data shall proceed to examine the report on the strength of facts, materials, and data collected by the Commission.

(12) Whether the data of Marathas in public employment as found out by Gaikwad Commission makes out cases for grant of reservation under Article 16(4) of the Constitution of India to Maratha community?

276. The reservation under Article 16(4) of the Constitution is enabling power of the State to make any provision for reservation of appointment or posts in favour of other backward class of citizens

who in the opinion of the State is not adequately represented in the services under the State. The conditions precedent for exercise of power under Article 16(4) is that the backward class is not adequately represented in the services under the State.

277. The Constitution Bench of this Court in ***Indra Sawhney*** while elaborating on Article 16(4) has held that clause (4) of Article 16 speaks of adequate representation and not proportionate representation in paragraph 807: -

> "807. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Article 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the

> total population would certainly be relevant...”

278. The objective behind clause (4) of Article 16 is sharing the power by those backward classes of the society who had no opportunities in the past to be part of the State services or to share the power of the State. ***Indra Sawhney*** has noted the above objective in paragraph 694 of the judgment (by **Justice Jeevan Reddy**), which is to the following effect: -

> “694. The above material makes it amply clear that the objective behind clause (4) of Article 16 was the sharing of State power. The State power which was almost exclusively monopolized by the upper castes i.e., a few communities, was now sought to be made broad-based. The backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16(4) is empowerment of the deprived backward communities – to give them a share in the administrative apparatus and in the governance of the community.”

279. The State, when provides reservation under Article 16(4) by executive action or by legislation,

condition precedent, that the backward class is not adequately represented in the service has to be fulfilled. The Constitution Bench in ***M.Nagaraj (Supra)*** has laid down following in paragraph 102:-

> "102...If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation..."

280. Further in paragraph 107, ***M.Nagaraj*** laid down following:-

> "107...As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

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

services. The Maratha community is only one community among the numerous castes and communities in the State of Maharashtra. The principal caste and communities in the State of Maharashtra consists of Scheduled Castes/Scheduled Tribes, de-notified tribes, nomadic tribes (B, C and D), special backward category and other backward classes, general categories and the minorities.

282. A large number of castes and communities are included in the above class of castes. We may refer to number of caste and communities included in different groups. Few details are on the record: SC(59), ST(47) and OBC(348).

283. The above details indicate that in a rough estimate in the State of Maharashtra, there are more than 500 castes and communities which are living in the State and earning their livelihood.

which include Scheduled Caste, Scheduled Tribe to have representation in the public services. The State cannot take any measure which violates the balance. The expression 'inadequacy' has to be understood in above manner.

285. Now we proceed to look into the report of Gaikwad Commission which has separately in detail in Chapter IX dealt with the subject "inadequacy of Marathas in the services under the State."

286. The Commission in paragraph 214(b) of the report states: -

> "214(b). The information regarding recruitment status of all the Reserved Classes and Open Categories in the services under the State has been sought from the State Government and other state agencies..."

287. The Commission was well aware of the Constitutional conditions stipulated to be complied by the State for reserving the posts in favour of backward class of citizens which is clear from what has been stated in paragraph 215 which for ready reference is extracted as below: -

"215. The three Constitutional conditions stipulated to be compiled by State for reserving the posts in favour of any Backward Class of Citizens in the Public Services under or controlled by the State as also confirmed to be non-negotiable by the judicial pronouncement from time to time are as under: -

i) If such Backward Class is not **adequately** represented in the services under the State.

ii) The total reservation **should not exceed 50%** unless there are **extra ordinary and compelling circumstances** which should be **demonstrated and justified** by a quantifiable data.

iii) Such reservation should be consistent with the **maintenance of efficiency in the administration.**"

in Central services namely IAS, IPS, IFS and Table C deals with position of employees and officers in Mantralaya Cadre. The tables A and C enumerated the details grade wise from Grade-A to Grade-D. **We proceed to examine the issue on the basis of facts and figures compiled by the Commission obtained from State and other sources.** The figures compiled relates as on 01.08.2018. Figures having obtained from the State, there is no question of doubting the facts and figures compiled by the Commission.

289. Table A is part of paragraph 219 of the report. We need to extract entire table A for appreciating the question.

Table A: Strength of Marathas in Government/Public Services/PRIs/ULBs in the State

S. No	Grade of services	Sanctioned posts	Posts filled in as on 01/0	Vacant posts	Posts sanctioned for open	Post filled for open cate	Posts filled from Maratha class	Posts filled from SCs	Posts filled from STs	Posts filled from Vimukt	Posts filled from Nomadi	Posts filled from Nomadi	Posts filled from Nomadi	Posts filled from other	Posts filled from Specia

			8/18		category	gory	from out of open category posts			a Jati (VJA)	c Tribe (NTB)	c Tribe (NTC)	c Tribe (NTD)	backward class (OBC)	l backward class (SBC)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Grade A	83532	491900	34342	42669	28048	9321 (11.16%)	6765 (8.16%)	2822 (3.38%)	1422 ((1.7%)	1116 (1.34%)	1383(1.66%)	911 (1.09%)	4400(5.27%)	2324(2.78%)
2	Grade B	834425	595504	23921	44527	31193	9057 (10.86%)	9038 (10.83%)	3980 (4.77%)	1976 (2.37%)	1693 (2.03%)	2235 (2.68%)	1513(1.81%)	6376(7.64%)	1500(1.80%)
3	Grade C	9524 10	7834 07	169003	44857 5	41338 1	153224 (16.09%)	9721 5 (10.21%)	6615 5 (6.95%)	2314 5 (2.43%)	2013 6 (2.11%)	2596 7 (2.73%)	17477 (1.84%)	100196 (10.52%)	19735 (2.07%)
4	Grade D	3013 85	1995 70	101815	1372 99	9959 2	36387 (12.07%)	3036 9 (10.08%)	1728 2 (5.73%)	5671 (1.88%)	5588 (1.85%)	6248 (2.07%)	3479 (1.15%)	24999 (8.29%)	6342 (2.10%)
	Total	1420 752	1091 671	329081	6730 70	5722 14	207989	1433 87	9023 9	3221 4	2853 3	3583 3	2380	135971	29901
						Ave %	14.64	10.09	6.35	2.27	2.01	2.52	1.65	9.57	2.10

290. The relevant figures pertaining to posts filled as on 01.08.2018, includes posts filled from open category, posts filled from Maratha classes from out of open category posts, posts filled from SCs, posts filled from STs, posts filled from Vimukt Jati(VJA), posts filled from Nomadic Tribes NT-B, posts filled from Nomadic Tribes NT-C,NT-D and posts filled from the backward classes (OBC) and posts filled from special backward classes(SBC). The above figures correctly represent the representation of different classes in public services.

291. Now, we take the representation of Marathas grade wise as reflected by Table A.

GRADE-A

292. Posts filled are 49,190 out of which open category posts are 28,048 and posts filled from Maratha classes are 9,321. The Maratha Community obviously has been competing in the open category and has obtained the post as open category candidates. The Chart also mentioned below each

class the percentage against the column of posts filled from Maratha class, percentage 11.16% has been mentioned. Similarly, different percentage has been mentioned against all other classes. When we take the total number of posts, posts filled for open category, it is mentioned as 28,048 out of which Marathas are 9,321. **When we calculate the percentage of Maratha representation out of the open category filled post, percentage comes out to 33.23 percent.** Thus, the correct percentage of Maratha out of the open category post is 33.23 percent which indicates that more than 33 percent of the open category post has been bagged by Maratha. In Maharashtra while considering the status of reservation, we have noticed that 52 percent posts are reserved for different categories and only 48 percent posts are available for open category. Out of 48 percent posts available for open category, Marathas have obtained 33.23 percent. The percentage given by the Commission in below Maratha class i.e. 11.86% is obviously wrong and erroneous. The Maratha who have been competing in open category cannot

claim any post in the reserved category of 52 percent. Thus, the representation has to be computed taking into the seats of open category. Similarly, while computing the percentage of Marathas in Grade B, C and D, similar mistakes have been committed by the Commission. In Grade-B, total posts filled from open category were 31193 out of which Marathas were 9057, percentage of which comes out to 29.03 percent. In Grade-C, total posts filled from open category were 4,13,381 out of which Marathas were 1,53,224, percentage of which comes out to 37.06 percent and for Grade-D, total posts filled form open category were 99592 out of which Marathas were 36387, percentage of which comes out to 36.53 percent.

293. A comparative chart of open category seats which are filled, number of posts of Maratha community and percentage in the posts is as follows: -

Grade	**No. of open category**	**No. of filled from**	**Percentage of Maratha in open**

	posts filled	**Maratha Class**	**category post.**
Grade A	28048	9321	33.23%
Grade B	31193	9057	29.03%
Grade C	413381	153224	37.06%
Grade D	99592	36387	36.53%

294. The above representation of Marathas in public services in Grade-A, B, C and D are adequate and satisfactory. One community bagging such number of posts in public services is a matter of pride for the community and its representation in no manner can be said to not adequate in public services. The Constitutional pre-condition that backward class is not adequately represented is not fulfilled. The State Government has formed opinion on the basis of the above figures submitted by the Gaikwad Commission. The opinion of the State Government being based on the report, not fulfilling the Constitutional requirement for granting reservation to Maratha community becomes unsustainable.

295. Now we also look into Table B and C given in paragraphs 220 and 224 are as follows:-

Table B

Sr. No	Services	Total sanctioned Posts	Posts filled	Vacant posts	Sanctioned Posts From Open category	Posts Filled From Open category	Maratha officers occupying posts	Posts Filled From SCs	Posts Filled From STs	Posts Filled From vimukta Jati (V.J A)	Posts Filled From Noamdic Tribe (N. T B)	Posts Filled From No Madic Tribe (N. TC)	Post Filled From Tribe (N. T. D)	Post filled from other backward class(O .B. C)	Posts filled from special backward class (SBCs)	TOTAL
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1	IAS	361	309	52	186	161	25 (6.93 %)	36 (9.97 %)	15 (4.16%)	6 (1.66)	0	3 (0.83%)	7 (1.94%)	54 (14.96 %)	2 (0.55%)	148
2	IPS	256	145	11	179	140	39 (15. 23%)	34 (13.28%)	12 (4.69%)	2 (0.78%)	1 (0.39%)	0	2 (0.78%)	54 (21. 09 %)	0	144
3	IFS	203	156	47	97	89	16 (7.88 %)	20 (9. 85%)	6 (2.96%)	2 (0.99%)	0	1 (0.49%)	0	38 (18. 72 %	0	83

Table C: Mantralaya Cadres

Sr. No.	Grade of Services	Sanctioned Posts	Posts filled in as on 1/8/201	Vacant Posts	Post Vacant for Open Catego	Posts Filled From Open Cat	Posts filled from Maratha Class From out of	Posts Filled From SCs	Posts Filled From STs	Posts filled from Vi	Posts filled from No	Posts Filled from No	Posts filled from No madic	Posts Filled From Other Bac	Posts filled from special bac

			8		**ry**	**egory**	**Open Category Posts**			**mukta Jati (V.J.A)**	**madic Tribe (N.T.B)**	**madic Tribe (N.T.C)**	**Tribe (N.T.D)**	**kward Class (OBC)**	**kward class (SBC)**
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Grade A	585	465	120	170	248	93 (15.90 %)	62 (10.60 %)	27 (4.62 %)	15 (2.56 %)	10 1.71 %	13 2.22 %	10 1.71 %	62 (10.60 %)	
2	Grade B	2410	1793	617	390	793	415 (17.22 %)	279 (11.58 %)	96 (3.98 %)	43 (1.78 %)	48 (1.99 %)	69 (2.86 %)	54 (2.24 %)	326 (13.53 %)	
3	Grade C	2755	1679	1076	739	808	421 (15.28 %)	273 (9.9%)	104 (3.77 %)	38 (1.38 %)	38 (1.38 %)	52 (1.89 %)	41 (1.49 %)	266 (9.66 %)	
4	Grade D	1136	845	291	359	333	185 (16.29%)	229 (20.16 %)	66 (5.81 %)	25 (2.20 %)	26 (2.29 %)	21 (1.85 %)	9 (0.79 %)	100 (8.80 %)	
	Total	6886	4782	2104	1658	2182	1114	843	293	121	122	155	114	754	
						Total %	16.18	12.24	1.26	1.76	1.77	2.25	1.66	10.95	

296. Table B contains all details including posts filled from open category, posts filled from Maratha officers. Taking the post of IAS in the open category filled are 161. Maratha IAS officers are 25, percentage of which comes to 15.52 percent. Similarly, in IPS out of 140 filled up posts, Marathas are 39, percentage of which comes to 27.85

percent and similarly, in IFS, out of 89, 16 were Marathas, percentage of which comes to 17.97 percent.

297. With regard to percentage mentioned in each column, error has been committed by the Commission in reflecting less percentage which is incorrect and erroneous. Following is a tabular chart of posts filled in open category, posts filled by Maratha and percentage is as follows: -

Services	**No. of open category posts filled**	**No. of filled from Maratha Class**	**Percentage of Maratha in open category post.**
IAS	161	25	15.52%
IPS	140	39	27.85%
IFS	89	16	17.97%

298. Now, we come to Table C i.e. Mantralaya Cadres. Table C also contains the details of posts filled from open category and posts filled from Maratha category in Grade-A, B, C and D. For example, Grade-A posts filled from open category are 248 out of which Marathas are 93, percentage of which comes out to 37.5 percent.

299. Similarly, in Grade-B, posts filled from open category are 793 out of which Marathas are 415, percentage of which comes to 52.33 percent.

300. For Grade-C, posts filled from open category are 808 out of which Marathas are 421, percentage of which comes to 52.10 percent.

301. For Grade-D, posts filled from open category are 333, out of which 185 are Marathas, percentage of which comes to 55.55 percent.

302. The tabular chart for posts filled in open category, posts filled by Marathas and percentage is as follows: -

Grade	**No. of open category posts filled**	**No. of posts filled from Maratha Class**	**Percentage of Maratha in open category post.**
A	248	93	37.5%
B	793	415	52.33%
C	808	421	52.1%
D	333	185	55.55%

303. All the three tables A, B and C and percentage of Marathas who have competed from open category

make it abundantly clear that they are adequately represented in the services. The Commission although noted all the figures correctly in all the columns but committed error in computing the percentage adding posts available for open category as well as posts available for reserved categories. Maratha cannot claim to compete for the reserved category posts; hence, there is no question of computing their representation including the reserved category posts. The representation of Marathas has to be against open category posts, hence, their percentage has to be determined as compared to total open category filled posts, and the representation of Marathas in most of the Grades is above 30 percent. This is the basic error committed by the Commission in computing the percentage due to which it fell in error in finding their representation in services inadequate.

304. There is one more fundamental error which has been committed by the Commission. The Constitution pre-condition for providing reservation as mandated by Article 16(4) is that the backward class is not

adequately represented in the public services. The Commission labored under misconception that unless Maratha community is not represented equivalent to its proportion, it is not adequately represented. We may notice what has been said by the Commission in paragraph 219 while recording its conclusion emerging from the analysis of information contained in Table A,B,C and D. In paragraph 219(c), the Commission states: -

> "219(C)...The obvious conclusion that emerges from the above information is that in none of the four grades the strength of Maratha Class employees is touching the proportion to their population in the State which is based on various sources is estimated at an average 30%. So also, their presence in administration is more at the lower grades of "C" and "D" and have a comparatively lesser existence and role in decision making levels of State administration in "A" and "B" grades..."

305. ***Indra Sawhney*** has categorically held that what is required by the State for providing reservation under Article 16(4) is not proportionate representation but adequate representation. The Commission thus proceeds to examine the entitlement under Article 16(4) on the concept of proportionate

representation in the State services which is a fundamental error committed by the Commission.

306. The Government committed an error in accepting the recommendation without scrutinizing the report with regard to correct percentage of representation of Marathas in services. The constitutional precondition as mandated by Article 16(4) being not fulfilled with regard to Maratha class, both the Gaikwad Commission's report and consequential legislation are unsustainable. We thus hold that Maratha class was not entitled for any reservation under Article 16(4) and grant of reservation under Article 16(4) is unconstitutional and cannot be sustained.

(13) Social and Educational Backwardness of Maratha Community

307. We have noted above that three National Backward Classes Commissions and three State Backward Classes Commissions considered the claim of Maratha community to be included in the other backward community but all Commissions rejected such

claim rather they were held to be belonging to forward community. The first National Backward Classes Commission on 30.03.1955, i.e., Kaka Kalelkar Commission did not include Maratha commission in the list of backward communities. The Commission observed:

> "In Maharashtra, besides the Brahman it is the Maratha who claimed to be the ruling community in the villages and the Prabhu that dominated all other communities.

308. The second National Backward Classes Commission, i.e., Mandal Commission in its report included Maratha community as forward Hindu community. The National Commission on Backward Classes in the year 2000 elaborately examined the claim of Maratha community to be included in other backward class. The entire Commission heard the claim of Maratha, including the members of State Backward Classes Commission representing the claim of Maratha community. The National Backward Classes commission held that Maratha community is an advanced community of the society and it cannot be

included with Kunbi under separate entity of its own. We may extract paragraphs 18, 19 and 22 of the Commission's report which are to the following effect:

> "18. A community with a history of such origin and close association with the ruling classes, a community, many of whose members, from its inception enjoyed important economic and political rights and positions of power and influence and eventually became rulers and members of ruling classes at different levels cannot in any way be thought to have suffered any social disadvantages. The Bench is aware that in what is identified as a ruling class/caste, every member of it does not rule, but the fact that those who rule come from a distinct caste community imparts a certain amount of prestige and self-confidence even to those from the same caste/community who personally belong to the ruling functionaries and to the totality of that caste/community. It is significant to note that Marathas have sought and received recognition of as of Kshatriya Varna category and therefore does not secure them status or caste upgradation Examples are Vanniakula Kshatriya in Tamil Nadu, the adoption of the umbrella name "Kshatriya" by all BCs in Gujarat, Paundra- Kshatriya (an SC) in West Bengal and so on. But no community which is recognized generally, i.e. by the rest of the society as of "Kshatriya" category and correctly finds place in a BC list.

19. The modern history of Maharashtra is witness to the continued dominance of Marathas in its society and polity as evident from the fact, for example, that in the post-Independence period, the community provided the largest number of Chief Ministers. During the full Bench hearing on 14.12.99, the Bench had put the question to the representatives of the Maratha Community as to why despite there being so many Chief Ministers and important Ministers in the State, some of whom also became important Ministers in the Centre, none of them got or moved to get Marathas included in the list of BCs is eloquent testimony not only of the fact that Marathas are not a backward class but also of the wisdom and objectivity of these Chief Ministers. The only ground raised by the representatives of the community in support of their claim for inclusion in the list of BCs what the fact of the origin of Marathas from Kunbis and the alleged use of the name Maratha by some members of Kunbi caste in some areas of the State. The Bench is of the view that since there, undoubtedly, is a distinct class/community Called "Maratha" and since it is obviously an advanced community in society and polity as already noted, it cannot be included in the list of Backward Classes. The Bench cannot accept the claim of the representatives of the community that many known Maratha leaders including one whose name they mentioned have got caste certificates as "Kunbi" as a valid ground for inclusion of Marathas in the list of BCs with Kunbis. The Bench has no ground to believe that any known Maratha leaders would have sought such certificates, nor have those who have made this allegations presented any evidence in support of this claim. But

> even if, for argument's sake, claim or argument is it does not prove that Maratha is the same as Kunbi or synonym of Kunbi. Leaving aside the allegations made by some of the representatives of the community, the Bench is aware that some shortsighted individuals belonging to different non-backward castes unfortunately resort to seeking and securing fake caste certificates and in the context of the well-known qualities of India's administrative system, elements are not rare which entertain such requests and deliberately issue false caste certificates. This menace, like different forms of corruption, has become more and more threatening. In certain Advices, the Commission has advised the Central and State Governments how this menace could be extirpated. But false caste-certificates and false caste-identities based on them cannot change the reality of caste-identities as they occur in society."
>
> 22. In view of the above facts and position, the Bench finds that Maratha is not a socially backward community but is a socially advanced and prestigious community and therefore the Request for Inclusion of "Maratha" in the Central List of Backward Classes for Maharashtra along with Kunbhi should be rejected. In fact "Maratha" does not merit inclusion in the Central list of Backward Classes for Maharashtra either jointly with "Kunbhi" or under a separate entity of it's own."

309. We may also refer now to the three State Backward Classes Commissions appointed by the State.

In the year 1961, Deshmukh Committee appointed by the State of Maharashtra did not include the Maratha community in the list of backward communities. In the year 2001, Khatri Commission rejected the demand of Maratha to be included in backward class communities. On 25.07.2008, Bapat Commission in its report rejected the demand to include Maratha community in the other backward class communities by majority.

310. After the Bapat Commission's report, the State Government had appointed Rane Committee to be headed by a Cabinet Minister who collected data and observed that Maratha may not be socially and educationally backward but recommended grant of reservation as educationally and financially backward class. The National Commission or the State Commission, when it is appointed to examine the claim of a particular community to be included or excluded from a list of other backward classes, it is to look into the contemporaneous data and fact. The State to inform itself of the status of a

particular community appoints Commissions or Committees to take affirmative measures as ordained by the constitutional provisions of Articles 15 and 16. The relevant is the data status of the community as existing at the time of investigation and report.

311. This Court in **Ram Singh and others vs. Union of India, (2015) 4 SCC 697,** has categorically laid down in paragraph 49 that a decision which impacts the rights of many under Articles 14 and 16 of the Constitution must be taken on contemporaneous inputs. Following observations were made by two-Judge Bench of this Court in paragraph 49:

> "49. ......A decision as grave and important as involved in the present case which impacts the rights of many under Articles 14 and 16 of the Constitution must be taken on the basis of contemporaneous inputs and not outdated and antiquated data. In fact, under Section 11 of the Act revision of the Central Lists is contemplated every ten years. The said provision further illuminates on the necessity and the relevance of contemporaneous data to the decision-making process."

312. We fully endorse the above view of this Court. Any study of Committee or Commission is with regard

to present status since object is to take affirmative actions in present or in future to help the particular community. Three National Backward Classes Commissions reports as noted above in the year 1955, 1980 and 2000, were the reports regarding the status of the community as was found at the relevant time. Similarly, three State Committee/Commissions in the year 1961, 2001 and 2008 also were reporting the status of Marathas at the relevant time when the report was submitted. The term of the reference of the Gaikwad Commission was not to examine as to whether earlier reports of the National Commissions for Backward Classes or Committee/Commissions of the State earlier in not recommending Maratha to be included in OBC were correct or not. Terms of reference which is a part of the report clause (1) and clause (3) clearly indicate that the Commission was to collect contemporaneous data. Quantifiable data collected by the State which have been referred in the report were of the data collected period after 2014. The Commission’s observations made in the report that it

does not agree with the earlier reports cannot be approved.

313. We, however, hasten to add that it is always open to the State to collect relevant data to find out as to whether a particular caste or community is to be included in the list of other backward classes or excluded from the same despite any decision to the contrary taken earlier. The Constitution Bench in ***Indra Sawhney*** has also laid down for periodical review which is for the purpose and object that those communities who were earlier backward and advanced should be excluded and those communities who were earlier advanced and might have degraded into backward class should be included. Thus, the State was fully entitled to appoint backward classes commission to collect relevant data and submit the report.

314. When in earlier period of about 60 years, right from 1955 to 2008, repeatedly it was held that Maratha community is not backward class, Gaikwad Commission ought to have applied the test that "**what**

happened thereafter that now the Maratha community is to be included in OBC”. The Commission has not adverted to this aspect of the matter. The Commission ought to have also focused on comparative analysis as to what happened in the recent years that Marathas have become backward from forward class. In this context, we may also refer to the judgment of this Court in **Ram Singh (supra)** where National Backward Classes Commission has rejected the claim of Jat to be included in other backward communities with regard to several States. The National Commission recommended that Jat is politically dominant class and need not to be included in OBC. The Union disregarding the said report had issued a notification including Jat as OBC in the different States in the Central List. It was challenged in this Court by way of writ petition. This Court held that the report of National Backward Classes Commission could not have been disregarded and ought to have been given due weight. This Court held that Jat community is politically organised class which was rightly not

included in the category of other backward classes. In paragraph 55 following was laid down:

> **"55.** The perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunates" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can backwardness any longer be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative: possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organised classes (such as Jats) in the List of Backward Classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed."

315. We have already noted that after the 2014 enactment, writ petition was filed in the High Court challenging 2014, enactment by which Maratha community was declared as socially and educationally

backward class and separate reservation was provided for. The Ordinance XIII of 2014 was issued to that effect; writ petition was filed in the High Court challenging the Ordinance and inclusion of Maratha as other backward category. The High Court elaborately heard all parties and passed a detailed interim order in Writ Petition No.2053 of 2014 on 14.11.2014 where it set out various facts which were placed before the Court for staying the Ordinance and staying the grant of separate reservation to Maratha community. We may refer to paragraph 40(e) of the order dated 14.11.2014 of the High Court which is to the following effect:

> "40. In the context of 16% reservation for Marathas upon their classifications as Educationally and Socially Backward Classes, he following position emerges:
>
> ....
>
> (e) The petitioner in Public Interest Litigation No.140 of 2014 placed on record some statistics by reference to data compiled by Dr. Suhas Palshikar in the book on "Politics of Maharashtra: Local Context of the Political Process:", Editors: Suhas Palshikar and Nitin Birmal, Pratima Prakashan, 2007 which suggest that-

(I) From 1962 to 2004, from out of 2430 MLAs, 1336 MLAs corresponding to 55% were Marathas;

(ii) Nearly 54% of the educational institutions in the State are controlled by Marathas.

(iii) Members of the Maratha community dominate the universities in the State with 60 to 75% persons in the management.

(iv) Out of 105 sugar factories, almost 86 are controlled by Marathas. About 23 district cooperative banks have Marathas as their Chairpersons.

(v) About 71.4% of the cooperative institutions in the State are under control of Maratha community.

(vi) About 75 to 90% of the land in the State is owned by Maratha community.

None of the aforesaid was disputed by or on behalf of the respondents in any of the affidavits or at the hearing.

It was also stated by the petitioner at the hearing that ever since the establishment of the State of Maharashtra on 1 November 1956, out of 17 Chief Ministers, 12 have been Marathas. The last non-Maratha Chief Minister was during the period January 2003 to October 2004. This statement was also not disputed."

316. The above stated facts were not disputed before the High Court, and before this Court also in the

submissions of the parties above facts have been repeated and it has been submitted that those facts clearly prove that Maratha are not socially backward. The Commission in its report does not dispute that Maratha is politically dominant class. In this context, following is extracted from the report:

> "Political dominance cannot be ground to determine social and educational backwardness of any community."

317. We have already found that Maratha community has adequate and sufficient representation in the public services. We have also noted that representation of Maratha in public services is present in all categories i.e. Group A, Group B, Group C and Group D posts, and the Marathas have occupied the posts by competing with open categories. The representation of Marathas as noticed above has in many grades about 30% against all filled posts of open category. When a community is able to compete with open category candidates and obtain substantial number of seats (about 30%), this

was relevant fact to be noticed while considering the social and educational backwardness of the community. Even if grant and non-grant of reservation to backward under Article 16(4) may not be considered as decisive for socially and educationally backward class for grant under Article 15(4) but grant or non-grant under Article 16(4) certainly is relevant for consideration which reflects on backward class or classes both in favour and against such backward class. We have noticed that the Commission has taken erroneous view that the representation of Maratha community in public services is not proportionate to their population and has recommended for grant of reservation under Article 16(4). We having disapproved the grant of reservation under Article 16(4) to Maratha community, the said decision becomes relevant and shall have certainly effect on the decision of the Commission holding Maratha to be socially and educationally backward. Sufficient and adequate representation of Maratha community in public

services is indicator that they are not socially and educationally backward.

318. The Commission in its report while discussing, in Chapter VIII has analysed the various data including data of students belonging to Maratha community who are pursuing Engineering, Medical and other disciplines. In paragraph 178 the Commission has recorded that it obtained the information as regards Marathas engaged in and pursuing academic career, which would also throw light on the depth of their involvement in higher education. In Paragraph 178, 1(b) the Commission has extracted a table for the last three academic years (2014-15, 2015-16, 2016-17) in the Engineering Courses as received from the Directorate of Technical Education of the State Government. Out of open category seats in Diploma of 167168 Maratha achieved admission in 34,248 seats and in Graduate out of 221127, they could receive 32045 admissions, under Post Graduate out of 63795 they could secure admission in 12666 . Similarly details have been given about the Graduation and

Post-Gaduation Medical Courses for three years. In MBBS out of 4720 in the year 2015-16 Maratha received 428 seats, in other streams out of 14360 they secured 2620 seats, in the above regards table is produced hereunder:

Academic Year	Total Intake	Marathas	Percentage	Remarks
2015-16	MBBS-4720	MBBS-428	9.1%	The other courses include Dental AYUSH (Aurveda Unani Sidhh Homeopathy & Nursing)
	Other-14360	Other-2620	18.2%	
Total	19080	3048	16%	
2016-17	MBBS-5170	MBBS-270	5.2%	
	other-14098	other-1059	7.5%	
Total	19268	1329	6.9%	
2017-18	MBBS-5170	MBBS-293	5.7%	
	Other-15303	other-1019	6.7%	
Total	20473	1312	6.4%	

319. Similarly, the Commission has given details of Medical Post Graduation Courses in para-178-1(c) (c-ii) which indicates following with regard to other under-Graduate and Post-Graduate posts, details of which given in paragraph 178-1(d) which indicates:

Academic Year	Total Admissions	Open	Marathas	SC	ST	OBCs	DT/VJ/SB Cs
14-15	681967	467994	29371	49088	15728	102221	17565
15-16	730180	504184	28725	54272	15435	108608	18953
16-17	790674	557394	27597	57348	16002	112573	19760
Total	2202821	1529572 (69.5%)	85693 (3.89%)	160708 (7.30%)	47165 (2.14%)	323402 (14.68%)	56281 (2.55%)

320. The above facts and figures which were obtained by the Commission itself indicate that students of Maratha community have succeeded in open competition and got admissions in all the streams including Engineering, Medical Graduation and Post-Graduation Courses and their percentage is not negligible. The computation of percentage by the Commission against Maratha is since out of open category seats, since 50% seats are for reserved category and only 50% are open, the percentage of the Maratha, thus, shall substantially increase as per table given by the Commission itself.

321. The Commission has also made studies with regard to representation of Maratha in prestigious Central services, namely, IAS, IPS and IFS with

regard to State of Maharashtra. In the State of Maharashtra out of 161 posts filled from open category candidates, there are 25 IAS belonging from Maratha. Similarly out of 140 posts filled from open category, 39 of IPS belong to Maratha and in IFS out of 97, 89 posts filled from open category, there are 16 IAS belong to Maratha community. When we compute the percentage of IAS, IPS and IFS, percentage of Maratha out of the posts filled from open category candidates comes to 15.52, 27.85 and 17.97 percentage respectively, which is substantial representation of Marathas in prestigious Central services.

322. We may further notice that the above numbers of Maratha officers are only in the State of Maharashtra on the posts of the IPS, IAS and IFS being Central services. Similarly, the members of Maratha community must have occupied the above posts in the other States of the Country of which details are not there.

323. The Commission has also collected data regarding engagement of Maratha in Higher Academic and Educational Fields of University Assignments in the State in paragraph 226. The Table D has been compiled by the Commission. In the said paragraph where Marathas occupied all categories of posts, including Head of Department, Professor, Associate Professor and Assistant Professor, the Commission has in the Chart also noted the number of Marathas occupying different posts in several Universities. It is true that in some of the Universities there may not be Maratha community in one or two posts but Chart indicates that there are sufficient number of Maratha in different Universities occupying posts of HOD, Professor, Associate Professor and Assistant Professor.

324. There cannot be any concept of Marathas occupying all higher posts including the posts in the Universities according to their proportion of population. The Commission has commented in the report that their percentage in the above posts is

less, whereas Table indicates that in HOD post in Savitribai Phule University Pune, out of open category filled post of 29 of HOD, only 3 are from Maratha community, out of 14 Professors only 2 are from Maratha community and out of 33 Associate Professors only 3 are from Maratha community and out of 79 Assistant Professors only 3 are from Maratha community. The Commission concludes that only 4.3% are from Maratha community in the above posts.

325. In the Higher Academic posts and posts like IAS, IPS and IFS, there cannot be any basis to contend that since Maratha community is not occupying posts according to their proportion of population, they are socially and educationally backward classes. The above are the data and figures on the basis of which the Commission concluded that the Marathas are socially and educationally backward class. When we look into the aforesaid details regarding Maratha students occupying Engineering, Medical and other streams, Maratha officers occupying Central posts of IAS, IPS and IFS and are

occupying posts of Higher Academic in Universities, mere fact that their occupation of posts is not equivalent to the proportion of their population cannot lead to the conclusion that they are socially and educationally backward. We are conscious that the Commission has conducted sample survey collected representations and other information, data and has allotted marks on social and educational and economic backward class and in the marking Marathas were found to be backward. However, data and facts which have been collected by the Commission noted above clearly indicate that Marathas are neither socially nor educationally backward and the conclusion recorded by the Gaikwad Commission on the basis of its marking system, indicator and marking is not sufficient to conclude that Marathas are socially and educationally backward.

326. The facts and figures as noted above indicate otherwise and on the basis of the above data collected by the Commission, we are of the view that the conclusion drawn by the Commission is not

supportable from the data collected. The data collected and tabled by the Commission as noted above clearly proves that Marathas are not socially and educationally backward.

327. We have completed more than 70 years of independence, all governments have been making efforts and taking measures for overall developments of all classes and communities. There is a presumption unless rebutted that all communities and castes have marched towards advancement. This Court in **Ram Singh versus Union of India and others (Supra)** has made such observations in paragraph 52:-

> "52...This is because one may legitimately presume progressive advancement of all citizens on every front i.e. social, economic and educational. Any other view would amount to retrograde governance. Yet, surprisingly the facts that stare at us indicate a governmental affirmation of such negative governance inasmuch as decade old decisions not to treat the Jats as backward, arrived at on due consideration of the existing ground realities, have been reopened, in spite of perceptible all-round development of the nation. This is the basic fallacy inherent in the impugned governmental decision that has been challenged in the present proceedings..."

327(a). We also endorse the opinion of Brother Justice S. Ravindra Bhat on affirmative actions and giving of more and more incentives to realise the constitutional objectives which undoubtedly is the obligation and duty of the State.

328. We are constrained to observe that when more people aspire for backwardness instead of forwardness, the country itself stagnates which situation is not in accord with constitutional objectives.

(14) The Constitution (One Hundred and Second Amendment) Act, 2018[The Constitution(102nd Amendment)Act, 2018].

329. I have advantage of going through erudite draft judgment circulated by my esteemed Brother, Ravindra Bhat. Although, we both are aditem on the question of Constitutional validity of Constitution 102nd Amendment Act, 2018, I regret my inability to agree with the interpretation of the Constitution 102nd Amendment Act, 2018 as put by my esteemed Brother.

330. The case of the appellant is that after 102nd Amendment to the Constitution which came into force with effect from 15.08.2018, the Maharashtra Legislature had no competence to enact Act, 2018. After the Constitution 102nd Amendment, the States have no power to identify socially and educationally backward classes. The Constitution 102nd Amendment had brought change in the regime already in existence for backward class to fall it in line with Articles 341 and 342 of the Constitution. Article 366(26C) says that the phrase SEBCs "means" those backward classes which are so deemed under Article 342A, for the purposes of this Constitution. The expression "for the purposes of this Constitution" is used in Articles 15(4) and 16(4), 338B, 342A and in other Articles of the Constitution of India. In view of Article 342A the SEBCs are those who are specified by the President by public notification for the purposes of a State or Union Territory under sub-clause(1) of Article 342A. Article 342A being analogous to Articles 341 and 342 must be

interpreted exactly in the same manner. The Parliament inserted phrase "Central List" in clause (2) of Article 342A only to emphasize the fact that after Constitution 102nd Amendment, the only list that shall be drawn for the purposes of SEBCs is the Central List drawn by the President.

331. Learned counsel for the appellant contends that Maharashtra Legislature had no competence to enact 2018 Legislation after Constitution 102nd Amendment. Learned senior counsel, Shri Gopal Sankaranarayanan, submitted that for interpreting Article 342A reliance on Select Committee report of Rajya Sabha is unwarranted.

332. The above submissions of the appellant have been stoutly refuted by the learned counsel for the State of Maharashtra as well as other States. Under Articles 15(4) and 16(4), the Union and the States have co-equal powers to advance the interest of the socially and educationally backward classes; therefore, any exercise of power by the Union cannot encroach upon the power of the State to identify

socially and educationally backward classes. The expression "for the purpose of the Constitution" can, therefore, only to be construed with the contours of the power that Union is entitled to exercise with respect to entities, institutions, authorities and public sector enterprises under the control of the Union. The power to identify and empower socially and educationally backward classes and determining the extent of reservation required is vested in the State by our Constitution and recognised by judicial pronouncements including ***Indra Sawhney***. The expression "Central List" occurring in Article 342A(2) relates to the identification under Article 342A(1) wherein the Central List will include the socially and educationally backward classes for the purposes of the Central Government. Any other interpretation would allow to whittle down the legislative power of the State. Article 342A must be interpreted in the historical context. It is submitted that the Constitution 102nd Amendment has brought changes with regard to Central List. The expression Central List

is well understood concept in service jurisprudence for reservation purposes of OBC, there are two lists, Central List and State List.

333. It is submitted that the Parliamentary Committee report and other materials throw considerable light on the intention of Parliament for inserting Article 342A in the Constitution. The Constitutional amendment has to be interpreted in the light of the Parliamentary intention. The power of the State Government to legislate cannot be taken away without amendment of Articles 15 and 16. The Parliament has not even exercised its power to occupy the field of a State by clearly using the expression 'Central List' in sub-clause (2). If the Constitution 102nd Amendment is interpreted in the manner as appellants are interpreting, the Constitutional Amendment shall be violative of the federal structure and shall be unconstitutional.

334. We have in this batch of cases issued notice to learned Attorney General, the interpretation of the 102nd Amendment to the Constitution of India

being in question. Shri K.K. Venugopal, learned Attorney general submits that the Constitution Bench in ***Indra Sawhney*** in paragraph 847 had taken the view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. He submitted that the Constitution Bench in ***Indra Sawhney*** directed the Government of India, each of the State Governments and the Administrations of Union Territories to constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens.

335. Learned Attorney General submits that in view of the above nine-Judge Bench judgment of this Court it is inconceivable that any such amendment can be brought in the Constitution that no State shall have competency to identify the backward classes, Article

15(4) necessarily includes the power of identification. Under Article 12 of the Constitution, the State includes the Government and Parliament, and Government and Legislature of each State. In event the States have to deprive their rights under Articles 15(4) and 16(4) of the Constitution, a proviso had to be added. Article 15(4) and 16(4) are the source of power to identify SEBC. The Constitution 102nd amendment has not made any such amendment by which the effect of Articles 15(4) and 16(4) has been impacted. He submits that the National Commission for Backward Classes Act, 1993 was passed by the Parliament in obedience of direction of ***Indra Sawhney***. Section 2(c) of the Act defines "lists" which is clearly limited to the Central Government; Learned Attorney General submits that Article 342A covers the Central Government list alone. Learned Attorney General has referred to Select Committee report dated 17.07.2017 and submits that Select Committee report after considering the response and clarification by the concerned Ministry had opined that 102nd Amendment was not to take the

rights of the State to identify other backward classes in their States. He submits that rights of the State to identify OBC for their States in respect of the States are untouched. Referring to State of Punjab, learned Attorney General submits that there are two lists, Central List which contains 68 OBC, the State List which contains 71, he submits that with regard to the Scheduled Castes and Scheduled Tribes the President was given power in the Constitution with which State had no concern. There was no attempt on behalf of the Parliament to modify Articles 15(4) and 16(4).

336. Learned Attorney submits that Article 342A has to be read harmoniously with the other provisions of the Constitution. Learned Attorney General has also referred to a short affidavit filed by the Union of India in Writ Petition (C) No.12 of 2021-Dinesh B. vs. Union of India & Ors., wherein Union has taken the stand that the power to identify and specify the SEBCs lies with Parliament, only with reference to the Central List of SEBCs. The State Governments may

have their separate State Lists of SEBCs in recruitment. Learned Attorney General adopts the same stand taken by the Union of India in the aforesaid affidavit. He reiterated that the Parliament by passing Constitution Amendment has not taken away the power of the State to identify backward classes (SEBCs) in their States.

337. He further submits that there is no violation of basic structure of the Constitution. Replying to the argument of learned counsel for the writ petitioner under clause (2) of Article 368 learned Attorney General submits that power to identify backward classes being under Articles 15 and 16, there is no occasion to examine the list of 7th Schedule to find the source of power. He submits that no amendments have been made in any of the Lists of 7th Schedule so as to attract the proviso to Article 368(2). He submits that the Constitution 102nd Amendment did not require ratification by the State Legislature.

338. Before coming to the Articles in the Constitution inserted by the Constitution 102nd Amendment, we need to notice the Statement of Objects and Reasons contained in the Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017 which was introduced in the Lok Sabha on 4th April, 2017 and some details regarding legislative process which culminated into passing of the Constitution (One Hundred and Second Amendment) Act, 2018. When Bill came for discussion to amend the Constitution of India, it was passed by Lok Sabha on 10.04.2017. Rajya Sabha on motion adopted by the House on 11.4.2017 referred the Bill to the Select Committee for examination of the Bill and report thereon to the Rajya Sabha. The Select Committee of Rajya Sabha examined the Bill by holding 7 meetings. The Select Committee asked clarification on various issues from the Ministry and after receipt of clarifications submitted the report on 17.07.2017. The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017 with the Select Committee report came for consideration before the Rajya Sabha. The Bill was

passed with certain amendments on 31.07.2017 by the Rajya Sabha. After passing of the Bill, it was again taken by the Lok Sabha and it was passed by the Lok Sabha on 2nd August, 2018. Rajya Sabha agreed to the Bill on 6th August, 2018.

339. The Statement of Objects and Reasons of Constitution 102nd Amendment are contained in the Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017. It is useful to extract the entire Statement of Objects and Reasons as contained in the Bill:

> "STATEMENT OF OBJECTS AND REASONS
>
> The National Commission for the Scheduled Castes and Scheduled Tribes came into being consequent upon passing of the Constitution (Sixty-fifth Amendment) Act, 1990. The said Commission was constituted on 12th March, 1992 replacing the Commission for the Scheduled Castes and Scheduled Tribes set up under the Resolution of 1987. Under article 338 of the Constitution, the National Commission for the Scheduled Castes and Scheduled Tribes was constituted with the objective of monitoring all the safeguards provided for the Scheduled Castes and the Scheduled Tribes under the Constitution or other laws.
>
> 2. Vide the Constitution (Eighty-ninth Amendment) Act, 2003, a separate National Commission for

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

3. In the year 1992, the Supreme Court of India in the matter of ***Indra Sawhney*** and others Vs. Union of India and others (AIR 1993, SC 477) had directed the Government of India to constitute a permanent body for entertaining, examining and recommending requests for inclusion and complaints of over-inclusion and under-inclusion in the Central List of Other Backward Classes. Pursuant to the said Judgment, the National Commission for Backward Classes Act was enacted in April, 1993 and the National Commission for Backward Classes was constituted on 14th August, 1993 under the said Act. At present the functions of the National Commission for Backward Classes is limited to examining the requests for inclusion of any class of citizens as a backward class in the Lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate. Now, in order to safeguard the interests of the socially and educationally backward classes more effectively, it is proposed to create a National Commission for Backward Classes with constitutional status at par with the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes.

(Underlined by us)

4. The National Commission for the Scheduled Castes has recommended in its Report for 2014-15 that the handling of the grievances of the socially and educationally backward classes under

clause (10) of article 338 should be given to the National Commission for Backward Classes.

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

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

(b) to insert a new article 342A so as to provide that the President may, by public notification, specify the socially and educationally backward classes which shall for the purposes of the Constitution be deemed to be socially and educationally backward classes.

6. The Bill seeks to achieve the above objectives.

NEW DELHI; THAAWARCHAND GEHLOT. The 30th March, 2017."

340. By the Constitution 102nd Amendment, Articles 338 sub-clause (10), new Article 338B, Article 342A and 366(26C) were inserted.

341. In the writ petition before the High Court, the question was raised "whether the Constitution (One Hundred and Second Amendment) Act, 2018 affects the competence of the Legislature to enact the impugned Legislation." The High Court noticed the parliamentary process including the report of Select Committee. The High Court held that use of Central List in sub-clause (2) of Article 342A is not in vacuum but it must take its due meaning in reference to the context. The High Court held that Parliament being conscious of the facts that there are two lists operating in various States, firstly, for providing reservation prescribed by the Central Government in Central services and the other list for providing reservation by the respective State Governments, the Parliament intended that it would retain the power to include or exclude from the Central List. The High Court, further, held that had the Parliament intended to deprive the State of its power, it would have specifically mentioned so. The High Court rejected the submission of the learned counsel for the appellants that the Constitution

102nd Amendment denuded the power of the State to legislate with regard to other backward categories in respect to State.

342. We have also noticed that Writ Petition (C) No.938 of 2020-Shiv Sangram and another vs. Union of India and others, had been filed questioning the constitutional validity of the Constitution 102nd Amendment.

PRINCIPLES TO INTERPRET CONSTITUTIONAL PROVISIONS

343. We in the present case are concerned with Constitutional Amendment brought by the Constitution (One Hundred and Second Amendment) Act, 2018. The Constitutional Amendment is not a normal legislative exercise and it is always carried out with an object and the purpose. The Constitution of India is a grand norm given to us by the Framers of the Constitution with great deliberations and debates. The Constitution contained the objectives and goals of the nation and contains ideals For the governance by the State. **Justice G.P. Singh** in

'Principles of Statutory Interpretation', 14th Edition under the heading **'Intention of the Legislature'** explains the statutory interpretation in following words:

> "A statute is an edict of the Legislature" and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be construed according 'to the intent of those that make it' and 'the duty of judicature is to act upon the true intention of the Legislature-the mens or sententia legis'." The expression 'intention of the Legislature' is a shorthand reference to the meaning of the words used by the Legislature objectively determined with the guidance furnished by the accepted principles of interpretation. "If a statutory provision is open to more than one interpretation the court has to choose that interpretation which represents the true intention of the Legislature, in other words the legal meaning' or 'true meaning' of the statutory provision."

344. Chief Justice, Sir, Maurice Gwyer speaking in Federal Court, in **The Central Province and Berar Sales of Motor Spirit and Lubricants Taxations Act, 1938, AIR 1939 Federal Court 1,** held that rules which apply to the interpretation of other statute

applies equally to the interpretation of the constitutional enactment. But their application is of necessity condition by the subject matter of the enactment itself.

345. On the interpretation of the Constitution of India, a Constitution Bench of this Court in **ITC Ltd. vs. Agricultural Produce Market Committee and others, (2002) 9 SCC 232,** laid down following proposition in paragraph 59:

> "59. The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles."

346. It is said that the statute is an edict of the Legislature. The elementary principle of interpreting the Constitution or statute is to look into the words used in the statute, when the language is clear, the intention of the Legislature is to be gathered from the language used. The aid to interpretation is resorted to only when there is some ambiguity in words or expression used in the

statute. The rule of harmonious construction, the rule of reading of the provisions together as also rule of giving effect to the purpose of the statute, and few other principles of interpretation are called in question when aids to construction are necessary in particular context. We have already noticed the Statement of Objects and Reasons of the statute in the earlier paragraph. Paragraph 5 of the Statement of Objects and Reasons mentions amendment of Constitution by (a) inserting a new Article 338B so as to constitute the National Commission for Backward Classes and (b) to insert a new Article 342A so as to provide that the President may, by public notification, specify the socially and educationally backward classes. The Bill was moved by Thawarchand Gehlot, Minister of Social Justice and Empowerment.

347. Learned counsel for both the parties have advanced the respective submissions on the interpretation of words "Central List" as used in clause (2) of Article 342A. Both the parties having

advanced divergent submissions on the true and correct interpretation of “Central List”, it becomes necessary to take aid of interpretation. What was the purpose and object of uses of expression 'Central List', sub-clause (2) of Article 342A has to be looked into to find a correct meaning of the constitutional provisions.

348. We have noticed above that learned Attorney General as well as learned counsel for the State of Maharashtra and other States have relied on Select Committee report, debates in Parliament and the Statement of Minister to find out the intention of the Parliament in inserting Article 342A of the Constitution.

349. Shri Gopal Sankaranarayanan, learned senior counsel for the petitioner has questioned the admissibility of Parliamentary Committee report. He submits that Parliamentary Committee report is not admissible and cannot be used as aid to interpretation which submission has been refuted by Shri P.S. Patwalia, learned senior counsel as well

Dr. A.M. Singhvi, learned Senior Counsel, who state that Parliamentary Committee report as well the Statement made by the Minister in the Parliament are admissible aids to the interpretation and are necessary to find out the intention of the Parliament in bringing the 102nd Amendment to the Constitution. We, thus, proceed to look into the law as to admissibility of report of Parliamentary Committee and Statement of Minister in the Parliament as aids to interpret a constitutional provision.

350. Shri Gopal Sankaranarayanan, relying on the judgment of this Court in **State of Travancore, Cochin and others vs. Bombay Company Ltd., AIR 1952 SC 366,** submits that this Court observed that the "speeches made by the members of the Constituent Assembly as external aid to the constitutional interpretation is not admissible. Mr. Gopal Sankaranarayanan relies on paragraph 16 of the judgment which is to the following effect:

"**16.** It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes — see *Administrator-General of Bengal* v. *Prem Nath Mallick* [22 IA 107, 118] . The reason behind the rule was explained by one of us in *Gopalan case* [1950 SCR 88] thus:

"A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,"

or, as it is more tersely put in an American case—

"Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other — *United States* v. *Trans-Missouri Freight Association* [169 US 290, 318] ."

This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its

> meaning. It would seem that the rule is adopted in Canada and Australia — see *Craies on Statute Law*, 5th Ed., p. 122."

351. It is relevant to notice that in paragraph 16 it was also observed that rule of exclusion has not always been upheld to in America and sometime distinction is made between using such material to ascertaining purpose of a statute and using it for ascertaining its meaning. The judgment itself indicated that the said material is sometime used to ascertain the purpose of a statute. The law has been explained and elaborated in subsequent judgments of this Court which we shall notice hereinafter. One more judgment on which reliance has been placed by Shri Gopal Sankaranarayanan is the judgment of this Court in **Aswini Kumar Ghose and another v. Arabinda Bose and another, AIR 1952 SC 369,** in which this Court referring to earlier judgment of this Court in **State of Travancore, Cochin and others vs. Bombay Company Ltd.(supra)** laid down in paragraph 31:

> **"31.** As regards the speeches made by the Members of the House in the course of the

> debate, this Court has recently held that they are not admissible as extrinsic aids to the interpretation of statutory provisions: (*State of Travancore-Cochin* v. *Bombay Co. Ltd. etc.* [CA Nos. 25, 28 and 29 of 1952]"

352. With regard to speeches in the Constituent Assembly, the Constitution Bench of this Court, in **His Holiness Kesvananda Bharati vs. State of Kerala and another, (1973) 4 SCC 225,** several Hon'ble Judges in their separate judgments have relied and referred to Constituent Assembly debates for the interpretation of provisions of Part III and Part IV. Justice S.M. Sikri, CJ in paragraph 116 observed:

> **"186.** The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people.."

353. Justice Jaganmohan Reddy stoutly said that Constituent Assembly debates be looked into for ascertaining intention of our framers of the

Constitution. Justice Jaganmohan Reddy also held that in a constitutional matter this Court should look into the proceedings of relevant date including any speech which may throw light in ascertaining it. Justice Jaganmohan Reddy in paragraph 1088 laid down:

> "1088. ...Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it.……"

354. Justice H.R. Khanna in paragraph 1358 also in his judgment had elaborately referred to and relied

on the speeches made in the Constituent Assembly. In paragraph 1367 His Lordship laid down:

> **"1367.** So far as the question is concerned as to whether the speeches made in the Constituent Assembly can be taken into consideration, this court has in three cases, namely, *I.C. Golak Nath* v. *State of Punjab*, *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India* [(1971) 1 SCC 85 : (1971) 3 SCR 9] and *Union of India* v. *H.S. Dhillon* [(1971) 2 SCC 779 : (1972) 2 SCR 33] taken the view that such speeches can be taken into account. In *Golak Nath case* Subba Rao, C.J., who spoke for the majority referred to the speeches of Pt. Jawaharlal Nehru and Dr Ambedkar on p. 791. Reference was also made to the speech of Dr Ambedkar by Bachawat, J. in that case on p. 924. In the *case of Madhav Rao*, Shah, J. who gave the leading majority judgment relied upon the speech of Sardar Patel, who was Minister for Home Affairs, in the Constituent Assembly (see P. 83). Reference was also made to the speeches in the Constituent Assembly by Mitter, J. on pages 121 and 122. More recently in *H.S. Dhilion case* relating to the validity of amendment in Wealth Tax Act, both the majority judgment as well as the minority judgment referred to the speeches made in the Constituent Assembly in support of the conclusion arrived at. It can, therefore, be said that this Court has now accepted the view in its decisions since *Golak Nath case* that speeches made in the Constituent Assembly can be referred to while dealing with the provision of the Constitution."

355. Justice K.K. Mathew in paragraph 1598 had held that the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution. Following was laid down in paragraph 1598:

> "**1598.** If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent in case of latent ambiguity in the provision. ...."

356. In the Constitution Bench in **R.S. Nayak vs. A.R. Antulay, 1984(2) SCC 183,** The argument was

again advanced that debates in Parliament or the report of the Commission or Committee which proceed the enactment is not permissible aid to construction. Submission was noted in paragraph 32 of the judgment to the following effect:

> "**32.** Mr. Singhvi contended that even where the words in a statute are ambiguous and may be open to more than one meaning or sense, a reference to the debates in Parliament or the report of a commission or a committee which preceded the enactment of the statute under consideration is not a permissible aid to construction. "

357. In paragraph 33 it was held that in order to ascertain true meaning of literal words in the statute reference to the report are held legitimate external aid. In paragraph 33 following was laid down:

> "**33.** The trend certainly seems to be in the reverse gear in that in order to ascertain the true meaning of ambiguous words in a statute, reference to the reports and recommendations of the commission or committee which preceded the enactment of the statute are held legitimate external aids to construction. The modern approach has to a considerable extent eroded the exclusionary rule even in England. ……"

358. Ultimately, this Court rejected the submission raised and held that the reports of the Committee were admissible. Following was laid down in paragraph 34:

> **"34.** ….Further even in the land of its birth, the exclusionary rule has received a serious jolt in *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg AG:*[(1975) 1 All ER 810, 843] Lord Simon of Claisdale in his speech while examining the question of admissibility of Greer Report observed as under:
>
> > "At the very least, ascertainment of the statutory objective can immediately eliminate many of the possible meanings that the language of the Act might bear; and, if an ambiguity still remains, consideration of the statutory objective is one of the means of resolving it.
>
> The statutory objective is primarily to be collected from the provisions of the statute itself. In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity — it is the plainest of all the guides to the general objectives of a statute. But it will not always help as to particular provisions. As to the statutory objective of these, a report leading to the Act is likely to be the most potent aid; and, in my judgment, it would be mere obscurantism not to avail oneself of it. There is,

> indeed clear and high authority that it is available for this purpose. ……"

359. It is noted that although the above Constitution Bench was subsequently overruled by seven-Judge Bench but the above proposition was not touched.

We may also notice the Constitution Bench judgment of this Court in **Minerva Mills Ltd. and others vs. Union of India and others, (1980) 3 SCC 625. CJ, Y.V. Chandrachud** speaking for the Constitution Bench referred to speech of Law Minister made in the Parliament and held that the constitutional provisions cannot be read contrary to its proclaimed purpose as was stated by the Law Minister in the floor of the House. In paragraph 65 following was laid down:

> **"65.** Mr. Palkhivala read out to us an extract from the speech of the then Law Minister who, while speaking on the amendment to Article 31-C, said that the amendment was being introduced because the government did not want the "let and hindrance" of the fundamental rights. If the Parliament has manifested a clear intention to exercise an unlimited power,

> it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should read down Article 31-C, so as to make it conform to the ratio of the majority decision in *Kesavananda Bharati* [*Kesavananda Bharati* v. *State of Kerala*, 1973 Supp SCR 1 : (1973) 4 SCC 225 : AIR 1973 SC 1461] , is to destroy the avowed purpose of Article 31-C as indicated by the very heading "*Saving of Certain Laws*" under which Articles 31-A, 31-B and 31-C are grouped. Since the amendment to Article 31-C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31-C from the challenge of unconstitutionality by reading into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose."

360. We may conclude the discussion on the topic by referring to a subsequent Constitution judgment of this Court in **Kalpana Mehta and others vs. Union of India and others, (2018) 7 SCC 1**, in which one of us Justice Ashok Bhushan was also a member. In the

above case, the Constitution Bench elaborately dealt with the role of Parliamentary Committee. One of the questions which was referred to before the Constitution Bench to answer was "whether in a litigation filed before this Court under Article 32 and our Court can refer to and place reliance upon the report of the Parliamentary Standing Committee. The Constitution Bench referring to earlier judgment of this Court in **R.S. Nayak v. A.R. Antulay (supra)** laid down following in paragraphs 123 and 134:

> "**123.** A Constitution Bench in *R.S. Nayak* v. *A.R. Antulay* [*R.S. Nayak* v. *A.R. Antulay*, (1984) 2 SCC 183, after referring to various decisions of this Court and development in the law, opined that the exclusionary rule is flickering in its dying embers in its native land of birth and has been given a decent burial by this Court. The Constitution Bench further observed that the basic purpose of all canons of the Constitution is to ascertain with reasonable certainty the intention of Parliament and for the said purpose, external aids such as reports of Special Committee preceding the enactment, the existing state of law, the environment necessitating enactment of a legislation and the object sought to be achieved, etc. which Parliament held the luxury of availing should not be denied to the court whose primary function is to give effect

> to the real intention of the legislature in enacting a statute. The Court was of the view that such a denial would deprive the Court of a substantial and illuminating aid to construction and, therefore, the Court decided to depart from the earlier decisions and held that reports of committees which preceded the enactment of a law, reports of Joint Parliamentary Committees and a report of a commission set up for collecting information can be referred to as external aids of construction.
>
> **134.** From the aforesaid, it clear as day that the Court can take aid of the report of the Parliamentary Committee for the purpose of appreciating the historical background of the statutory provisions and it can also refer to committee report or the speech of the Minister on the floor of the House of Parliament if there is any kind of ambiguity or incongruity in a provision of an enactment."

361. Justice Dipak Misra, CJ speaking for himself and Justice A.M. Khanwilkar recorded his conclusion in paragraph 159.1 and 159.2 to the following effect:

> "159.1. Parliamentary Standing Committee report can be taken aid of for the purpose of interpretation of a statutory provision wherever it is so necessary and also it can be taken note of as existence of a historical fact.

> 159.2. Judicial notice can be taken of the Parliamentary Standing Committee report under Section 57(4) of the Evidence Act and it is admissible under Section 74 of the said Act."

362. Dr. Justice D.Y. Chandrachud laid down following in paragraph 260:

> **"260.** The use of parliamentary history as an aid to statutory construction is an area which poses the fewest problems. In understanding the true meaning of the words used by the legislature, the court may have regard to the reasons which have led to the enactment of the law, the problems which were sought to be remedied and the object and purpose of the law. For understanding this, the court may seek recourse to background parliamentary material associated with the framing of the law."

363. Justice Ashok Bhushan, one of us, in his concurring judgment has observed that Committees of both Rajya Sabha and Lok Sabha are entrusted with enormous duties and responsibilities in reference to the functions of Parliament. Following was observed in paragraph 335:

> **"335.** Various committees of both Rajya Sabha and Lok Sabha are entrusted with enormous duties and responsibilities in reference to the functions of Parliament. Maitland in *Constitutional History of England* while referring to the committees of the Houses of British Parliament noticed the functions of the committees in the following words:
>
> > "… Then again by means of committees the Houses now exercise what we may call an inquisitorial power. If anything is going wrong in public affairs a committee may be appointed to investigate the matter; witnesses can be summoned to give evidence on oath, and if they will not testify they can be committed for contempt. All manner of subjects concerning the public have of late been investigated by parliamentary commissions; thus information is obtained which may be used as a basis for legislation or for the recommendation of administrative reforms."

364. After noticing the relevant Rules, it was held that parliamentary materials including reports and other documents are permissible to be given as evidence in the Court of law. In paragraph 351 following was laid down:

> **"351.** From the above discussion it is clear that as a matter of fact the parliamentary materials including reports and other documents have been sent from

time to time by the permission of Parliament itself to be given as evidence in courts of law."

365. Noticing the observation of House of Lords in **Pepper (Inspector of Taxes) v. Hart,** that parliamentary materials for the purpose of construing legislation can be used, following observation in paragraph 380 was made:

> **"380.** In the end Lord Wilkinson held that reference to parliamentary materials for the purpose of construing legislation does not breach Article 9 of the Bill of Rights (1688). The following was held: (*Hart case* [*Pepper (Inspector of Taxes)* v. *Hart*, 1993 AC 593 : (1992) 3 WLR 1032 : 1992 UKHL 3 (HL)] , AC p. 644)
>
> "… For the reasons I have given, as a matter of pure law this House should look at Hansard and give effect to the parliamentary intention it discloses in deciding the appeal. The problem is the indication given by the Attorney General that, if this House does so, your Lordships may be infringing the privileges of the House of Commons.
>
> For the reasons I have given, in my judgment reference to parliamentary materials for the purpose of construing legislation does not breach Article 9 of the Bill of Rights. …""

366. In paragraph 395, it was also noted by this Court that parliamentary proceeding including reports of the Standing committee of Parliament were relied in large number of cases of this Court. In paragraph 395 following was laid down:

> **"395.** This Court in a number of cases has also referred to and relied on parliamentary proceedings including reports of the Standing Committee of Parliament. The learned counsel for the petitioners have given reference to several cases in this regard, namely, *Catering Cleaners of Southern Railway* v. *Union of India* [*Catering Cleaners of Southern Railway* v. *Union of India*, (1987) 1 SCC 700 : 1987 SCC (L&S) 77] where the Court has taken into consideration report of a Standing Committee of petitions. Another case relied on is *Gujarat Electricity Board* v. *Hind Mazdoor Sabha* [*Gujarat Electricity Board* v. *Hind Mazdoor Sabha*, (1995) 5 SCC 27 : 1995 SCC (L&S) 1166]. In *State of Maharashtra* v. *Milind* [*State of Maharashtra*v. *Milind*, (2001) 1 SCC 4 : 2001 SCC (L&S) 117], the Court has referred to and relied on a Joint Parliamentary Committee report. In *Federation of Railway Officers Assn.* v. *Union of India* [*Federation of Railway Officers Assn.* v. *Union of India*, (2003) 4 SCC 289 : AIR 2003 SC 1344], the Court has referred to a report of the Standing Committee of Parliament on Railways. In *Aruna Roy* v. *Union of India* [*Aruna Roy*v. *Union of India*, (2002) 7 SCC 368 : 5 SCEC 310] , report of a

> Committee, namely, S.B. Chavan Committee, which was appointed by Parliament was relied and referred. *M.C. Mehta* v. *Union of India* [*M.C. Mehta* v. *Union of India*, (2017) 7 SCC 243] was again a case where report of a Standing Committee of Parliament on Petroleum and Natural Gas has been referred to and relied. Other judgments where Parliamentary Committee reports have been relied are *Kishan Lal Gera* v. *State of Haryana* [*Krishan Lal Gera* v. *State of Haryana*, (2011) 10 SCC 529] , *Modern Dental College and Research Centre* v. *State of M.P.* [*Modern Dental College & Research Centre* v. *State of M.P.*, (2016) 7 SCC 353 : 7 SCEC 1] and *Lal Babu Priyadarshi* v. *Amritpal Singh* [*Lal Babu Priyadarshi* v. *Amritpal Singh*, (2015) 16 SCC 795 : (2016) 3 SCC (Civ) 649].”

367. The above discussion makes it clear that the law is well settled in this county that Parliamentary Committee reports including speech given by the Minister in the Parliament and the debates are relevant materials to ascertain the intention of Parliament while constituting constitutional provisions. We, thus, reject the objection of Shri Gopal Sankaranarayanan that Parliamentary Committee report and the speech of the Minister cannot be looked into for ascertaining

the intention of Parliament in bringing the Constitution 102nd Amendment.

368. The intention of the Parliament for bringing the constitutional amendment is necessary to be found out to interpret the constitutional amendments. The words used in constitutional amendment have to be interpreted in the context for which they were used. We may refer to the celebrated words of Justice Holmes in **Towne v. Eisner, 245 US 418,** where he observed: "**a word is not crystal, transparent and unchanged; it is a skin of living thought and may very greatly in colour and content according to the circumstances and the time in which it is used.**" In what context the words "Central List" has been used in Article 342A(1) has to find out and what was the intent of Parliament in using the words "Central List" in sub-clause (2) and what was the intent of the Parliament in inserting Article 342A in the Constitution are relevant for purposes of constitutional interpretation.

369. We need to look into the parliamentary process which culminated into parliament passing the Constitution (102nd Amendment) Act, 2018. The Constitution (123rd Amendment) Bill, 2017 was introduced in the Lok Sabha on 02.04.2017 and was passed in Lok Sabha on 10.04.2017. When the Bill came to the Rajya Sabha, by a Motion adopted by the House on 11.04.2017, the Bill was referred to the Select Committee comprising of 25 members of Rajya Sabha. The Select Committee held seven meetings before submitting its report. Several members gave their response to the Committee. In the first meeting of the Committee held on 17.04.2017, Ministry of Social Justice and Empowerment placed certain clarification of the Minister which was noticed and incorporated in paragraph 6 of the Minutes which is to the following effect:

> "6. Secretary, Ministry of Social Justice and Empowerment further clarified that under the Backward Classes, unlike the SCs & STs, there are two lists i.c. the Central List and the State List. The Central List provides for education and employment opportunities in Central Government Institutions. In the State

> List, the States are free to include or exclude, whoever they wish to, in their Backward Classes List. As a result, if there is a certain category which is not in the Central List, it may still be found in the State List. That is the freedom and prerogative of the State Backward Classes Commission and that would continue to be there.

370. The Committee in its meeting held on 22.05.2017 asked several clarifications. One of the clarifications asked was "To what extent the rights of the States would be affected after coming into by the Bill under the Constitution of the Select Committee."

371. The Committee held sixth meeting on 03.07.2017. One of the proposed amendments have been noted in paragraph 21 of the Minutes, clarification on which was also noted in paragraph and the amendment was not accepted. The amendment proposed was "notwithstanding in any … in clause (9), the State Government shall continue to have power … socially and educationally backward classes." The above proposed amendment in Article 338B was not accepted

since Ministry clarified that the power of the State is not affected. Paragraphs 21, 22 and 23 are as follows:

> "21. The Committee discussed the amendment wherein in article 338B a new sub-clause (10) was proposed to be inserted. This sub-clause (10) would state that 'notwithstanding anything provided in clause 9, the State Government shall continue to have powers to identify Socially and Educationally Backward Classes'.
>
> 22. It was clarified by the Ministry to the Committee that the proposed amendment does not interfere with the powers of the State Governments to identify the Socially and Educationally Backward Classes. The existing powers of the State Backward Classes Commission would continue to be there even after the passage of the Constitution (One Hundred and Twenty-third Amendment) Bill, 2017.
>
> (underlined by us)
>
> 23. The Committee held discussions on the amendments proposed and in view of the explanation given by the Ministry, the Committee adopted clause 3 without any amendments."

372. Article 342A was also discussed by the Committee various set of Amendments were noted in reference to Article 342A. The Committee noticed

amendments proposed in Article 342A in paragraph 24 t the following effect:

> "24. The Committee then took up Clause 4 of the Bill for consideration. The Committee considered the following amendment proposed by certain Members:
>
> (h) Sub-clause (1) of article 342A be modified as follows:
>
> "The President with respect to any State or Union Territory, and where it is a State, on the request made by the governor thereof, by public notification specify the socially and educationally backward classes for the purposes of making provisions for reservation of appointment to an office or posts under Government of India or under any authority of Government of India or under the control of the Government of India or seats in Central Government educational institutions"
>
> (ii) Sub-clause (2) of article 342A be modified as follows:
>
> "The President may, on the advise of the National Commission for Backward Classes include or exclude from the Central list of socially and educationally backward classes specified in a notification issued under clause (1).";
>
> (iii) In article 342A insert clause (3) as follows:
>
> "The Governor of a State, by public notification specify the socially and educational backward classes for the purposes of making provisions for reservation of posts under that State or

under any other authority of the State or under the central of the State, or seats in the educational institutions. within that State" and

(iv) In article 342A insert clause (4) as follows:

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

373. The Committee, however, did not accept any of the amendments in view of explanation furnished by the Ministry. The 7th meeting was held on 14.07.2017. The clarification issued by the Secretary of Ministry of Social Justice and Empowerment has been noticed in paragraph 29 which is to the following effect:

"29. .....She also clarified that conferring of constitutional status on the National Commission for Backward Classes would in no way take away the existing powers of the State Backward Classes Commissions. The only difference would be with regard to the Central List, where the power of exclusion or inclusion, after the Constitutional amendment, it would come to the Parliament with the recommendations of the NCBC."

374. After elaborate discussion, the Committee submitted its report dated 19.07.2017. One of the amendments which was moved before the Committee in Article 338B was noticed and not accepted. In the report the Ministry's stand was that proposed amendment does not interfere with the power of the State Government to identify the socially and educationally backward classes. Paragraphs 47 and 48 of the report is as follows:

> "47. The Committee discussed the amendment wherein in article 338B a new sub-clause (10) was proposed to be inserted. This sub-clause (10) would read as follows:
>
> > 'Notwithstanding anything provided in clause 9, the State Government shall continue to have powers to identify Socially and Educationally Backward Classes'
>
> 48. It was clarified by the Ministry of Social Justice and Empowerment to the Committee that the proposed amendment does not interfere with the powers of the State Governments to identify the Socially and Educationally Backward Classes. The existing powers of the State Backward Classes Commission would continue to be there even after the passage of the Constitution (One Hundred and Twenty-third Amendment) Bill, 2017."

375. With regard to the proposed Article 342A of the Constitution, in paragraph 67 the Committee recorded the observation to the following effect:

> "67. The Committee observes that the amendments do not in any way affect the independence and functioning of State Backward Classes Commissions' and they will continue to exercise unhindered their powers of inclusion/exclusion of other backward classes with relation to State List."

376. The Select Committee's report came for consideration before the Rajya Sabha. During the debate, members have expressed their apprehension regarding adversely affecting the rights of the State by the proposed constitutional amendment. The Rajya Sabha passed the Bill on 31.07.2017 with amendment. Shri Thawarchand Gehlot, Minister of Social Justice and Empowerment proposed the Bill. Several members expressed their apprehension that Bill is not in the interest of the powers of the State. Shri B.K. Hari Prasad speaking on the Bill stated following:

> "SHRI B.K. HARIPRASAD: Sir, repealing the Act of 1993 means that nothing would stay as it is and, again, the directions

> of the Supreme Court are being negated. So, this Commission would not help the Backward Classes and would take away the powers of the States too. They want to centralize all the powers, as they have done in other cases. This cannot happen in the case of OBCS. As I have already said, though the Act was passed in Parliament way back in 1993 for purposes of employment, etc. and way back in 2007 for education, nothing has been implemented so far. If they centralize all things like employment, identification of castes, etc., they would be doing gross injustice to the OBCS. They should think twice before scrapping the powers of the States because, as I have already mentioned, it is the States which identify various castes and communities. They know better than the people sitting here in Delhi. Hence, amending Article 342 and equating identification of OBC List to the SC/ST List should not be done. ”

377. Shri Bhupender Yadav has also stated in his speech that Amendment Bill cast threat to federalism and the State interest. In his statement (translated from Hindi) he said:

> “.....that this will be a big threat to the federalism of the country and what will happen to the rights of the States? Here I want to say that at least this subject should go before the House and through the House to the country that about five and a half thousand castes and categories are under OBC in the Central List of the country and about ten and a

> half thousand castes and categories are under OBC in the States List. The work of their identification (SIC) and the power that Parliament has, is for five and a half thousand Central List only, the rights of the States will be safe with them and therefore, they have done the work of strengthening the federal structure through this amendment. For the first time, we have created the system that if the work of filling up the OBC posts will not be done, then the report of the OBC Commission will be placed before the Parliament. This should be the demand of democracy of the country that if the lower class people do not get justice, then all those documents should come before the Parliament with reasons. Provision to do the same has been made in this OBC Commission."

378. Shri Dilip Kumar Tirkey(Odisha), in his speech has referred to State List and Central List and stated (translated from Hindi) that powers to identify OBC are remained with the State.

> "Shri Dilip Kumar Tirkey (Odisha) :
>
> Sir, you gave me an opportunity to speak on the very important Amendment Bill, for this, I thank you. Sir, in our country, reservation for OBC was given about 24 years ago but there is a clear provision in Article 14-15 of the Constitution that the States can make special provision for the socio-economic backward classes. Our party BJD is in support of National Commission to be made for OBC and we are.

supporting it but we have some issues and concerns and I would like to present them before the House. Sir, as per the present system, every State has its own OBC list and on that basis, they get reservation. If, in a State, any caste falls under OBC list then it is not mandatory that it falls under the Central or other States list. The logic behind this is that there are different castes in every state and these different castes have different conditions. Now, after formation of the National Commission, one Central list will be made and only Centre shall notify them. Sir, this is the opinion of our party that the power of notification of OBC castes should remain with the States only because only the concerned state thoroughly knows the fact of number of castes in their States and what is their condition. Only the government knows thoroughly. They may face problems with central list. Therefore, I would like to appeal to Hon'ble Minister and the House to add such a provision in the Bill whereby the work of adding or deleting any caste from the OBC list should be strictly done only on the recommendation of the state government to which it relates to. Sir, you can make national list after the uniformity comes gradually. When S.C., S.T, National Commission was formed, it also took much time. In my opinion, after the separate S.C., S.T. Commission was formed, it got the status of Constitutional body in 2003. Therefore, 1 would like to appeal to the House and the government to reconsider and think on this point. Further, I would like to add one more thing that in the observation of Hon'ble Supreme Court, there was a provision of review after every 10 years so that other castes are not left, therefore, it should be reviewed

> after every 10 years. In my opinion, do the needful keeping it in view also, thank you."

379. Similar apprehension was expressed by T.K. Rangarajan and Shri Pradeep Tamta that Article 342A takes away the existing powers of the State to notify list of SEBC. After the debate, the Bill was presented and passed in Rajya Sabha.

380. The Minister, Shri Thawarchand Gehlot, after the debate stated that apprehension expressed by the members that power of the State shall be affected and federal structure shall be damaged is incorrect. He stated that the power of the State shall not be affected in any manner, the State's power to include and exclude in its list of OBC shall still continue. The statement (translated from Hindi) made by the Minster is to the following effect:

> "Sir, 4 major amendments are being made in the Constitution; one amendment pertains to part 10. of Article 338 wherein, OBC Commission did not have power to hear grievances of the people belonging to OBC category, that was to SC Commission, now this power is being given to the upcoming OBC Commission. There is provision of SC Commission under Article

338, provision of ST Commission is under 338(A) and now provision of constituting OBC Commission is being made under Article 338(B). SC Commission and ST Commission already have Constitutional status similarly, Constitutional status is being given to OBC Commission as well. It simply means that the way rights, duties and power are given to the SC and ST Commission, same rights have also been given to them. Articles 341 and 342 provide for the inclusion and removal of the castes of the respective categories. Article 342 (A) also provides for inclusion and removal of the castes belonging to OBC category by adopting the same procedure. Along with this, various types of definitions are given in Article 366; castes belonging to SC category are referred to in sub-clause 24 of it; castes belonging to ST category are referred to in sub-clause 25 of it and now a new Article 26(C) is added to it. On the basis of it, castes belonging to OBC category will be defined. Hon'ble members were feared that the rights the State Commissions have at present that might be reduced and the federal system will be violated, pertaining to this I am to say that it will not at all happen. There is no provision anywhere in the Articles to reduce their rights in any way. States have constituted OBC Commission in their respective territories since long ago. When the Kaka Kalelkar Committee was constituted and when it submitted its report, at that time also many States had constituted such Commission. The State List deals with work concerned with OBC category and notifies them. Thereafter, on the basis of Mandal Commission Report as well many States have constituted such Commissions. Supreme Court had also given

> verdict in 1992-1993, on that ground also many States had constituted OBC Commission in their respective territories. At present as many as 30-31 States have constituted such Commissions. Complete list of it is with me. **Right to include or remove in the States List concerned with OBCS will remain as it is and it will not be violated in any manner.**
>
> In addition, keeping in view the sentiments of Article 15 and 16, States have also exercised their powers pertaining to making schemes in the interest of OBC category and making provisions in this behalf and such power will remain as it is. We are not making any amendment in Article 15 and Article 16. It simply means that State Commissions will not be affected in any way by this Constitutional amendment. Maximum number of Hon'ble Members have shared their views expressing their fear on this point. I, sincerely want to make it clear that State Governments have right and will remain as it is in future as well. No attempt will be made to tamper with them."

381. The Bill was passed in Rajya Sabhad on 31.07.2017 and thereafter it was taken by the Lok Sabha on 02.08.2017. In Lok Sabha the Minister of Social Justice and Empowerment again made a statement that the Commission will take decision related to the Central List It is useful to extract

the statement(translated from Hindi) of the Minister made on 02.08.2017 which is to the following effect:

> "Sh. Thawar Chand Gehlot
> Madam, this Commission, which will be made, will make decisions related to the Central List. As there is a common list related to Scheduled Caste and Scheduled Tribe of the State and the Centre, so is not the case here. In it, separate list is made for Centre as well as for States. The task of making the list of States is done by taking decision by the States Commission.
>
> If any State Government proposes to include any Caste of that State in the Central List, then n this regard, this Commission will give opinion, otherwise the opinion of this Commission is neither binding regarding the State List nor the Commission will consider it. According to my own belief, I assure you that the report of the Central Commission will not be binding on the subjects related to the State, it contains such provisions. You be assured and support this bill."

382. The Lok Sabha also passed the Constitution 123rd Amendment Bill, 2017 on 02.08.2018 which was agreed to by the Rajya Sabha on 06.08.2018 and the Constitution (102nd Amendment) Act, 2018 after receiving the assent of the President of India on 11.08.2018 was published on 11.08.2018 and its enforcement has been notified with effect from 15.08.2018. The Constitution (102nd Amendment) Act

inserted Article 338B and 342A and Article 366(26C) which are to the following effect:

> "338B. (1) There shall be a Commission for the socially and educationally backward classes to be known as the National Commission for Backward Classes.
>
> (2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.
>
> (3) The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.
>
> (4) The Commission shall have the power to regulate its own procedure.
>
> (5) It shall be the duty of the Commission—
>
> (a) to investigate and monitor all matters relating to the safeguards provided for the socially and educationally backward classes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;
>
> (b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the socially and educationally backward classes;
>
> (c) to participate and advise on the socio-economic development of the socially and educationally backward classes and to

evaluate the progress of their development under the Union and any State;

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

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

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

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

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

reasons for the non-acceptance, if any, of any of such recommendations.

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

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

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

(c) receiving evidence on affidavits;

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

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

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

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting the socially and educationally backward classes.".

342A. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in

relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.".

"366(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of this Constitution;'."

383. After noticing the principles of statutory interpretation of Constitution and aids which can be resorted to in case of any ambiguity in a word, we now proceed to look into the constitutional provisions inserted by the Constitution (102nd Amendment) Act.

384. The first Article which has been inserted by the Constitution (One Hundred and Second Amendment) Act is Article 338B. The statement of objects and reasons of the Constitution (One Hundred and Twenty Third Amendment) Bill, 2017, we had noticed above,

in which one of the objects of the Constitutional amendment was: -

> "...in order to safeguard the interests of the socially and educationally backward classes more effectively, it is proposed to create a National Commission for Backward Classes with constitutional status at par with the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes.
>
> (Underlined by us)"

385. Prior to Constitution (One Hundred and Second Amendment), there was already existing a National Commission for Backward Classes under the National Commission for Backward Classes, Act, 1993(in short 1993 Act), which was a statutory commission. To comprehend the role and functions of the National Commission for Backward Class created by the Constitution (One Hundred and Second Amendment) Act, we need to notice the difference into the role and functions of the statutory commission and Constitutional commission. Section 9 of 1993 Act provided for the functions of the Commission, which is to the following effect: -

> **"9. Functions of the Commission.–**
>
> (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.
>
> (2) The advice of the Commission shall ordinarily be binding upon the Central Government."

386. Section 11 provides for periodical revision of the list by the Central government which is to the following effect:-

> **"11. Periodic revision of lists by the Central Government.–**
>
> (1) The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.
>
> (2) The Central Government shall, while undertaking any revision referred to in sub-section (1), consult the Commission. "

387. The Act, 1993, indicates that functions of the Commission were confined to only examine requests for inclusion or exclusion from the list of backward classes. The list "was defined in Section 2C of the Act, 1993 to mean the list for reservation for appointment of backward class in the services under the Government of India. Article 338B now inserted provides a much larger and comprehensive role to the Commission. The Act, 1993 required the Commission to give advice only to the Central Government. Article 338B now requires the Commission to give advice both to the Central Government and to the States, which is clear from sub-clauses (5),(7) and (9) of Article 338B, which is quoted as below:-

> "(5) It shall be the duty of the Commission—
>
> (a) to investigate and monitor all matters relating to the safeguards provided for the socially and educationally backward classes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;
>
> (b) to inquire into specific complaints with respect to the

deprivation of rights and safeguards of the socially and educationally backward classes;

(c) to participate and advise on the socio-economic development of the socially and educationally backward classes and to evaluate the progress of their development under the Union and any State;

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

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

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

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

> State and the reasons for the non-acceptance, if any, of any of such recommendations.
>
> (9) The Union and every State Government shall consult the Commission on all major policy matters affecting the socially and educationally backward classes."

388. The most important difference which is now brought by Article 338B is sub-clause (9), which mandates that every State Government to consult the Commission on all major policy decisions affecting socially and educationally backward classes. Sub-clause (9) is engrafted in mandatory form by using expression "shall". The States thus are now bound to consult the Commission on all major policy matters affecting socially and educationally backward class. For the purposes of this case, we need not elaborate on the expression "policy matter" occurring in sub-clause (9) of Article 338B. However, in the facts of the present case, the decision of the Maharashtra Government which culminated in 2018 Act to exceed ceiling limit of 50 percent fixed for reservation as per existing law and to give separate reservation to Maratha in employment under State and in educational

institutions of the State where all policy decisions within the meaning of clause (9) of Article 338B.

389. The word 'consultation' occurring in sub-clause (9) is expression which has been used in several Articles of the Constitution i.e. Article 124, 207, 233, 234, 320 and host of other articles. We may notice the content and meaning of the expression 'consultation'.

390. The Black's Law Dictionary, 10th Edition, defines 'consultation' as follows:-

> "**Consultation**, n.(15c) **1.** The act of asking the advice or opinion of someone(such as a lawyer). **2.** A meeting in which parties consult or confer. **3.** Int'l law. The interactive methods by which states seek to prevent or resolve disputes.- **consult**, vb.-consulting, consultative, adj. "

Advanced Law Lexicon by P.Ramanatha Aiyar, 3rd Edition, defines 'consult':

> "**Consult.** 'Consult implies a conference of two or more persons or the impact of two or more minds brought about in respect of a topic with a view to evolve a correct or atleast a satisfactory solution. It must be directed to the essential points of the subject under

> discussion and enable the consultor to consider the pros and cons before coming to a decision. The consultation may be between an uninformed person and an expert or between two experts."

391. The 'consultation' or deliberation is not complete or effective unless parties there to makes their respective points of view known to the others and examine the relative merit of their view. The consultation is a process which requires meeting of minds between the parties involves in the process of consultation on the material facts and points involved. The consultation has to be meaningful, effective and conscious consultation. We may now notice few cases of this Court where the expression 'consultation' as occurring in the Constitution of India has been dealt with.

392. In ***Chandramouleshwar Prasad versus The Patna High Court and others, (1969) 3 SCC 56,*** this Court had occasion to consider the expression 'consultation' as occurring in Article 233 of the Constitution. The Constitution Bench of this Court

explaining the expression 'consultation' held that 'consultation' is not an empty formality and it should be complete and effective. Following has been laid down in paragraph 7 of the judgment: -

> "7. ...Consultation with the high Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto...
>
> ...Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Article 233 of the Constitution. In the absence of consultation the validity of the notification of October 17, 1968 cannot be sustained."

393. In ***Union of India versus Shankalchand Himatlal Sheth and another, (1977) 4 SCC 193,*** the Constitution Bench of this Court had occasion to examine Article 222 and the expression 'consult'. Explaining the word 'consult', Justice Y.V. Chandrachud, in paragraphs 38 and 39 laid down following: -

> "38. In Words and Phrases (Permanent Edition, 1960, Volume 9, page 3) to 'consult' is defined as 'to discuss something together, to deliberate'. Corpus Juris Secundum (Volume 16A, Ed. 1956, page 1242) also says that the word 'consult' is frequently defined as meaning 'to discuss something together, or to deliberate'. Quoting Rollo v. Minister of Town and Country Planning(1) and Fletcher v. Minister of Town and Country Planning(2) Stroud's Judicial Dictionary (Volume 1' Third Edition, 1952, page 596) says in the context of the expression " consultation with any local authorities" that "Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice". Thus, deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts. Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided

governmental considerations are outside the contemplation of our Constitution.

39. It may not be a happy analogy, but it is commonsense that he who wants to 'consult' a doctor cannot keep facts up his sleeve. He does so at his peril for he can receive no true advice unless he discloses facts necessary for diagnosis of his malady. Homely analogies apart, which can be multiplied, a decision of the Madras High Court in R. Pushpam & Anr. v. Stale of Madras(1) furnishes a good parallel. section 43(b), Madras District Municipalities Act, 1920, provided that for the purpose of election of Councillors to a Municipal Council, the Local Government 'after consulting the Municipal Council' may determine the wards in which reserved seats shall be set apart. While setting aside the reservation made in respect of one of the wards on the ground that the Local Government had failed to discharge its statutory obligation of consulting the Municipal Council, Justice K. Subba Rao, who then adorned the Bench of the Madras High Court, observed : "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution." In, order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision."

394. In ***Indian Administrative Services (S.C.S.) Association, U.P. and Others*****,*****(1993) Supp.(1) SCC 730,*** this Court had occasion to explain the expression 'consultation' as occurring in All India Services Act, 1951. In paragraph 26, following conclusions were recorded by this Court:-

> "26.(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.
>
> ... ..."

395. The word 'consultation' as occurring in Articles 124, 216, 217 and 222 came for consideration before the Constitution Bench of this Court in ***Supreme Court Advocates on Record Association and others versus Union of India, (1993) 4 SCC 441.*** Justice Ratnavel Pandian delivering a concurring opinion has elaborately dealt with the

consultation. In paragraph 112, following has been stated: -

> "112. It is clear that under Article 217(1), the process of 'consultation' by the President is mandatory and this clause does not speak of any discretionary 'consultation' with any other authority as in the case of appointment of a Judge of the Supreme Court as envisaged in Clause (2) of Article 124. The word 'consultation' is powerful and eloquent with meaning, loaded with undefined intonation and it answers all the questions and all the various tests including the test of primacy to the opinion of the CJI. This test poses many tough questions, one of them being, what is the meaning of the expression 'consultation' in the context in which it is used under the Constitution. As in the case of appointment of a Judge of the Supreme Court and the High Court, there are some more constitutional provisions in which the expression 'consultation' is used......"

396. When the Constitutional provision uses the expression 'consultation' which 'consultation' is to be undertaken by a Constitutional authority like National Commission for Backward Classes in the present case, the 'consultation' has to be meaningful, effective with all relevant materials and information placed before Commission. As

observed above, the National Backward Class Commission has been given constitutional status under Article 338B has now been entrusted with numerous functions regarding the backward classes. The Commission is now to advice not only the Union Government but the State Government also and various measures as enumerated in sub-clause(5). The objective of sub-clause (9) of Article 338B is to ensure that even the States did not take any major policy decision without consulting the Commission who is competent to provide necessary advice and solution keeping in view the larger interest of backward class. We thus are of the considered opinion that the consultation by the State on all policy matters affecting the socially and educationally backward classes is now mandatory as per sub-clause(9) of Article 338B which mandatory requirement cannot be by-passed by any State while the State takes any major policy decision.

397. It is true that the expression 'consultation' in sub-clause (4) of Article 338B is not to be read

as concurrence but as held above, ‘consultation’ has to be effective and meaningful. The object of consultation is that ‘consultee’ shall place the relevant material before person from whom ‘consultation’ is asked for and advice and opinion given by consulting authority shall guide the authority who has asked for consultation.

398. The regime which was invoked prior to insertion of Article 342A was that central list was issued by the Central Government under 1993 Act and State lists were issued by State Governments. It was also open for the State to request for exclusion or inclusion from the list of OBCs of Central list. The same procedure is to issue even after insertion of Article 342A with regard to Central list.

399. The appellants insist that Article 342A has to be given a literal interpretation. The plain language of an Article has to be given full effect irrespective of intention of Parliament as claimed by the Attorney General as well the learned counsel for the State. The submission of the appellants is

that Article 342A borrows the same scheme as is delineated in Articles 341 and 342 of the Constitution. It is submitted that when Article 342A borrows the same scheme which is clear from the fact that sub-clause (1) of Article 342A is *para mataria* with Articles 341(1) and 342(1), it is clearly meant that power to identify educationally and socially backward classes is only with the President but after consultation with the Governor of the State. It is submitted that expression the "socially and educationally backward classes" which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory" has to be given meaning and it is only list issued by public notification under sub-clause (1) which is the list of backward classes of a State or Union territory. No other list is contemplated. Hence, the State has no authority or jurisdiction to identify backward classes or issue any list that is so called State List. Further interpreting sub-clause (2) of Article 342A, it is submitted that use of expression

"Central List" in sub-clause (2) is only to refer the list specified by the notification in sub-clause (1) of Article 342A and expression Central List has been used in the above context.

400. Elaborating the argument, it is further contended that the definition given in the Article 366(26C) which provides that socially and educationally backward classes means such backward classes as are so deemed under Article 342A for the purposes of this Constitution, the use of the expression "for the purposes of this Constitution" clearly means that it is for Articles 15 and 16 also, the list which is referred to under Article 342A has to be utilised. The definition under Article 366(26C) does not contemplate any other list apart from list under Article 342A.

401. In contra with above interpretation put by the petitioner, learned Attorney General and learned counsel for the State submit that the Constitutional provision is to be interpreted as per the intention

of the Parliament and Parliament having never intended to take away the power of the State to identify backward classes in the State for the purpose of employment in the State, Article 342A cannot be read in a manner as claimed by the appellants. The use of expression "Central List" under sub-clause (2) of Article 342A is decisive since the Parliament clearly intended to confine the list as contemplated by Article 342A(1) as a Central List for the purposes of employment in the Central Government services and Central Government organisations.

402. Primarily the language employed in a statute and the Constitutional provision is determinative factor of legislative intention. The legislative intention opens two clues. Firstly, meaning of the word in the provision and secondly, the purpose and object pervading through the statutes. It is well settled that primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. This Court

apart from the above well settled principles of statutory interpretation has laid down some further rules of interpretation to interpret the constitutional provision. We may profitably refer to a Constitution Bench judgment of this Court in **State (NCT) of Delhi vs. Union of India and another, 2018(8) SCC 501.** The Constitution Bench in the above case had occasion to interpret the Constitutional provision of Article 239AA which was inserted by Constitution (Sixty Ninth Amendment) Act, 1991. The Constitution Bench of this Court interpreted Article 239-AA by referring to principles of the constitutional objectivity, federal functionalism, democracy and pragmatic federalism. Justice Dipak Misra, CJ, speaking for himself, A.K. Sikri and A.M. Khanwilkar, JJ., laid down that although, primarily, it is a literal rule which is considered to be the norm while interpreting statutory and constitutional provisions, yet mere allegiance to the dictionary or literal meaning of words contained in the provisions, sometimes, does not serve the purpose of

a living document. In paragraph 135 following was laid down:

> **"135.** The task of interpreting an instrument as dynamic as the Constitution assumes great import in a democracy. The constitutional courts are entrusted with the critical task of expounding the provisions of the Constitution and further while carrying out this essential function, they are duty-bound to ensure and preserve the rights and liberties of the citizens without disturbing the very fundamental principles which form the foundational base of the Constitution. Although, primarily, it is the literal rule which is considered to be the norm which governs the courts of law while interpreting statutory and constitutional provisions, yet mere allegiance to the dictionary or literal meaning of words contained in the provision may, sometimes, annihilate the quality of poignant flexibility and requisite societal progressive adjustability. Such an approach may not eventually subserve the purpose of a living document."

403. The Constitution Bench further observed that a theory of purposive interpretation has gained importance where the Courts shall interpret the Constitution in the purposive manner so as to give effect to its intention. In paragraphs 149, 150, 155 and 156 following was laid down:

"149. Having stated the principles relating to constitutional interpretation we, as presently advised, think it apt to devote some space to purposive interpretation in the context, for we shall refer to the said facet for understanding the core controversy. It needs no special emphasis that the reference to some precedents has to be in juxtaposition with other concepts and principles. As it can be gathered from the discussion as well as the authorities cited above, the literal rule is not to be the primary guiding factor in interpreting a constitutional provision, especially if the resultant outcome would not serve the fructification of the rights and values expressed in the Constitution. In this scenario, the theory of purposive interpretation has gained importance where the courts shall interpret the Constitution in a purposive manner so as to give effect to its true intention. The Judicial Committee in *Attorney General of Trinidad and Tobago* v. *Whiteman* [*Attorney General of Trinidad and Tobago* v. *Whiteman*, (1991) 2 AC 240 : (1991) 2 WLR 1200 (PC)] has observed: (AC p. 247)

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit.…"

150. In *S.R. Chaudhuri* v. *State of Punjab* [*S.R. Chaudhuri* v. *State of Punjab*, (2001) 7 SCC 126] , a three-Judge Bench has opined that constitutional provisions

are required to be understood and interpreted with an object-oriented approach and a Constitution must not be construed in a narrow and pedantic sense. The Court, while holding that the Constituent Assembly Debates can be taken aid of, observed the following: (SCC p. 142, para 33)

> "*33. … The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve.*"
>
> (emphasis supplied)

155. The emphasis on context while interpreting constitutional provisions has burgeoned this shift from the literal rule to the purposive method in order that the provisions do not remain static and rigid. The words assume different incarnations to adapt themselves to the current demands as and when the need arises. The House of Lords in *R. (Quintavalle)* v. *Secy. of State for Health* [*R. (Quintavalle)* v. *Secy. of State for Health*, (2003) 2 AC 687 : (2003) 2 WLR 692 : 2003 UKHL 13 (HL)] ruled: (AC p. 700, para 21)

> "*21. … The pendulum has swung towards purposive methods of construction*. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a

> classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners* v. *Adamson*[*River Wear Commissioners* v. *Adamson*, (1877) LR 2 AC 743, at p. 763 (HL)] . In any event, nowadays the shift towards purposive interpretation is not in doubt. *The qualification is that the degree of liberality permitted is influenced by the context*.…"
>
> (emphasis supplied)

156. Emphasising on the importance of determining the purpose and object of a provision, Learned Hand, J. in *Cabell* v. *Markham* [*Cabell* v. *Markham*, 148 F 2d 737 (2d Cir 1945)] enunciated:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

404. The shift from literal rule to purposive and objective interpretation of a constitutional document is adopted since the Constitution is not to be interpreted in static and rigid manner, the

Constitution is an organic and living document which needs to be interpreted with cardinal principals and objectives of the Constitution. The shift from literal to purposive method of interpretation has been now more and more, being adopted for interpreting a constitutional document. The Constitution Bench in **State (NCT of Delhi) case (supra)** has also noticed one more principle which is to be applied for interpretation of a constitutional document that is constitutional culture and pragmatism. In paragraphs 165, 166 and 169 following was held:

> **"165.** The constitutional courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution.

166. History reveals that in order to promote and nurture this spirit of constitutional culture, the courts have adopted a pragmatic approach of interpretation which has ushered in an era of "constitutional pragmatism".

169. Further, the Court also highlighted that a balance between idealism and pragmatism is inevitable in order to create a workable situation ruling out any absurdity that may arise while adopting either one of the approaches: (*Supreme Court Advocates-on-Record Assn. case* [*Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1] , SCC pp. 320-31 & 611, paras 145 & 766)

"*145.* … '*468.* The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and Integrated to make the system workable in a satisfactory manner.' [**Ed.**: As observed in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441, p. 699, para 468.]

* * *

766. It is this pragmatic interpretation of the Constitution that was postulated by the Constituent Assembly, which did not feel the necessity of filling up every detail in

the document, as indeed it was not possible to do so.””

405. Justice Dipak Misra in the Constitution Bench further laid down in paragraph 284.11:

> **“284.11.** In the light of the contemporary issues, the purposive method has gained importance over the literal approach and the constitutional courts, with the vision to realise the true and ultimate purpose of the Constitution not only in letter but also in spirit and armed with the tools of ingenuity and creativity, must not shy away from performing this foremost duty to achieve constitutional functionalism by adopting a pragmatic approach. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution which we call constitutional pragmatism. The spirit and conscience of the Constitution should not be lost in grammar and the popular will of the people which has its legitimacy in a democratic set-up cannot be allowed to lose its purpose in simple semantics.”

406. In the above judgment the Constitution Bench laid down that the purposive method has gained importance over the literal approach. One of us (Justice Ashok Bhushan) while delivering a

concurring judgment in the Constitution Bench judgment of **State (NCT of Delhi) (supra)** has also laid down that the Constitutional interpretation has to be purposive taking into consideration the need of time and constitutional principles. It was further held that the intent of Constitution Framers and object and purpose of Constitutional amendment always throw light on the Constitutional provisions. Following was laid down in paragraph 537:

> **"537.** From the above discussions, it is apparent that constitutional interpretation has to be purposive taking into consideration the need of time and constitutional principles. The intent of Constitution Framers and object and purpose of constitutional amendment always throw light on the constitutional provisions but for interpreting a particular constitutional provision, the constitutional scheme and the express language employed cannot be given a go-by. The purpose and intent of the constitutional provisions have to be found from the very constitutional provisions which are up for interpretation. We, thus, while interpreting Article 239-AA have to keep in mind the purpose and object for which the Sixty-ninth Constitution (Amendment) Act, 1991 was brought into force. After noticing the above principles, we now proceed further to examine the nature and content of the constitutional provisions."

407. We may also notice a seven-Judge Bench judgment of this Court on principles of interpretation of Constitution. In **Abhiram Singh vs. C.C. Commachen(Dead) By Legal Representatives and others**, **(2017) 2 SCC 629**, Justice Madan B. Lokur, with whom Justice T.S. Thakur, CJ and Justice S.A. Bobde, concurred noticed the conflict between a literal interpretation or purposive interpretation. It was held that interpretation has, therefore, to consider not only the context of the law but the context in which the law is enacted. Justice Lokur extracted Bennion on Statutory Interpretation in paragraph 38 to the following effect:

> "**38.** In *Bennion on Statutory Interpretation*[6th Edn. (Indian Reprint) p. 847] it is said that:
>
> "General judicial adoption of the term "purposive construction" is recent, but the concept is not new. Viscount Dilhorne, citing Coke, said that while *it is now fashionable to talk of a purposive construction of a statute the need for such a construction has been recognized since the seventeenth century*. [*Stock* v. *Frank Jones (Tipton) Ltd.*, (1978) 1 WLR 231 at p.

> 234] In fact the recognition goes considerable further back than that. The difficulties over statutory interpretation belong to the language, and there is unlikely to
> be anything very novel or recent about their solution … Little has changed over problems of verbal meaning since the Barons of the Exchequer arrived at their famous resolution in *Heydon case* [*Heydon Case*, (1584) 3 Co Rep 7a : 76 ER 637] . Legislation is still about remedying what is thought to be a defect in the law. Even the most "progressive" legislator, concerned to implement some wholly normal concept of social justice, would be constrained to admit that if the existing law accommodated the notion there would be no need to change it. No legal need that is …."

408. Approving the purposive construction the Court also held that a pragmatic view is required to be taken and the law interpreted purposefully. In paragraph 39 following was observed:

> **"39.** We see no reason to take a different view. Ordinarily, if a statute is well drafted and debated in Parliament there is little or no need to adopt any interpretation other than a literal interpretation of the statute. However, in a welfare State like ours, what is intended for the benefit of the people is not fully reflected in the text of a statute. In such legislations, a pragmatic view is required to be taken and the law interpreted purposefully and realistically so that the benefit reaches the masses. …"

409. Justice T.S. Thakur delivering his concurring opinion in paragraph 74 held that an interpretation which has the effect of diluting the constitutional objective should be avoided and the purpose of the constitution be kept in mind. In paragraphs 74, 76 and 77 following was observed:

> **"74.** The upshot of the above discussion clearly is that under the constitutional scheme mixing religion with State power is not permissible while freedom to practice, profess and propagate religion of one's choice is guaranteed. The State being secular in character will not identify itself with any one of the religions or religious denominations. This necessarily implies that religion will not play any role in the governance of the country which must at all times be secular in nature. The elections to the State Legislature or to Parliament or for that matter or any other body in the State is a secular exercise just as the functions of the elected representatives must be secular in both outlook and practice. Suffice it to say that the constitutional ethos forbids mixing of religions or religious considerations with the secular functions of the State. This necessarily implies that interpretation of any statute must not offend the fundamental mandate under the Constitution. An interpretation which has the effect of eroding or diluting the constitutional objective of keeping the State and its activities free from religious considerations, therefore, must

be avoided. This Court has in several pronouncements ruled that while interpreting an enactment, the Courts should remain cognizant of the constitutional goals and the purpose of the Act and interpret the provisions accordingly.

76. Extending the above principle further one can say that if two constructions of a statute were possible, one that promotes the constitutional objective ought to be preferred over the other that does not do so.

77. To somewhat similar effect is the decision of this Court in *State of Karnataka* v. *Appa Balu Ingale*[*State of Karnataka* v. *Appa Balu Ingale*, 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762] wherein this Court held that as the vehicle of transforming the nation's life, the Court should respond to the nation's need and interpret the law with pragmatism to further public welfare and to make the constitutional animations a reality. The Court held that Judges should be cognizant of the constitutional goals and remind themselves of the purpose of the Act while interpreting any legislation. The Court said: (SCC p. 486, para 35)

> "*35.* The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs, make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should

> respond to the nation's needs and interpret the law with pragmatism to further public welfare to make the constitutional animations a reality. Common sense has always served in the court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which is sine qua non for stability in the process of change in a parliamentary democracy. In interpreting the Act, the Judge should be cognizant to and always keep at the back of his/her mind the constitutional goals and the purpose of the Act and interpret the provisions of the Act in the light thus shed to annihilate untouchability; to accord to the Dalits and the Tribes right to equality; give social integration a fruition and make fraternity a reality.””

410. Applying the above principles laid down by the Constitution Benches of this Court on interpretation of a Constitution, in the fact of the present case, we need to discern the intention of Parliament in inserting Article 342A. We have already found that reports of the Parliamentary Committee and the statement made by the Minister while moving the Bill are relevant aids for a construction of constitutional provision. The Parliamentary Committee report makes it clear that after obtaining

the clarification from the Ministry that the Constitutional Amendment is not intended to take away the right of identification of backward class from a State. It submitted its report to the effect that rights of State Backward Classes Commission shall continue unhindered. The Parliamentary Standing Committee further noticed that the list which is contemplated under Article 342A is only Central List of the backward classes for a particular State for the purposes of services under the Government of India and its organizations.

411. We have further noticed the statement of Minister of Social, Justice and Empowerment, made both in Rajya Sabha and Lok Sabha. **The Minister stated the task of preparing list of the State of the Backward Classes is taken by the State Commission and the amendment shall have no effect on the right of the State and State Backward Classes Commission to identify the backward classes.** We have extracted above the relevant statement of Minister in the foregoing paragraphs.

412. We may further notice that the above statement was made by the Minister of Social Justice and Empowerment in the background of several members of the Parliament expressing their apprehension that the Constitution 102nd Amendment shall take away rights of the States to identify backward classes in each State. The Minister of Social Justice and Empowerment for allaying their apprehension made a categorical statement that the Constitutional Amendment shall not affect the power of the State, the State Backward Classes Commission to identify the backward classes in the State.

413. Learned Attorney General for India in his submission has referred to the statement of Minister of Social Justice and Empowerment as well as Parliamentary Select Committee report and has emphasised that the Parliamentary intention was never to take away the rights of the States to identify backward classes in their respective States. Learned Attorney General has referred to and

relied on the Union's stand taken in Writ Petition (C) No.12 of 2021-Dinesh B. vs. Union of India & Ors., where the stand of the Union on the Constitution (102nd Amendment) Act, 2018 was made clear in paragraph 11. We extract paragraph 11 of the above affidavit relied by the learned Attorney General which is to the following effect:

> "11. That, from the above, it is evident that the power to identify and specify the SEBCs lies with Parliament, only with reference to the Central List of SEBCs. The State Governments may have their separate State Lists of SEBCs for the purpose of providing reservation in recruitment to State Government services or admission in State Government educational institutions. The castes/communities included in such State Lists of SEBCs may differ from the castes/communities included in the Central List of SEBCs. It is submitted that the inclusion or exclusion of any caste or community in the State List of SEBCs is the subject of the concerned State Government and the Government of India has no role in the matter."

414. It is, thus, clear as sun light that Parliamentary intention discernible from Select Committee report and statement of Ministry of Social Justice and Empowerment is that the intention of the

Parliament for bringing Constitutional amendment was not to take away the power of the State to identify backward class in the State.

415. The Parliamentary intention was further discernible that the list which was contemplated to be issued by President under Article 342A was only the Central List which was to govern the services under the Government of India and organisations under the Government of India. When the Parliamentary intention is discernable and admissible as aid to statutory interpretation, we see no reason not to interpret Article 342A in manner as per the intention of the Parliament noticed above.

416. We also need to reflect on the submission of petitioner that the scheme under Article 342A has to be interpreted in accordance with already existing scheme under Articles 341 and 342. There is no doubt that the Constitutional scheme under Article 342A (1) and those of Article 341(1) and 342(1) are same

but there is a vast difference between the list of SC and ST as contemplated by Articles 341 and 342 of those of backward classes which now is contemplated under Article 342A.

417. The concept of Scheduled Castes was well known even before the enforcement of the Constitution. There was already Scheduled Castes list in existence when the Constitution was enforced. We may refer to Government of India Act, 1935, Schedule (1), paragraph 26 which defines the Scheduled Castes in the following words:

> "26.-(1) In the foregoing provisions of this Schedule the following expressions have the meanings hereby assigned to them, that is to say:-
>
> "…… …… …
> "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; and…"

418. The Government of India has also issued a Scheduled Castes List under the Government of India

Scheduled Castes Order 1936. The Constitution framers were, thus, well aware with the concept of Scheduled Casts and Scheduled Tribes and hence the same scheme regarding SC was continued in the Constitution by way of Article 341 of the Constitution.

419. The expression 'backward class' does not find place in the Government of India Act, 1935. The Constitution framers recognising that backward classes of citizens need affirmative action by the State to bring them in the main stream of the society has engrafted a special provision for backward classes. Under Article 16(4) the State was empowered to make any provision for reservation of appointment or posts in favour of any backward class of citizens not adequately represented in services. When the Constitution empowers the State to make any provision, the provision may embrace all aspects of measures including identification of the backward classes. The Constitution Bench of this Court in ***Indra Sawhney*** has accepted and recognised this

position. It is both the States and Union who are entitled to identify backward classes of citizens and to take measures. ***Indra Sawhney*** had, thus, issued directions to Union as well as States to constitute permanent body for identification and for taking necessary measures. The power to identify the backward classes was with the State and there are no intentions that the power of the State as occurring in Articles 15(4) and 16(4) in any manner has been taken away by the Constitutional amendment. The power given to the State under Articles 15(4) and 16(4) are for the benefit of backward classes of citizens. Any limitation or limitation of such power cannot be readily inferred and has to be expressly provided by the Constitution. The submission of the petitioner that Article 342A which relates to socially and educationally backward class should be read in the Constitutional scheme as delineated under Articles 341 and 342, thus, cannot be accepted.

420. Now, we come to the expression "Central List" as occurring in Article 342A (2). In pursuance of the direction issued by the Constitution Bench of this Court in ***Indra Sawhney***, the Parliament has enacted the National Commission for Backward Classes Act, 1993. Section 2(c) of the Act defines 'lists' in the following words:

> "Section 2(c) "lists" means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India;"

421. Section 9 of the Act defines the functions of the Commission. Section 9 provides as follows:

> "9. **Functions of the Commission**.-(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the Central Government."

422. The National Commission for Backward Classes Act, 1993 clearly indicates that the Parliamentary enactment was related to services under the Government of India and the Act, 1993 was not to govern or regulate identification of backward classes by the concerned State. The States had also enacted "State Legislation" constituting Backward Classes Commission. In the State of Maharashtra, Maharashtra State Backward Classes Commission, act was enacted in 2005. Along with passing of the Constitution 102nd Amendment, the National Commission for Backward Classes (Repeal) Act, 2018 was passed which received the assent of the President of India on 14.08.2018. We may notice Section 2 of the Repeal Act which is to the following effect:

"Section2.(1) The National Commission for Backward Classes Act, 1993 is hereby repealed and the National Commission for Backward Classes constituted under sub-section (1) of section 3 of the said Act shall stand dissolved.

(2) The repeal of the National Commission for Backward Classes Act, 1993 shall, however, not effect,--

(i) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed, or

(iii) any penalty, confiscation or punishment
incurred in respect of any contravention under the Act so repealed; or

(iv) any proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

(3)... … … …"

423. The National Commission for Backward Classes by the Constitutional 102nd Amendment was, thus, given constitutional status which was available to the Commission which as a statutory Commission under 1993 enactment.

The Parliamentary Select Committee report dated 17.07.2017 and the Minutes of the Parliamentary

Standing Committee as referred to and extracted above indicates that it was well known that there are two lists of Backward Classes, one "Central List" and other "State List". During the Parliamentary Committee report it was clarified and expressed that Constitutional amendment is only with regard to "Central List" which expression was expressly included in sub-clause (2) of Article 342A.

424. We may also look into the use of expression "Central List" under Article 342A in contradiction to the words, "list of Scheduled Castes", "list of Scheduled Tribes" as occurring in Articles 341(2) and 342(2) which are to following effect:

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

> **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."

425. Article 341(1) uses expression 'Scheduled Castes' and the same expression finds place in sub-clause (2) when the sub-clause (2) of the Article uses expression "list of Scheduled Castes" specified in notification. Similarly, Article 342(2) also uses expression 'list of Scheduled Tribes' specified in the notification.

426. Article 342A(2) uses an extra word "Central" before the expression 'List' of socially and educationally backward classes. If it is to be accepted that the constitutional scheme of Articles 341 and 342 was to be followed and carried in Article 342A also, the same expression, which was necessary to be used i.e. "list of socially and

educationally backward classes" which use would have been in line of the expression occurring in Article 341(2) and 342(2). It is, thus, clear that an extra word, namely, 'Central' has been added in Article 342(2) before the expression 'list of socially and educationally backward classes'. When the statute or Constitution uses an additional word it has to be presumed that the use of additional word is for a purpose and object and it is not superfluous or redundant.

427. While interpreting a constitutional provision, no word shall be treated as superfluous and redundant. We have noticed above that the list for services in the Government of India was Central List which was being prepared prior to the Constitution Amendment, under Act, 1993.

428. We may also deal with the submission of the petitioner that the word 'Central List' was used in sub-clause (2) of Article 342A to refer the public notification specifying the socially educationally

backward classes issued by the President of India under sub-clause (1). The expression "list of socially and educationally backward classes' specified in notification under sub-clause (1) is already there under sub-clause (2) which clearly meant and referred to notification issued under sub-clause (1), hence, there was no necessity for use of an additional word 'Central' in sub-clause (1) which was wholly superfluous and redundant. We are of the view that the word 'Central' was used for a purpose and object, the use of the 'Central' was only with the intent to limit the list issued by the President to Central services. Sub-clause (1) of Article 342 and sub-clause (2) of Article 342A has to be given harmonious construction and we read both the Articles together to find out purpose and intent of the list issued by the President under sub-clause (1). It is the 'Central List' which could be amended by the Parliament by exercising power under sub-clause (2) of Article 342A.

429. A question may be asked that when under 1993 Act "Central List" was prepared by Government of India and the "State list" was prepared by States, what was the necessity to bring the 102nd Constitutional Amendment if the same regime of two lists i.e. "Central list" and "State list" was to continue? For answering the question we first look into the 1993 Act to understand the nature of exercise undertaken under the Act regarding "Central List" and change in the exercise, if any, after 102nd Constitutional Amendment.

430. We have already noticed Section 2(c) and 9 of 1993 Act. We may also notice Section 11 of 1993 Act which provides: -

> "11. Periodic revision of lists by the Central Government.-(1) The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes. (2) The Central Government shall, while undertaking any revision referred to in sub-section (1), consult the Commission."

431. Section 2(c), 9 and 11 makes it clear that list prepared by the Central Government from time to time for reservation of appointments or posts in favour of backward classes in the services under the Government of India and any local or other authority, within the territory of India or under the control of Government of India was an statutory exercise of the Government of India under the 1993 Act. All the lists which were issued after 1993 Act by the Government of India were by executive orders issued from time to time. For what purpose, 102nd Constitutional Amendment was made? Answer is not for to seek.

432. Under the Government of India Act, 1935, the list of "the Scheduled Castes" was to be specified by His Majesty in Council as per clause 26 of Schedule I of the Government of India Act, 1935, which was also an executive function. The legal regime of the list of Scheduled caste saw a sea change under the Constitution of India as reflected

in Article 341 and 342. What was the change brought by Constitution of India regarding the list of Scheduled Caste can be well understood when we look into the debates of the Constituent Assembly on Draft Articles 300A and 300B which corresponds to Articles 341 and 342 of the Constitution of India.

433. Dr. B.R. Ambedkar moving the Amendment briefly outlined the object and purpose of the Constitutional provisions in debates dated 17.09.1949 in following words: -

> "...The object of these two articles, as I stated, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this: that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and

> not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

434. The main object of the Constitutional provision was to "eliminate any kind of political factors having a play in the matter of the disturbance in the Scheduled so published by the President."

435. We have to read the same objective for change of the statutory regime of backward class under 1993 Act into Constitutional regime by Article 342A. To eliminate any kind of political factor to play with regard to list of backward class issued by Government of India from time to time under 1993 Act, the Constitution Amendment was brought as was brought by Constituent Assembly by Draft Article 341 and 342. Now, by virtue of Article 342A, the list once issued by the President under Article 342A(1) cannot be tinkered with except by way of Parliamentary enactment. Thus, the above was the objective of the Constitutional Amendment and not the taking away the power of the States to identify

the Backward Class in State with regard to reservation for employment in the State services and reservation in educational institution in the States. A laudable objective of keeping away political pressure in amending the list of Backward class issued by President once has been achieved, hence, it cannot be said that the 102nd Constitutional Amendment was without any purpose if the power of State to identify Backward classes in their State was to remain as it is.

436. The above also sufficiently explain the stand taken by Minister of Social Justice and Empowerment on the floor of House. The Minister clarified that the Constitutional Amendment is not to take away the power of the State to identify the Backward Classes in the State for purposes of the State and was confined to "Central List" which was being prepared by the Government of India as in earlier regime. Learned Attorney General in his submission forcefully carried the same stand regarding interpretation of Article 342A. We see no reason to

reject the submission of learned Attorney General for India and learned senior counsel appearing for the States that the 102nd Constitutional Amendment was not intended to take away the power of the State regarding identification of Backward Class for services in the State or educational institutions in the State.

437. We also need to reflect on definition of socially and educationally backward classes as occurring in Article 366(26C). Article 366 is the definition clause of the Constitution. Article 366 begins with the following effect:

> "366. Definition in this Constitution, unless the context otherwise requires, the following expressions have as, the meanings hereby respectively assigned to them,……"
>
> '(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of this Constitution;'."

438. When we look into the definition as inserted by Article 366(26C), it is clear that definition provides that socially and educationally backward

class means such backward classes as are deemed under Article 342A for the purposes of this Constitution. When we have interpreted Article 342A to mean that Article 342A refers to 'Central List' which is prepared for services under the Government of India and organisations under the Government of India, the definition given under Article 366(26C) which specifically refer to Article 342A has to be read together and list of backward classes which is not Central List shall not be governed by the definition under Article 366(26C). Since, the 26C has been inserted in the context of Article 342A, if the context is list prepared by the State and it is State List, definition under (26C) shall not govern. Article 366(26C), thus, has to be read contextually with Article 342A and for no other purpose.

439. The interpretation which we have put on Article 342A is in full accord with intention of the framers of the Constitution. Dr. B.R. Ambedkar in the Constituent Assembly had said that a backward community is to be determined by each local

Government. The determination, i.e., identification of the backward classes was, thus, left to the local Government as was clearly and categorically stated by Dr. Ambedkar in the Constituent Assembly debates. It is most relevant for the present discussion to quote the exact words used by Dr. Ambedkar while answering the debate on draft sub-clause, Article 10(3) which is Article 16(4) of the present Constitution:

> **"Somebody asked me: "What is a backward community"? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government."**

440. The framers of the Constitution, thus, had contemplated that determination of backward class as occurring in draft Article 10(3), i.e, present Article 16(4) is to be done by the local Government. The constitutional scheme, thus, was framed in accordance with the above background. After the Constitution, it is for the last 68 years backward class was being identified by the respective State

Governments and they were preparing their respective lists and granting reservation under Articles 15(4) and 16(4) as per their decision. The Constitution Bench of ***Indra Sawhney*** did recognise and held that each State Government is fully competent to identify backward classes and this is why the ***Indra Sawhney*** directed for appointment of a permanent body both by the Union as well as by the State and consequently Commissions were constituted National Backward Classes Commission and State Backward Classes Commission. To reverse the entire constitutional scheme regarding identification of backward classes by the State which was continuing in the last 68 years, a clear and explicit Constitutional Amendment, was necessary. There is no express indication in the 102nd Constitutional Amendment that the power of the State is being taken away for identification of the backward classes.

441. We are not persuaded to interpret Article 342A against the intention of the Parliament which is reflected in the Parliamentary Committee report and

the statement made by the Minister on the floor of the House. The statement of the Minister on the floor of the House was clear and categorical, we cannot put an interpretation which was never intended by the Parliament and which may have serious consequences with the rights of the States which neither Parliament intended nor wanted to bring. We, thus, hold that Article 342A was brought by Constitution 102nd Amendment to give constitutional status to National Backward Classes Commission and for publication of list by the President of socially and educationally backward classes which was to be Central List for governing employment under Government of India and the organisations under it. The expression 'Central List' used in sub-clause (2) of Article 342A has been used for the purpose and object which cannot be ignored nor lost sight. The definition clause under Article 366(26C) has to be read contextually with Article 366(26C) which is referred under Article 366(2C) itself. Thus, the definition is relevant in the context of 'Central List' and the definition is

not governing to list prepared by the State which was not under contemplation in Article 342A.

442. We do not find any merit in the challenge to the Constitution 102nd Amendment. The Constitution 102nd Amendment does not violate any basic feature of the Constitution. The argument of the learned counsel for the petitioner is that Article 368 has not been followed since the Constitution 102nd Amendment was not ratified by the necessary majority of the State. The Parliament never intended to take the rights of the State regarding identification of backward classes, the Constitution 102nd Amendment was not covered by Proviso to Article 368 sub-clause (2), hence, the same did not require any ratification. The argument of procedural violation in passing the 102nd Constitutional Amendment cannot also be accepted. We uphold the Constitution 102nd Amendment interpreted in the manner as above.

443. The High Court in the impugned judgment has correctly interpreted the Constitution 102nd Amendment and the opinion of the High Court that the

Constitution 102nd Amendment does not take away the legislative competence of Maharashtra Legislature is correct and we approve the same.

(15)<u>Conclusions.</u>

444. From our foregoing discussion and finding we arrive at following conclusions:

(1) The greatest common measure of agreement in six separate judgments delivered in ***Indra Sawhney*** is:

(i) Reservation under Article 16(4) should not exceed 50%.

(ii) For exceeding reservation beyond 50%, extra-ordinary circumstances as indicated in paragraph 810 of Justice Jeevan Reddy should exist for which extreme caution is to be exercised.

(2) The 50% rule spoken in **Balaji and** affirmed in ***Indra Sawhney*** is to fulfill the objective of equality as engrafted in Article 14 of which

Articles 15 and 16 are facets. 50% is reasonable and it is to attain the object of equality. To change the 50% limit is to have a society which is not founded on equality but based on caste rule.

(3) We are of the considered opinion that the cap on percentage of reservation as has been laid down by Constitution Bench in ***Indra Sawhney*** is with the object of striking a balance between the rights under Article 15(1) and 15(4) as well as Articles 16(1) and 16(4) . The cap on percentage is to achieve principle of equality and with the object to strike a balance which cannot be said to be arbitrary or unreasonable.

(4) Providing reservation for advancement of any socially and educationally backward class in public services is not the only means and method for improving the welfare of backward class. The State ought to bring other measures including providing educational facilities to the members of backward class free of cost giving concession

in fee, providing opportunities for skill development to enable the candidates from the backward class to be self-reliant.

(5) There can be no quarrel that society changes, law changes, people changes but that does not mean that something which is good and proven to be beneficial in maintaining equality in the society should also be changed in the name of change alone.

(6) When the Constitution Bench in ***Indra Sawhney*** held that 50% is upper limit of reservation under Article 16(4), it is the law which is binding under Article 141 and to be implemented.

(7) We find that the Constitution Bench judgment in ***Indra Sawhney*** is also fully applicable in reference to Article 15(4) of the Constitution of India.

(8) The setting aside of 50% ceiling by eleven-Judge Bench in **T.M.A. Pai Foundation case** as was

laid down by **St. Stephen's case** i.e. 50% ceiling in admission in aided Minority Instructions has no bearing on the principle of 50% ceiling laid down by ***Indra Sawhney*** with respect to reservation. The judgment of **T.M.A. Pai** was in reference to rights of minority under Article 30 and is not relevant for Reservation under Articles 16(4) and 15(4) of the Constitution.

(9) The Constitution (Eighty-first Amendment) Act, 2000 by which sub-clause (4B) was inserted in Article 16 makes it clear that ceiling of 50% "has now received constitutional recognition".

(10) We fully endorse the submission of Shri Rohtagi that extraordinary situations indicated in paragraph 810 were only illustrative and cannot be said to be exhaustive. We however do not agree with Mr. Rohtagi that paragraph 810 provided only a geographical test. The use of expression "on being out of the main stream of national life", is a social test, which also

needs to be fulfilled for a case to be covered by exception.

(11) We do not find any substance in any of the 10 grounds urged by Shri Rohatgi and Shri Kapil Sibal for revisiting and referring the judgment of ***Indra Sawhney*** to a larger Bench.

(12) What was held by the Constitution Bench in ***Indra Sawhney*** on the relevance and significance of the principle of *stare decisis* clearly binds us. The judgment of ***Indra Sawhney*** has stood the test of the time and has never been doubted by any judgment of this Court. The Constitution Bench judgment of this Court in ***Indra Sawhney*** neither needs to be revisited nor referred to a larger Bench for consideration.

(13) The Constitution Bench in **M. Nagaraj** does not contain any ratio that ceiling of 50% reservation may be exceeded by showing quantifiable contemporary data relating to backwardness. The Commission has completely

misread the ratio of the judgment, when the Commission took the view that on the quantifiable data ceiling of 50% can be breached.

(14) The Commission and the High Court found existence of the extra-ordinary situations with regard to exceeding 50% ceiling in respect to grant of separate reservation to Maratha because the population of backward class is 80% and reservation limit is only 50%, containing the Maratha in pre-existing reservation for OBC shall not be justice to them, which circumstances is not covered under the para meters indicated in ***Indra Sawhney's*** case as extra-ordinary circumstance to breach 50% ceiling.

(15) We have found that no extraordinary circumstances were made out in granting separate reservation of Maratha Community by exceeding the 50 per cent ceiling limit of reservation. The Act, 2018 violates the principle of equality

as enshrined in Article 16. The exceeding of ceiling limit without there being any extra-ordinary circumstances clearly violates Article 14 and 16 of the Constitution which makes the enactment *ultra vires.*

(16) The proposition is well settled that Commissions' reports are to be looked into with deference. However, one of the parameter of scrutiny of Commission's report as approved by this Court is that on the basis of data and materials referred to in the report whether conclusions arrived by the Commission are justified.

(17) The measures taken under Article 15(4) and 16(4) can be examined as to whether they violate any constitutional principle, and are in conformity with the rights under Article 14, 15 and 16 of the Constitution. The scrutiny of measures taken by the State, either executive or legislative, thus, has to pass test of the constitutional scrutiny.

(18) The word 'adequate' is a relative term used in relation to representation of different caste and communities in public employment. The objective of Article 16(4) is that backward class should also be put in main stream to enable to share power of the State by affirmative action. To be part of public service, as accepted by the Society of today, is to attain social status and play a role in governance.

(19) We have examined the issues regarding representation of Marathas in State services on the basis of facts and materials compiling by Commission and obtained from States and other sources. The representation of Marathas in public services in Grade A, B, C and D comes to 33.23%, 29.03%, 37.06% and 36.53% computed from out of the open category filled posts, is adequate and satisfactory representation of Maratha community. One community bagging such

number of posts in public services is a matter of pride for the community and its representation in no manner can be said to not adequate in public services.

(20) The Constitution pre-condition for providing reservation as mandated by Article 16(4) is that the backward class is not adequately represented in the public services. The Commission labored under misconception that unless Maratha community is not represented equivalent to its proportion, it is not adequately represented.

Indra Sawhney has categorically held that what is required by the State for providing reservation under Article 16(4) is not proportionate representation but adequate representation.

(21) The constitutional precondition as mandated by Article 16(4) being not fulfilled with regard to Maratha class, both the Gaikwad Commission's

report and consequential legislation are unsustainable.

(22) We having disapproved the grant of reservation under Article 16(4) to Maratha community, the said decision becomes relevant and shall certainly have effect on the decision of the Commission holding Maratha to be socially and educationally backward. Sufficient and adequate representation of Maratha community in public services is indicator that they are not socially and educationally backward.

From the facts and figures as noted by Gaikwad Commission in its report regarding representation of Marathas in public services, the percentage of Marathas in admission to Engineering, Medical Colleges and other disciplines, their representation in higher academic posts, we are of the view that conclusion drawn by the Commission is not supportable from the data collected. The data collected and tabled by the Commission as noted

in the report clearly proves that Marathas are not socially and educationally backward class.

(23) The elementary principle of interpreting the Constitution or statute is to look into the words used in the statute, when the language is clear, the intention of the Legislature is to be gathered from the language used. The aid to interpretation is resorted to only when there is some ambiguity in words or expression used in the statute. The rule of harmonious construction, the rule of reading of the provisions together as also rule of giving effect to the purpose of the statute, and few other principles of interpretation are called in question when aids to construction are necessary in particular context.

(24) The shift from literal rule to purposive and objective interpretation of a constitutional document is adopted since the Constitution is not to be interpreted in static and rigid manner, the Constitution is an

organic and living document which needs to be interpreted with cardinal principals and objectives of the Constitution. The shift from literal to purposive method of interpretation has been now more and more, being adopted for interpreting a constitutional document.

(25) The law is well settled in this county that Parliamentary Committee reports including speech given by the Minister in the Parliament are relevant materials to ascertain the intention of Parliament while construing constitutional provisions.

(26) We are of the considered opinion that the consultation by the State on all policy matters affecting the socially and educationally backward classes is now mandatory as per sub-clause(9) of Article 338B which mandatory requirement cannot be by-passed by any State while the State takes any major policy decision.

Sub-clause (9) of Article 338B uses the expression 'consultation'. It is true that the expression 'consultation' is not to be read as concurrence but the 'consultation' has to be effective and meaningful. The object of consultation is that 'consultee' shall place the relevant material before person from whom 'consultation' is asked for and advice and opinion given by consulting authority shall guide the authority who has asked for consultation.

(27) It is, thus, clear as sun light that Parliamentary intention discernible from Select Committee report and statement of Minister of Social Justice and Empowerment is that the intention of the Parliament for bringing Constitutional amendment was not to take away the power of the State to identify backward class in the State.

(28) When the Parliamentary intention is discernable and admissible as aid to statutory interpretation, we see no reason not to interpret Article 342A in manner as per the intention of the Parliament noticed above.

(29) We are of the view that word ‘Central’ in Article 342A (2) was used for purpose and object. The use of ‘Central’ was only with the intent to limit the list issued by the President to Central services. It is well settled rule of interpretation that no word in a statute or Constitution is used without any purpose. Word ‘Central’ has to be given meaning and purpose.

(30) When we have interpreted Article 342A to mean that Article 342A refers to 'Central List' which is prepared for services under the Government of India and organisations under the Government of India, the definition given under Article 366(26C) which specifically refer to Article 342A has to be read together and list of backward classes which is not Central List shall

not be governed by the definition under Article 366(26C). Since, the (26C) has been inserted in the context of Article 342A, if the context is list prepared by the State and it is State List, definition under (26C) shall not govern.

(31) We, thus, hold that Article 342A was brought by Constitution 102nd Amendment to give constitutional status to National Backward Classes Commission and for publication of list by the President of socially and educationally backward classes which was to be Central List for governing employment under Government of India and the organisations under it.

(32) The Constitution 102nd Amendment Act, 2018 does not violate any basic feature of the Constitution. We uphold the constitutional validity of Constitution (One Hundred and second Amendment) Act, 2018.

(16) O R D E R

In view of the foregoing discussions and conclusions, we decide all the Civil Appeals and Writ Petitions in this batch of cases in following manner:

(1) C.A.No.3123 of 2020 and other civil appeals challenging the impugned judgment of the High Court dated 27.06.2019 are allowed. The impugned judgment of the High Court dated 27.06.2019 is set aside. The writ petitions filed by the appellants in the High Court are allowed with following effect:

(a) Section 2(j) of the Act, 2018 insofar as it declares Maratha community Educationally and Socially Backward Category is held to be ultra vires to the Constitution and struck down.

(b) Section 4(1)(a) of Act, 2018 as amended by Act, 2019 insofar as it grants reservation under Article 15(4) to the extent of 12% of total seats in educational institutions including private institutions whether aided or unaided by the State, other than minority

educational institutions, is declared ultra vires to the Constitution and struck down.

(c) Section 4(1)(b) of Act, 2018 as amended by Act, 2019 granting reservation of 13% to the Maratha community of the total appointments in direct recruitment in public services and posts under the State, is held to be ultra vires to the Constitution and struck down.

(d) That admissions insofar as Postgraduate Medical Courses which were already held not to affect by order dated 09.09.2020, which shall not be affected by this judgment. Hence, those students who have already been admitted in Postgraduate Medical Courses prior to 09.09.2020 shall be allowed to continue.

(e) The admissions in different courses, Medical, Engineering and other streams which were completed after the judgment of the High Court dated 27.06.2019 till 09.09.2020 are saved. Similarly, all the

appointments made to the members of the Maratha community in public services after the judgment of the High Court dated 27.06.2019 till order passed by this Court on 09.09.2020 are saved. However, no further benefit can be claimed by such Maratha students admitted in different course or Maratha students who were appointed in public services in the State under Act, 2018.

(f) After the order was passed on 09.09.2020 neither any admission can be taken in the educational institutions nor any appointment can be made in public services and posts in accordance with Act, 2018.

(2) The Writ Petition (C)No.914 of 2020, Writ Petition (C)No.915 of 2020, Writ Petition (C)No.504 of 2020 filed under Article 32 of the Constitution are disposed of as per above directions.

(3) Writ Petition No.938 of 2020 challenging the Constitutional validity of Constitution 102nd

Amendment Act, 2018 is dismissed in view of the interpretation of Constitution 102nd Amendment Act, 2018 as above.

445. Before we close, we record our indebtedness to learned counsel who appeared in these cases and enlightened us with regard to issues involved in this batch of appeals and writ petitions which are of seminal importance both for constitutional law as well as for the society in general. All the learned counsel apart from oral submissions have submitted their excellent brief written notes touching various issues which were sought to be canvassed by them before this Court, which rendered valuable assistance to us.

446. Parties shall bear their own costs.

……**J.**
(ASHOK BHUSHAN)

……**J.**
(S. ABDUL NAZEER)

New Delhi,

May 05, 2021.

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No. 3123 of 2020

Dr. Jaishri Laxmanrao Patil .... Appellant (s)

Versus

The Chief Minister & Anr .....Respondent(s)
With

Civil Appeal No. 3124 of 2020
Civil Appeal No.3133 of 2020
Civil Appeal No.3134 of 2020
Civil Appeal No.3131 of 2020
Civil Appeal No.3129 of 2020
W.P.(C) No.915 of 2020
W.P.(C) No.504 of 2020
W.P.(C) No.914 of 2020
Civil Appeal No.3127 of 2020
Civil Appeal No.3126 of 2020
Civil Appeal No.3125 of 2020
Civil Appeal No.3128 of 2020
Civil Appeal No.3130 of 2020
W.P.(C) No.938 of 2020

J U D G M E N T

L. NAGESWARA RAO, J.

1. I have carefully gone through the erudite and scholarly opinions of Justice Ashok Bhushan and Justice S. Ravindra Bhat. So far as the question Nos.1, 2 and 3 are concerned, they are in unison. There is a difference of opinion in relation to question Nos. 4, 5

and 6. I am in agreement with the opinion of Justice Ashok Bhushan in respect of question Nos.1, 2 and 3. As these issues have been dealt with exhaustively by Justice Ashok Bhushan, I do not have anything further to add.

2. Question Nos.4, 5 and 6 pertain to the interpretation of Article 342 A of the Constitution of India. On these questions, I am unable to persuade myself to accept the conclusion reached by Justice Ashok Bhushan. I agree with the denouement of the judgment of Justice S. Ravindra Bhat on issue Nos.4, 5 and 6.

3. In view of the cleavage of opinion on the interpretation of Article 342 A of the Constitution, it is my duty to give reasons for my views in accord with the judgment of Justice S. Ravindra Bhat. In proceeding to do so, I am not delving into those aspects which have been dealt with by him.

4. Article 342 A which falls for interpretation is as follows: -

> ***342 A. 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 the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally*

backward classes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

5. Article 366 (26 C) which is also relevant is as under: -

366. Definitions. Unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

xx xx xx xx xx

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

6. Before embarking upon the exercise of construing the above Articles, it is necessary to refer to the cardinal principles of interpretation of the Constitution. Constitution is intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs. We must not forget that it is the Constitution we are expounding[1]. The Constitution is a living and organic document which requires to be construed broadly and liberally. I am reminded of

1 McCulloch v. Maryland, 17 U.S. 316 (1819)

the word of caution by Benjamin Cardozo who said that "a Judge is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. Judge is not to innovate at pleasure".[2] Rules which are applied to the interpretation of other statutes, apply to the interpretation of the Constitution[3]. It may be desirable to give a broad and generous construction to the constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact, the rule of "literal construction" is the safe rule even while interpreting the Constitution unless the language used is contradictory, ambiguous, or leads really to absurd results[4]. The duty of the judicature is to act upon the true intention of the legislature, the *mens* or *sententia legis*. (See: ***G. Narayanaswami v. G. Pannerselvam[5], South Asia Industries Private Ltd v. S. Sarup Singh and others[6], Institute of Chartered Accountants of India v. Price Waterhouse[7] and J.P. Bansal v. State of Rajasthan[8])***. The first and primary rule

2 Benjamin Cardozo, *the Nature of Judicial Process,* (New Haven: Yale University Press, 13th Edn., 1946), 141.
3 Re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938
4 Kuldip Nayar v. Union of India, (2006) 7 SCC 1
5 (1972) 3 SCC 717
6 1965 SCR (3) 829
7 (1997) 6 SCC 312
8 (2003) 5 SCC 134

of construction is that the intention of the legislature must be found in the words used by the legislature itself[9]. Oliver Wendell Holmes Jr. has famously said in a letter, "I do not care what their intention was. I only want to know what the words mean."[10] If the language of the meaning of the statute is plain, there is no need for construction as legislative intention is revealed by the apparent meaning[11]. Legislative intent must be primarily ascertained from the language used in statute itself.[12]

7. In his book *Purposive Interpretation in Law*,[13] Aharon Barak says that constitutional language like the language of any legal text plays a dual role. On the one hand, it sets the limits of interpretation. The language of the Constitution is not clay in the hands of the interpreter, to be molded as he or she sees fit. A Constitution is neither a metaphor nor a non-binding recommendation. On the other hand, the language of the Constitution is a source for its purpose. There are other sources, to be sure, but constitutional language is an important and highly credible source of information. The fact

9 Kanai Lal Sur v. Paramnidhi Sadhukhan, 1958 (1) SCR 360

10 Cited in Felix Frankfurter, *Some Reflections on the Reading of Statutes,* Columbia Law Review, Vol. 47, No. 4, 527-546 (1947), 538.

11 Adams Express Company v. Commonwealth of Kentucky, 238 US 190 (1915)

12 United States v. Goldenberg, 168 US 95 (1897)

13 Aharon Barak, *Purposive Interpretation in Law,* (Sari Bashi transl.), (Princeton: Princeton University Press, 2005).

that we may learn the purpose of a Constitution from sources external to it does not mean that we can give a Constitution a meaning that is inconsistent with its explicit or implicit language. Interpretation cannot create a new constitutional text. Talk of Judges amending the Constitution through their interpretation of the Constitution is just a metaphor. The claim that a constitutional text limits but does not command is true only for the limited number of cases in which, after exhausting all interpretive tools, we can still extract more than one legal meaning from the constitutional language and must therefore leave the final decision to judicial discretion. In these exceptional cases, language provides a general direction but does not draw a precise map of how to reach the destination. Usually, however, constitutional language sets not only the limits of interpretation, but also its specific content.[14] _

8. It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between these

14 Id, 374-375.

meanings, but beyond that the Court must not go.[15] Lord Parker, CJ observed in ***R. v. Oakes***[16] there is no ground for reading in words according to what may be 'the supposed intention of Parliament'.

9. Justice Ashok Bhushan in his opinion at para 346 rightly held that the elementary principle of interpreting the Constitution or a statute is to look into the words used in the statute and when the language is clear, the intention of the legislature is to be gathered from the language used. He further opined that aid to interpretation is resorted to only when there is some ambiguity in words or expression used in the statute. Justice Bhushan in ***State (NCT of Delhi) v. Union of India***[17] held that the constitutional interpretation has to be purposive taking into consideration the need of the times and constitutional principles. The intent of framers of the Constitution and object and purpose of constitutional amendment always throw light on the constitutional provisions but for interpreting a particular constitutional provision, the constitutional scheme and the express language employed cannot be given a go-by. He further held that the purpose and intent of the constitutional provisions

15 Jones v D.P.P. [1962] AC. 635
16 [1959] 2 Q.B. 350
17 (2018) 8 SCC 501

have to be found from the very constitutional provisions which are up for interpretation.

10. In the 183rd Report of the Law Commission of India, Justice M. Jagannadha Rao observed that a statute is a will of legislature conveyed in the form of text. It is well settled principle of law that as a statute is an edict of the legislature, the conventional way of interpreting or construing the statute is to see the intent of the legislature. The intention of legislature assimilates two aspects. One aspect carries the concept of 'meaning' i.e. what the word means and another aspect conveys the concept of 'purpose' and 'object' or 'reason' or 'approach' pervading through the statute. The process of construction, therefore, combines both liberal and purposive approaches. However, necessity of interpretation would arise only where a language of the statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. He supported his view by referring to two judgments of this Court in ***R.S. Nayak v. A.R. Antulay***[18] and ***Grasim Industries Ltd. v. Collector of Customs, Bombay***[19]. It was held in ***R.S. Nayak*** (supra) that the

18 (1984) 2 SCC 183
19 (2002) 4 SCC 297

plainest duty of the Court is to give effect to the natural meaning of the words used in the provision if the words of the statute are clear and unambiguous.

11. The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise between the subject of the enactment and the object which the legislature has used. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained.[20]

12. It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the legislature[21]. However, the object-oriented approach cannot be carried to the extent of doing violence to the plain language used by re-writing the section or structure words in place of the actual words used by the legislature[22]. The logical corollary that flows from the judicial pronouncements and opinion of

20 Workmen of Dimakuchi Tea Estate v Managenment of Dimakuchi Tea Estate, 1958 SCR 1156

21 M/s New India Sugar Mills Ltd v. Commissioner of Sales Tax, Bihar 1963 SCR Supl. (2) 459

22 C. I. T v. N. C. Budharaja and Co. 1994 SCC Supl. (1) 280

reputed authors is that the primary rule of construction is literal construction. If there is no ambiguity in the provision which is being construed there is no need to look beyond. Legislative intent which is crucial for understanding the object and purpose of a provision should be gathered from the language. The purpose can be gathered from external sources but any meaning inconsistent with the explicit or implicit language cannot be given.

13. In ***Aron Soloman v. Soloman & Co.***[23] the House of Lords observed that the intention of legislature is a 'slippery phrase'. What the legislature intended can be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. A construction which furthers the purpose or object of an enactment is described as purposive construction. A purposive construction of an enactment is one which gives effect to the legislative purpose by (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.[24] If that is the case,

23 1897 AC 22

24 Bennion on Statutory Interpretation, Fifth Edition Pg. 944

there is no gainsaying that purposive interpretation based on the literal meaning of the enactment must be preferred.

14. In case of ambiguity this Court has adopted purposive interpretation of statutory provisions by applying rule of purposive construction. In the instant case, the deliberations before the Select Committee and its report and Parliamentary Debates were relied upon by the Respondents in their support to asseverate that the object of Article 342 A is to the effect that the power of the State legislature to identify socially and educationally backward classes is not taken away. Ergo, Article 342 A requires to be interpreted accordingly.

15. The exclusionary rule by which the historical facts of legislation were not taken into account for the purpose of interpreting a legislation was given a decent burial by the House of Lords in ***Pepper (Inspector of Taxes) v Hart***[25]. In ***Kalpana Mehta and Ors. v. Union of India and Ors.***[26], a five Judge Bench of this Court held that the Parliamentary Standing Committee report can be taken as an aid of for the purpose of interpretation of a statutory provision. Wherever the reliance on such reports is necessary, they can be used for assisting the court in gathering historical facts. In accord

25 1993 AC 593
26 (2018) 7 SCC 1

with the said judgment, the deliberations of the report of the Select Committee can be utilised as an extrinsic aid for interpretation of Article 342 A, in case there is any ambiguity in the provision.

16. In ***R v. DPP ex-parte Duckenfield***[27]**,** Laws, CJ, cautioned about the great dangers in treating government pronouncements, however, helpful, as an aid to statutory construction. In ***Black-Clawson International Ltd.***[28] taking the opinion of a minister, or an official or a committee, as to the intended meaning in particular application of a clause or a phrase was held to be stunting of the law and not a healthy development. The crucial consideration when dealing with enacting historical materials is the possibility that Parliament changed its mind, or for some reason departed from it[29]. In ***Letang v. Cooper***[30] it was held that enacting history must be inspected with great care and caution. As an indication of legislative intention, it is very far behind the actual words of the Act. While setting out the relevant portions of the report of the Select Committee, Justice Bhat pointed out that the report reflected the opinions of both sides before concluding

27 [1999] 2 All ER 873
28 1975 AC 591
29 Assam Railways and Trading Co Ltd v. Inland Revenue, 1935 AC 445
30 [1965] 1 QB 232

that the concern of the States will be considered in accordance with the procedure under Article 341 & Article 342. There is no doubt that the Minister was assuaging the concerns of the Members by stating that the power of the States to identify backward classes is not being disturbed. I am convinced that there is no reason to depart from the text which is in clear terms and rely upon the legislative history to construe Article 342 A contrary to the language. I am not persuaded to agree with the submissions of the learned Attorney General and the other counsel for the States that Article 342 A has to be interpreted in light of the Select Committee report and discussion in the Parliament, especially when the legislative language is clear and unambiguous.

17. Where the Court is unable to find out the purpose of an enactment, or is doubtful as to its purposes, the Court is unlikely to depart from the literal meaning[31]. There is no dispute that the statement of objects and reasons do not indicate the purpose for which Article 342 A was inserted. During the course of the detailed hearing of these matters, we repeatedly probed from counsel representing both sides about the purpose for inserting Article 342 A in the Constitution. No satisfactory answer was forthcoming. In

31 Section 309, Bennion on Statutory Interpretation, 5th Edition.

spite of our best efforts, we could not unearth the reason for introduction of Article 342 A. As the purpose is not clear, literal construction of Article 342 A should be resorted to.

18. Craies culled out the following principles of interpretation of legislation: -

1. Legislation is always to be understood first in accordance with its plain meaning.
2. Where the plain meaning is in doubt, the Courts will start the process of construction by attempting to discover, from the provisions enacted, to the broad purpose of the legislation.
3. Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the Courts will be prepared to adopt that reading.
4. Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

5. Where the Courts concluded that the underlined purpose of the legislation is insufficiently plain, or cannot be advanced without an unacceptable degree of violence to the language used, they will be obligated, however regretfully in the circumstances of the particular case, to leave to the legislature the task of extending or modifying the legislation[32].

19. To ascertain the plain meaning of the legislative language, we proceed to construe Article 342 A of the Constitution of India. Article 342 A was inserted in the Constitution by the Constitution (102nd Amendment) Act, 2017. A plain reading of Article 342 A (1) would disclose that the President shall specify the socially and educationally backward classes by a public notification after consultation with the Governor. Those specified as socially and educationally backward classes in the notification shall be deemed to be socially and educationally backward classes in relation to that State or Union Territory for the purposes of the Constitution. Article 342 A (2) provides that inclusion or exclusion from the list of socially and educationally backward classes specified in the notification under Article 342 A (1)

32 Craies on Legislation, 9th Edition Pg. 643

can be only done by law made by the Parliament. The word 'Central list' used in Article 342 A (1) had given rise to conflicting interpretations. Article 366 deals with definitions. Sub-Article 26 (C) was inserted in Article 366 of the Constitution by the Constitution (102nd Amendment) Act, 2017 according to which, socially and educationally backward classes shall mean such backward classes as are so deemed under Article 342 A for the purposes of the Constitution. The use of words 'means' indicates that the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression that is put down in definition. (See: ***Gough v. Gough, (1891) 2 QB 665, Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court (1990) 3 SCC 682*** and ***P. Kasilingam v. P.S.G. College of Technology, 1995 SCC Supl. (2) 348.)*** When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive.[33]

20. The legislature can define its own language and prescribe rules for its construction which will generally be binding on the Courts[34]. Article 366 (26) (c) makes it clear that, it is only those backward classes as are so deemed

33 Indra Sarma v. V. K. V. Sarma, (2013) 15 SCC 755
34 Collins v. Texas, 223 U.S. 288

under Article 342 A which shall be considered as socially and educationally backward classes for the purposes of the Constitution and none else. No other class can claim to belong to 'socially and educationally backward classes' for the purposes of the Constitution, except those backward classes as are so deemed under Article 342 A of the Constitution.

21. This Court in ***Sudha Rani Garg v. Jagdish Kumar***[35] dealt with the word 'deemed' in the following manner: -

> "The word 'deemed' is sometimes used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be certain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

22. Lord Asquith in ***East End Dwellings Co. Ltd v. Finsbury Borough Council***[36] held that, "if one is bidden to treat imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of

35 (2004) 8 SCC 329
36 [1952] AC 109

affairs had in fact existed, must inevitably have flowed from it or accompanied it. The use of the word 'deemed' in the definition clause as well as in Article 342 A puts it beyond doubt that it is only those backward classes which are specified in the notification that may be issued by the President, who can claim to be socially and educationally backward classes for the purposes of the Constitution.

23. There is no equivocacy in the legislative language used in Article 342 A. The ordinary meaning that flows from a simple reading of Article 342 A is that the President after consultation with the Governor of a State or Union Territory may issue a public notification specifying socially and educationally backward classes. It is those socially and educationally backward classes who shall be deemed as socially and educationally backward classes in relation to that State or Union Territory for the purposes of the Constitution. There is no obscurity in Article 342 A (1) and it is crystal clear that there shall be one list of socially and educationally backward classes which may be issued by the President. Restricting the operation of a list to be issued under Article 342 A (1) as not being applicable to States can be done only by reading words which are not there in the provision.

According to Aharon Barak, "the structure of the Constitution can be given implicit meaning to what is written between the lines of the text, but it cannot add lines to the text. To do so would be to fill a gap or lacuna, using interpretative doctrines".[37] There is no reason for reading Article 342 A (1) in any other manner except, according to the plain legal meaning of the legislative language. The words 'Central list' is used in Article 342 A (2) have created some controversy in construing Article 342 A. To find out the exact connotation of a word in a statute, we must look to the context in which it is used[38]. No words have an absolute meaning, no words can be defined in vacuo, or without reference to some context[39]. Finally, the famous words of Justice Oliver Wendell Holmes Jr. "the word is not a crystal transparent and unchanged; it is a skin of a living thought and may vary in colour and content according to the circumstances and the time in which it is used".[40]

24. Article 342 A (2) provides that inclusion or exclusion from Central list of socially and educationally backward classes specified in a notification issued under Sub-Clause 1

37 Barak *supra,* 374.
38 Nyadar Singh v. Union of India 1988 4 SCC 170
39 Professor HA Smith cited in Union of India v. Sankalchand Himmat Lal Seth [1977) 4 SCC 193
40 *Towne* v. *Eisner,* 245 U.S. 425 (1918)

can be done only by the Parliament. A plain reading of the provision can lead to the following deduction: -

a. There is a notification issued by the President under clause (1).
b. The notification specifies socially and educationally backward classes.
c. Inclusion or exclusion can be done only by law made by the Parliament.
d. Save otherwise, the notification shall not be varied by any subsequent notification.
e. The list notified is referred to as "Central list".

25. I find it difficult to agree with the submissions made on behalf of the Respondents that the use of words 'central list' would restrict the scope and amplitude of the notification to be issued under Article 342 A (1). There is only one list that can be issued by the President specifying the socially and educationally backward classes and only those classes are treated as socially and educationally backward classes for the purposes of the Constitution. Taking cue from the National Commission for Backward Classes Act, 1993, the Respondents argued that the words 'Central list' is with reference only to appointments to Central services and admission in Central educational institutions. Reading

'Central list' in that manner would be curtailing the width of Article 342 A (1). If so read, the sweep of Sub-Clause (1) shall be minimized. Moreover, to achieve the said meaning, words which are not in Article 342 A (1) have to be read into it. Contextually, the words Central list in Article 342 A (2) can be only with reference to the list contained in the notification which may be issued under Article 342 A (1). It is well settled law that the provisions of the Constitution have to be harmoniously construed and it is apparent from Article 342 A (1) and (2) that there is no scope for any list of socially and educationally backward classes, other than the list to be notified by the President. As the other expressions 'for the purposes of the Constitution' and 'unless the context otherwise requires' have been dealt with by Justice Bhat, I have nothing more to add to the construction placed by him on the said expressions. To avoid any confusion, I endorse the conclusion of Justice Ashok Bhushan on question Nos. 1, 2 and 3 and the final order proposed in Para No. 444 of his judgment. Insofar as question Nos. 4, 5 and 6 are concerned, I am in agreement with the opinion of Justice S. Ravindra Bhat.

26. A conspectus of the above discussion would be that only those backward classes included in the public

notification under Article 342 A shall be socially and educationally backward classes for the purposes of the Constitution.

.....J.
[L. NAGESWARA RAO]

New Delhi,
May 05, 2021

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO. 3123 OF 2020

DR. JAISHRI LAXMANRAO PATIL ..... APPELLANT(S)

VERSUS

THE CHIEF MINISTER AND ORS .....RESPONDENT(S)

WITH

CIVIL APPEAL NO. 3124 OF 2020

CIVIL APPEAL NO. 3133 OF 2020

CIVIL APPEAL NO. 3134 OF 2020

CIVIL APPEAL NO. 3131 OF 2020

CIVIL APPEAL NO. 3129 OF 2020

WRIT PETITION (C) NO. 915 OF 2020

WRIT PETITION (C) NO. 504 OF 2020

WRIT PETITION (C) NO. 914 OF 2020

CIVIL APPEAL NO. 3127 OF 2020

CIVIL APPEAL NO. 3126 OF 2020

CIVIL APPEAL NO. 3125 OF 2020

CIVIL APPEAL NO. 3128 OF 2020

CIVIL APPEAL NO. 3130 OF 2020

WRIT PETITION (C) NO. 938 OF 2020

J U D G M E N T

HEMANT GUPTA, J.

I have gone through the judgments authored by learned Hon'ble Shri Ashok Bhushan, J., Hon'ble Shri S. Ravindra Bhat, J. and also the order authored by Hon'ble Shri L. Nageswara Rao, J. I am in agreement with the reasoning and the conclusion on the Question Nos. 1, 2 and 3 in the judgment rendered by Hon'ble Shri Ashok Bhushan, J., as well as additional reasons recorded by Hon'ble Shri S. Ravindra Bhat, J. and by Hon'ble Shri L. Nageswara Rao, J.

I entirely agree with the reasoning and the conclusions in the Judgment and order authored by Hon'ble Shri S. Ravindra Bhat, J. and Hon'ble Shri L. Nageswara Rao, J. on Question Nos. 4, 5 and 6.

.....J.
(HEMANT GUPTA)

NEW DELHI;
May 5, 2021.

REPORTABLE

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WRIT PETITION (C) NO. 938/2020

J U D G M E N T

S. RAVINDRA BHAT, J.

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

A Brief Prelude

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

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

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

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

> *"From January 26, 1950, onwards we are going to enter into a life of contradictions. In politics, we will have equality, one man, one vote, one vote and one value. In society and economy, we will still have inequality. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man-one value."*

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

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

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4 Rabindranath Tagore's Gitanjali, Verse 35.

5 Maharashtra Act No. I of 2015.

6 In Writ Petition No. 3151/2014.

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

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

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

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7Report of the Committee, page 10.

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

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

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

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

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

10 Writ petition 938/2020.

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

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

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

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

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

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

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

11 1992 Supp. (3) SCC 217.

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

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

12 1964 (4) SCR 680.

13 1976 (2) SCC 310.

14 1985 SCR Suppl. (1) 352.

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

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

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

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

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

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

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

16 (1990) 4 SCC 207.

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

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

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

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

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

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17 At page 552, SCC Report.

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

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

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

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

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

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

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

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

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

19 1989 (3) SCR 316.

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

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

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

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

21(2020) 3 SCC 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 Paras 614 and 814, SCC reports.

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

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

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

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

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

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

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

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

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

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

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

331959 SCR 995.

342002 (8) SCC 481.

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

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

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

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35 1994 Supp (1) SCC 324.

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

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

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

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

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

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

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

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

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

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

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

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

Affirmative Action and the Reservation Paradigm

Special Provisions

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

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

41(2006) 8 SCC 212.

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

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

38. It would be, in this context, relevant to notice that two important amendments to the Constitution of India, which have the effect of transforming the notion of equality, were made in the last 15 years. The first was the eighty sixth amendment – which inserted Article 21A[42]- which had the effect of enjoining the state to provide *free and compulsory education* to all children in the age group 6-14. The second was the Constitution Ninety Third Amendment Act, which inserted Article 15 (5)[43] enabling the state to make special provisions *"for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided."* The transformative potential of these provisions (both

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

43 ***"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth ..****[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."*

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

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

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

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44 2014 (8) SCC 1.

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

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

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

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

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

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

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

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

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

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

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

46(2019) 16 SCC 129.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52*Ibid*

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

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

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

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

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

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

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

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

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

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

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

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

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

62 *Ibid.*, at p. 105.

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

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

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

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

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

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

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

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

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

The US Experience

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

68 448 U.S. 448 (1980).

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

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

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

South Africa

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

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

70 515 U.S. 200 (1995)

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

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

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

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

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

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

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

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

Canada

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

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

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

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

74 [1987] 1 SCR 1114 at 1143.

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

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

Possibilities for Affirmative Action other than Reservation in India

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Relevant provisions in consideration

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

> *"338B. (1) There shall be a Commission for the socially and educationally backward classes to be known as the National Commission for Backward Classes.*
>
> *(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other*

Members so appointed shall be such as the President may by rule determine.

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

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

(5) It shall be the duty of the Commission— (a) to investigate and monitor all matters relating to the safeguards provided for the socially and educationally backward classes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the socially and educationally backward classes;

(c) to participate and advise on the socio-economic development of the socially and educationally backward classes and to evaluate the progress of their development under the Union and any State;

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

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

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

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

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

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

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

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

(c) receiving evidence on affidavits;

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

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

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

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting the socially and educationally backward classes."

xxxxxx xxxxxx xxxxxx

"342A. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally

backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

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

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

(1) ....

xxxxxx xxxxxx xxxxxx

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

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

*"**STATEMENT OF OBJECTS AND REASONS***

xxxxxx xxxxxx xxxxxx

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

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

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

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

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

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

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

II. Contentions of parties

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

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

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

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

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

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

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

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

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

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

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

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

80 1952 SCR 1112

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

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

81 AIR 1953 SC 75

82 (1998) 4 SCC 626.

83 (1983) 1 SCR 1000.

84 1993 (1) All. ER 42.

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

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

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

85(2018) 7 SCC 1

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

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

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

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

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

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

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

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

> *"a more effective arrangement in respect of the constitutional safeguards for Scheduled Castes and Scheduled Tribes than a single Special Officer as at present. It is also felt that it is necessary to elaborate the functions of the said Commission so as to cover measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes and Scheduled Tribes."*

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

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

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

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

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

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

*"**Article 366***

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

(1) xxxxxx xxxxxx xxxxxx

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

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

Article 338

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

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.

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

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

(5) It shall be the duty of the Commission —

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

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

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress of their development under the Union and any State;

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

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

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

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

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

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

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

(b) requiring the discovery and production of any documents;

(c) receiving evidence on affidavits;

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

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

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

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

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

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

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

"338A. National Commission for Scheduled Tribes.—

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

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

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.

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

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

(5) It shall be the duty of the Commission— (a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

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

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

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

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

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

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

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

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

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

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

(c) receiving evidence on affidavits;

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

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

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

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

Article 341

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

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

Article 342

342. Scheduled Tribes -*(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.*

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

IV. Previous commissions set up to identify SEBCs

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

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

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

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

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

> *"36. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and*

92 1965 (2) SCR 877.

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

Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India.

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38. It is an unquestionable principle of interpretation that interrelated statutory as well as constitutional provisions have to be harmoniously construed and understood so as to avoid making any provision nugatory and redundant. If the list of Scheduled Castes/Scheduled Tribes in the Presidential Orders under Articles 341/342 is subject to alteration only by laws made by Parliament, operation of the lists of Scheduled Castes and Scheduled Tribes beyond the classes or categories enumerated under the Presidential Order for a particular State/Union Territory by exercise of the enabling power vested by Article 16(4)would have the obvious effect of circumventing the specific constitutional provisions in Articles 341/342. In this regard, it must also be noted that the power under Article 16(4) is not only capable of being exercised by a legislative provision/enactment but also by an Executive Order issued under Article 166 of the Constitution. It will, therefore, be in consonance with the constitutional scheme to understand the enabling provision under Article 16(4) to be available to provide reservation only to the classes or categories of Scheduled Castes/Scheduled Tribes enumerated in the Presidential Orders for a particular State/Union Territory within the geographical area of that State and not beyond. If in the opinion of a State it is necessary to extend the benefit of reservation to a class/category of Scheduled Castes/Scheduled Tribes beyond those specified in the Lists for that particular State, constitutional discipline would require the State to make its views in the matter prevail with the central authority so as to enable an appropriate parliamentary exercise to be made by an amendment of the Lists of Scheduled Castes/Scheduled Tribes for that particular State. Unilateral action by States on the touchstone of Article 16(4) of the Constitution could be a possible trigger point of constitutional anarchy and therefore must be held to be impermissible under the Constitution."

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

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

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

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

96 AIR 1951 SC 226.

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

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

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

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97 SCC report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***

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

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

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

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

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

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

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

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

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

100 1978 (2) SCR 1.

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

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

"37. In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation—they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution.

38. Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:

"[T]o understand the Constitution as a legal text, it is essential to recognize the ... sort of text it is: a constitutive text that purports, in the name of the people..., to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices."

101(2011) 4 SCC 36.

> *(See Reflections on Free-Form Method in Constitutional Interpretation. [108 Harv L Rev 1221, 1235 (1995)]).”*
>
> *39. It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire document to see whether that meaning is validated by the constitutional values and scheme.”*

In examining provisions of the Constitution, courts should adopt the *primary rule,* and give effect to the plain meaning of the expressions; this rule can be departed, only when there are ambiguities. In *Kuldip Nayar* v. *Union of India* [102] after quoting from *G. Narayanaswami* v. *G. Panneerselvam*[103] this court held that

> *“201. … We endorse and reiterate the view taken in the above quoted paragraph of the judgment. It may be desirable to give a broad and generous construction to the constitutional provisions, but while doing so the rule of “plain meaning” or “literal” interpretation, which remains “the primary rule”, has also to be kept in mind. In fact the rule of “literal construction” is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results.”*

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

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

102(2006) 7 SCC 1.

103(1972) 3 SCC 717.

72(1990) 2 SCC 134.

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

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

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

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

73(2008) 5 SCC 176.

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

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

106(2017) 8 SCC 541

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

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

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

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

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

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

108[2006] EWHC 823 (Admin).

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

1101992 Supp (2) SCC 651

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

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

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

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

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

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

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

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

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

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

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112 1990 SCC (3) 130.

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

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

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

(emphasis supplied)

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

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

113(1994) 5 SCC 244.

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

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

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

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

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

"with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be "Scheduled Tribes" in relation to that State or Union Territory, as the case may be".

Article 342(2) of the Constitution empowers

"Parliament, by law, to include in or exclude from the list of "Scheduled Tribes" specified in a notification issued under clause (1), any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

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

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

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

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

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

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

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

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

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

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

83(2000) 6 SCC 12

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

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

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

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

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

84(1989) 2 SCC 645

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

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

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

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

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

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

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

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

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

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

116(2008) 2 SCC 202.

117(2005) 1 SCC 308.

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

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

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

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

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

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

118(2018) 14 SCC 408

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

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

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

***

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

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

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

130. In *Ashoka Kumar Thakur v. Union of India*[119] the issue which arose for consideration was the correct interpretation of Article 15(5)(extracted below in a footnote)[120], introduced by virtue of the Constitution (Ninety Third Amendment) Act, 2005. It enabled the state to make special provisions for the advancement of any SEBCs or for SCs or STs as far as they related to *"their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30".* This court held that on a true construction, special provisions for admission to such category of candidates, *even in private educational institutions*, was permissible. The court *inter alia*, held that:

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

119(2008) 6 SCC 1.

120*[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]*

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

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

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

121(1997) 7 SCC 339 at page 370.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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123 1990 SCR Supp. (1) 142

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

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

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

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

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

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

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124 1990) 2 All ER 118

99 (2003) 7 SCC 628

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

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

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

126(2017) 2 SCC 629

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

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Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

131*General Clauses Act*

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

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(8) "Central Government" shall—

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

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

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

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

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

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

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

132(2020) 14 SCC 664

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) For the purposes of the Constitution;

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

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

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

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

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

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

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

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

This court then observed as follows:

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

133 1994 Supp (1) SCC 191

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

138Ref. f.n. 104

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

These principles are beyond the amending power of the Parliament.

xxxxxx xxxxxx xxxxxx

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

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

xxxxxx xxxxxx xxxxxx

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

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

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

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

139(1981) 1 SCC 166

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

Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Delhi,
May 5, 2021.