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(BEFORE DIPAK MISRA, C.J. AND KURIAN JOSEPH, ROHINTON
FALI NARIMAN, SANJAY KISHAN KAUL AND INDU MALHOTRA, JJ.)

a

JARNAIL SINGH AND OTHERS

.. Petitioners;

Versus

LACHHMI NARAIN GUPTA
AND OTHERS

.. Respondents.

b

SLPs (C) No. 30621 of 2011[†] with Nos. 31735, 35000 of 2011,
2839, 4831, 5859-60, 30841 of 2012, 6915, 8327, 16710-11,
23339-40, 23344, 33163 of 2014, 21343, 25191, 31191,
33688 of 2015, 10638, 17491, 18844, 19422-23, 24681, 28306,
28446-47, 30942, 31288, 33481 of 2017, SLP (C) No. ...
(CC No. 6821 of 2017), SLPs (C) Nos. 16469, 18925, 22985 of
2018, Contempt Petition (C) No. 314 of 2016 in SLP (C) No. 4831
of 2012, Contempt Petition (C) No. 11 of 2017 in SLP (C) No. 19765
of 2015[‡], Contempt Petition (C) No. 13 of 2017 in 19767 of 2015,
Transfer Petition (C) Nos. 608-609 of 2017, SLP (C) No. ... of
2018 (Diary No. 28776 of 2017), SLP (C) No. ... of 2018 (Diary
No. 29066 of 2017), SLP (C) No. ... of 2018 (Diary No. 30189 of 2017),
SLP (C) No. ... of 2018 (Diary No. 31145 of 2017), SLP (C) No. ...
of 2018 (Diary No. 33481 of 2017), SLP (C) No. ... of 2018 (Diary
No. 33488 of 2017), SLP (C) No. ... of 2018 (Diary No. 34271
of 2017), SLP (C) No. ... of 2018 (Diary No. 34520 of 2017),
SLP (C) No. ... of 2018 (Diary No. 35324 of 2017), SLP (C)
No. ... of 2018 (Diary No. 35577 of 2017), SLP (C) No. ... of
2018 (Diary No. 35818 of 2017), SLP (C) No. ... of 2018 (Diary
No. 36305 of 2017), SLP (C) No. ... of 2018 (Diary No. 36377
of 2017), SLP (C) No. ... of 2018 (Diary No. 38895 of 2017),
SLP (C) No. ... of 2018 (Diary No. 42413 of 2017), SLP (C) No.
... of 2018 (Diary No. 619 of 2018), SLP (C) No. ... of 2018
(Diary No. 969 of 2018), SLP (C) No. ... of 2018 (Diary No. 971
of 2018), SLP (C) No. ... of 2018 (Diary No. 1042 of 2018), SLP
(C) No. ... of 2018 (Diary No. 1046 of 2018), SLP (C) No. ... of
2018 (Diary No. 1584 of 2018), SLP (C) No. ... of 2018 (Diary
No. 2677 of 2018), SLP (C) No. ... of 2018 (Diary No. 7243 of 2018),
SLP (C) No. ... of 2018 (Diary No. 22349 of 2018), Civil Appeals
Nos. 5247, 11816-17, 11820, 11822-25, 11828-32, 11837-40,
11842-45, 11847-50 of 2016, 701-704, 4562-64, 4833 and
4876-82 of 2017, decided on September 26, 2018

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[†] Arising from the Judgment and Order in *Lachhmi Narain Gupta v. Jarnail Singh*, 2011 SCC OnLine P&H 8144 (Punjab and Haryana High Court, CWP No. 13218 of 2009, dt. 15-7-2011)

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[‡] Arising out of SLPs (C) Nos. 19765-67 of 2015

- A. Constitution of India — Arts. 16(4-A) and 16(4-B), 330, 341 and 342 — Effectuation of Arts. 16(4-A) and 16(4-B) — Reservation in promotion with consequential seniority for SCs and STs under Arts. 16(4-A) and 16(4-B) — Preconditions therefor, laid down in *M. Nagaraj*, (2006) 8 SCC 212, that States had to (i) collect quantifiable data showing backwardness and inadequacy of representation of SCs & STs in public employment, and (ii) obliterate creamy layer of SCs and STs from reservation — Validity of — Reference to larger Bench, if warranted**
- a** — First precondition, held, invalid as it is contrary to *Indra Sawhney (I)*, 1992 Supp (3) SCC 217 — Second precondition of applicability of creamy layer principle to SCs and STs, held, valid — Thus, the judgment in *M. Nagaraj*, (2006) 8 SCC 212 does not need to be revisited, and consequently, there is no need to refer it to a seven-Judge Bench — Apart from striking down abovesaid Precondition (i) re collection of quantifiable data, *M. Nagaraj*, (2006) 8 SCC 212 is good law in every other way — In fact, tests laid down in *M. Nagaraj case* for judging validity of constitutional amendment were expressly approved by nine-Judge Bench in *I.R. Coelho*, (2007) 2 SCC 1
- c** — Held, requirement of collection of quantifiable data on backwardness insofar as SCs & STs are concerned is contrary to *Indra Sawhney*, 1992 Supp (3) SCC 217 and liable to be struck down to that extent
- d** — However, as far creamy layer principle is concerned, object of reservation is to ensure that Backward Classes of citizens move forward along with rest of the citizens on equal basis — This would not be possible if only creamy layer within that class bag all coveted jobs in public sector leaving rest of class backward — Moreover, application of creamy layer principle does not in any manner tinker with Presidential lists under Arts. 341 and 342 of the Constitution since caste or group or sub-group named in the list continues exactly as before and only those persons who have come out of backwardness by virtue of belonging to creamy layer are excluded from benefit of reservation — Therefore, when *M. Nagaraj case* applied the creamy layer test to SCs and STs in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342 — Constitution of India — Art. 141 — Reference to larger Constitution Bench when warranted — Law if can be clarified without such reference, by holistic reading of applicable precedents
- e** —
- f** —
- g** **B. Constitution of India — Arts. 14, 16(4), 15(4), 16(4-A) & (4-B), 330, 341 and 342 — Creamy layer principle — Held, applicable to SCs and STs — Exclusion of creamy layer of SCs and STs from Presidential Lists under Arts. 341 and 342, held, permissible**
- h** — Held, the creamy layer principle sounds in Arts. 14 and 16(1), as unequals within the same class are being treated equally with other members of that class — Thus, when Arts. 14 and 16 are harmoniously interpreted along

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with Arts. 341 and 342, it is clear that Parliament has complete freedom to include or exclude persons from Presidential Lists based on relevant factors — Similarly, constitutional courts, when applying principle of reservation are well within their jurisdiction to exclude creamy layer from such groups or sub-groups when applying principles of equality under Arts. 14 and 16 of the Constitution

C. Constitution of India — Arts. 16(4-A) & (4-B), 330, 341 and 342 — Adequacy of representation of SCs & STs in service in State in promotional posts — Determination of — Competent authority

— Held, *M. Nagaraj case*, (2006) 8 SCC 212 has wisely left test for determining adequacy of representation in promotional posts to State for simple reason that as post gets higher, it may be necessary, even if proportionality test to population as a whole is taken into account, to reduce number of SCs and STs in promotional posts since efficiency of administration is required to be maintained — Further held, contrasting Arts. 16(4-A) & 16(4-B) with Art. 330 of the Constitution, it is seen that when seats are to be reserved in the House of People for the SCs & STs, test of proportionality to population is mandated by Constitution

The instant cases arose out of two reference orders — the first by a two-Judge Bench referred to in a second reference order dated 15-11-2017, which was by three-Judge Bench, referring the correctness of decision in *M. Nagaraj*, (2006) 8 SCC 212 to a Constitution Bench. The controversy revolves around the interpretation of Articles 16(4), (4-A), (4-B), 335, 341 and 342 of the Constitution.

In *M. Nagaraj case* addition of Articles 16(4-A) and 16(4-B) was challenged on the ground that they violated the basic structure of the Constitution. While upholding the constitutional amendments it was held that Articles 16(4-A) and 16(4-B) flow from Article 16(4) and did not alter the basic structure. The Bench in *M. Nagaraj case* retained the controlling factors, namely, backwardness and inadequacy of representation as basis which enabled State to provide for reservation keeping in mind overall efficiency of the State administration under Article 335 and laid down the preconditions of the States deciding the same based on quantifiable data, and excluding the creamy layer of SCs and STs. It was further held that impugned amendments were confined only to SCs and STs and did not obliterate any of the constitutional requirements.

Held :

In *E.V. Chinnaiah*, (2005) 1 SCC 394 the validity of the A.P. Scheduled Castes (Rationalisation of Reservations) Act, 2000 was challenged. The Constitution Bench rejected the splitting up of Scheduled Castes into four sub-groups in varying percentages on basis of their backwardness and distinguished *Indra Sawhney (1) case*. The *Chinnaiah case* judgment was referred by a three-Judge Bench to a larger Bench vide order dated 20-8-2014 since according to the three-Judge Bench in *Chinnaiah case* was contrary to Article 338 of the Constitution and *Indra Sawhney (1) case*.

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(Paras 13 to 17)

E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329; *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1, *considered*

a *Mallela Venkata Rao v. State of A.P.*, 2000 SCC OnLine AP 613 : (2000) 3 APLJ 320, *referred to*

State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *cited*

The Constitution Bench in *Ashoka Kumar Thakur*, (2008) 6 SCC 1 upheld insertion of Article 15(5) in the Constitution vide the Constitution (Ninety-third Amendment) Act, 2005 subject to the creamy layer test to be applied to
b OBCs. (Para 20)

Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 : 3 SCEC 35, *considered*

Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248; *Indira Sawhney v. Union of India*, (1996) 6 SCC 506 : 1996 SCC (L&S) 1477, *cited*

c Now to the argument that *M. Nagaraj case* needs to be revisited as it conflicts with *E.V. Chinnaiah*, (2005) 1 SCC 394. Though *M. Nagaraj case* is a later judgment, it did not refer to *E.V. Chinnaiah* at all. *E.V. Chinnaiah case* judgment in essence held that the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, could not further sub-divide Scheduled Castes into four categories, as that would be violative of Article 341(2) of the Constitution for the simple reason that it is Parliament alone that can make any change in the
d Presidential List and not the State Legislatures. As *Chinnaiah case* does not in any manner deal with any of the aspects on which the constitutional amendments in *Nagaraj case* were upheld, it was not necessary for *M. Nagaraj case* to refer to *E.V. Chinnaiah case* at all. However, it was further contended that apart from this ratio, *E.V. Chinnaiah case* also decided that the subclassification of Scheduled Castes, created by the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations)
e Act, 2000, also violated Article 14 of the Constitution as the same would amount to tinkering with the Presidential List, which, as was held, could be done only by Parliament and not by the State Legislatures. The true *ratio* of the judgment flows from a construction of Article 341. *E.V. Chinnaiah case* dealt with a completely different problem, apart from dealing with a State statute and not a constitutional amendment, as was dealt with in *Nagaraj*. (Para 22)

f *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, *explained*

E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329, *distinguished*

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, *referred to*

g *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1; *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540; *Ajit Singh (2) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239; *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548, *cited*

h Now to other grounds argued on which *M. Nagaraj case* was requested to be revisited. The contention of counsel while defending *M. Nagaraj case* that when *M. Nagaraj case* speaks about backwardness of the “class” what is referred to is class of posts and not SCs/STs at all which require quantifiable data is liable to be rejected since reference to “class” is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear,

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therefore, that *M. Nagaraj* case has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes which is contrary to the nine-Judge Bench decision in *Indra Sawhney (1) case*. Besides, Presidential lists for SCs/STs contain only those castes/groups/tribes which are socially extremely backward and thus when *M. Nagaraj* case requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to *Indra Sawhney (1) case* and would have to be declared to be bad on this ground. (Paras 23 and 24)

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1, *relied on* *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, *held, per incuriam on this point, but is good law on other points*

However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The whole object of reservation is to see that Backward Classes of citizens move forward with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. Thus, when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, are excluded from the benefit of reservation. (Paras 25, 26 and 10 to 12)

State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *relied on*

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1; *Indra Sawhney (2) v. Union of India*, (2000) 1 SCC 168 : 2000 SCC (L&S) 1, *clarified and relied on*

Keshav Mills Co. Ltd. v. CIT, (1965) 2 SCR 908 : AIR 1965 SC 1636, *referred to*

“Administrative Nihilism” (Methods and Results, Vol. 4 of Collected Essays) by Huxley, *cited*

It is not necessary to go into the issue as to whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that constitutional courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or

a exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution. It is not possible to agree with Balakrishnan, C.J.'s statement in *Ashoka Kumar Thakur*, (2008) 6 SCC 1 that the creamy layer principle is merely a principle of identification and not a principle of equality. (Para 27)

b *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : 3 SCEC 35, view of Balakrishnan, C.J., clarified on this point

c Therefore, when *M. Nagaraj case* applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. This part of the judgment does not need to be revisited, and consequently, there is no need to refer *M. Nagaraj case* to a seven-Judge Bench. Besides, *M. Nagaraj case* is a unanimous judgment of five learned Judges of the Supreme Court which has held sway since the year 2006 and has been repeatedly followed and applied by a number of judgments of the Supreme Court. Further, *M. Nagaraj case* has also been approved by larger Benches of the Supreme Court. In fact, the tests laid down in *M. Nagaraj case* for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of the Supreme Court in *I.R. Coelho*, (2007) 2 SCC 1. The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, quantifiable data shall be collected by the State, on the parameters as stipulated in *M. Nagaraj case* on the inadequacy of representation, which can be tested by the courts and data so collected must be relatable to the cadre concerned. (Paras 28 to 30)

e *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, held, good law on these points

f *Anil Chandra v. Radha Krishna Gaur*, (2009) 9 SCC 454 : (2009) 2 SCC (L&S) 683; *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467 : (2011) 1 SCC (L&S) 1; *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289; *S. Pannesar Selvam v. State of T.N.*, (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76; *Central Bank of India v. SC/ST Employees Welfare Assn.*, (2015) 12 SCC 308 : (2016) 1 SCC (L&S) 355; *Suresh Chand Gautam v. State of U.P.*, (2016) 11 SCC 113 : (2016) 2 SCC (L&S) 291; *B.K. Pavitra v. Union of India*, (2017) 4 SCC 620 : (2017) 2 SCC (L&S) 128; *General Categories Welfare Federation v. Union of India*, (2012) 7 SCC 40 : (2012) 2 SCC (L&S) 328; *Rohtas Bhankhar v. Union of India*, (2014) 8 SCC 872 : (2014) 3 SCC (L&S) 122; *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1, referred to

g Even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held to be contrary to the majority in *Indra Sawhney (I) case*. So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, the proportionality

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to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. Article 46 has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Whereas “Backward Classes” in Article 16(4) is equivalent to the “weaker sections of the people” in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason that the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. The argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If such an argument is accepted, Article 16(4-A) would have to be struck down as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Articles 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in *Indra Sawhney (1) case* when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in *M. Nagaraj case*. Further such argument cannot be confused with the concept of “creamy layer” which applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes. (Paras 31 to 34)

M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013; *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1; *U.P. Power Corp. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289, *considered*

State of Rajasthan v. Bajrang Lal Sharma, 2010 SCC OnLine Raj 4735 : (2011) 3 Raj LW 2405; *Prem Kumar Singh v. State of U.P.*, 2011 SCC OnLine All 17 : (2011) 3 All LJ 343, *cited*

Further, it is not possible to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). *M. Nagaraj case* has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. In fact, there may be certain posts right at the top, where reservation is impermissible altogether. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. Article 16(4-A) is couched in language which leave it to the States to determine adequate representation depending upon the promotional post in question. By contrasting Articles 16(4-A) and 16(4-B) with Article 330 it becomes clear that when seats are to be reserved in the house of

People for SCs & STs the test of proportionality to the population is mandated by the Constitution. (Para 35)

- a* The judgment in *M. Nagaraj case* does not need to be referred to a seven-Judge Bench. However, the conclusion in *M. Nagaraj case* that State has to collect quantifiable data showing backwardness of SCs/STs being contrary to the nine-Judge Bench in *Indra Sawhney (1) case* is invalid to that extent. (Para 36)

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1, *relied on*

- b* *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, *held, per incuriam on one point, but good law on other points*

State of Tripura v. Jayanta Chakraborty, (2018) 1 SCC 146 : (2018) 1 SCC (L&S) 14; *State of Maharashtra v. Vijay Ghogre*, (2018) 17 SCC 261, *referred to*

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a

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— The present group of cases arises out of two reference orders—the first by a two-Judge Bench¹ referred to in a second reference order, dated 15-11-2017², which is by a three-Judge Bench, which has referred the correctness of the decision in *M. Nagaraj v. Union of India*³, (*Nagaraj*), to a Constitution Bench. b

2. The controversy in these matters revolves around the interpretation of the following Articles of the Constitution of India:

“16. *Equality of opportunity in matters of public employment.*—(1)-(4) * * *

c

(4-A) 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.

(4-B) 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 (4-A) 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. e

* * *

335. *Claims of Scheduled Castes and Scheduled Tribes to services and posts.*—The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State: f

Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State. g

* * *

1 *State of Tripura v. Jayanta Chakraborty*, (2018) 1 SCC 146 : (2018) 1 SCC (L&S) 14

2 *State of Maharashtra v. Vijay Ghogre*, (2018) 17 SCC 261

3 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

h

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

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

* * *

342. Scheduled Tribes.—(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

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

3. We have heard wide-ranging arguments on either side for a couple of days, raising several points. However, ultimately, we have confined arguments to two points which require serious consideration. The learned Attorney General for India, Shri K.K. Venugopal, led the charge for reconsideration of *Nagaraj*³. According to the learned Attorney General, *Nagaraj*³ needs to be revisited on these two points. First, when *Nagaraj*³ states that the State has to collect quantifiable data showing backwardness, such observation would be contrary to the nine-Judge Bench in *Indra Sawhney v. Union of India*⁴, [*Indra Sawhney (1)*], as it has been held therein that the Scheduled Castes and the Scheduled Tribes are the most backward among Backward Classes and it is, therefore, presumed that once they are contained in the Presidential List under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again. Secondly, according to the learned Attorney General, the creamy layer concept has not been applied in *Indra Sawhney (1)*⁴ to the Scheduled Castes and the Scheduled Tribes and *Nagaraj*³ has misread the aforesaid judgment to apply this concept to the Scheduled Castes and the Scheduled Tribes. According to the learned Attorney General, once the Scheduled Castes and the Scheduled Tribes have been set out in the Presidential List, they shall

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

⁴ 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

be deemed to be Scheduled Castes and Scheduled Tribes, and the said List cannot be altered by anybody except Parliament under Articles 341 and 342. The learned Attorney General also argued that *Nagaraj*³ does not indicate any test for determining adequacy of representation in service. According to him, it is important that we lay down that the test be the test of proportion of Scheduled Castes and Scheduled Tribes to the population in India at all stages of promotion, and for this purpose, the roster that has been referred to in *R.K. Sabharwal v. State of Punjab*⁵ can be utilised. Other counsel who argued, apart from the learned Attorney General, have, with certain nuances, reiterated the same arguments.

4. Ms Indira Jaising, learned Senior Advocate, appearing on behalf of one of the petitioners in CA No. 11816 of 2016, submitted that *Nagaraj*³ needs to be revisited also on the ground that Articles 16(4-A) and 16(4-B) do not flow from Article 16(4), but instead flow from Articles 14 and 16(1) of the Constitution. She further argued that claims of the Scheduled Castes and the Scheduled Tribes are based on a reading of Articles 14, 15, 16, 16(4-A), 16(4-B), and 335 of the Constitution. It was further submitted that a further subclassification within Scheduled Castes and Scheduled Tribes is impermissible, as has been held in *Indra Sawhney (1)*⁴ and in *E.V. Chinnaiah v. State of A.P.*⁶ She argued that the decision in *Nagaraj*³ would have the effect of amending the Presidential Order relating to Scheduled Castes and Scheduled Tribes, which would violate Articles 341 and 342 of the Constitution of India, as Parliament alone can amend a Presidential Order. She concluded her argument by saying that the exercise of reading down a constitutional amendment to make it valid, conducted in *Nagaraj*³, was constitutionally impermissible.

5. Shri P.S. Patwalia, learned Senior Advocate, appearing on behalf of the State of Tripura, reiterated some of the submissions and added that *Nagaraj*³ and *Chinnaiah*⁶ cannot stand together, which is why *Nagaraj*³ is per incuriam as it does not refer to the judgment in *Chinnaiah*⁶ at all.

6. On the other hand, Shri Shanti Bhushan has defended *Nagaraj*³ by stating that when *Nagaraj*³ speaks about backwardness of the “class”, what is referred to is not Scheduled Castes and Scheduled Tribes at all, but the class of posts. Hence, it is clear that backwardness in relation to the class of posts spoken of would require quantifiable data, and it is in that context that the aforesaid observation is made. He also argued, relying upon *Keshav Mills Co. Ltd. v. CIT*⁷, that a Constitution Bench judgment which has stood the test of time, ought not to be revisited, and if the parameters of *Keshav Mills*⁷ are to be applied, it is clear that *Nagaraj*³ ought not to be revisited.

3 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

5 (1995) 2 SCC 745 : 1995 SCC (L&S) 548

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

6 (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

7 (1965) 2 SCR 908 : AIR 1965 SC 1636

7. Shri Rajeev Dhavan, learned Senior Advocate, has argued before us that *Nagaraj*³ has to be understood as a judgment which has upheld the constitutional amendments adding Articles 16(4-A) and 16(4-B) on the ground that they do not violate the basic structure of the Constitution. According to him, since equality is part of the basic structure, and *Nagaraj*³ has applied the 50% cut-off criterion, creamy layer, and no indefinite extension of reservation, as facets of the equality principle to uphold the said constitutional amendments, *Nagaraj*³ ought not to be revisited. According to the learned Senior Counsel, “creamy layer” is a matter of applying the equality principle, as unequals within the same class are sought to be weeded out as they cannot be treated as equal to the others. The whole basis for application of the creamy layer principle is that those genuinely deserving of reservation would otherwise not get the benefits of reservation and conversely, those who are undeserving, get the said benefits. According to the learned Senior Advocate, the creamy layer principle applies to exclude certain individuals from the class and does not deal with group rights at all. This being the case, Articles 341 and 342 are not attracted. Further, Articles 341 and 342 do not concern themselves with reservation at all. They concern themselves only with identification of those who can be called Scheduled Castes and Scheduled Tribes. On the other hand, the creamy layer principle is applied by courts to exclude certain persons from reservation made from within that class on the touchstone of Articles 14 and 16(1) of the Constitution of India. He argued that even if it be conceded that creamy layer can fall within Articles 341 and 342, yet the Court’s power to enforce fundamental rights as part of the basic structure cannot be taken away. Indeed, *Nagaraj*³ was a case pertaining to a constitutional amendment and, therefore, Articles 341 and 342 cannot stand in the way of applying the basic structure test to a constitutional amendment.

8. Shri Rakesh Dwivedi, learned Senior Advocate, appearing in CA No. 5247 of 2016, submitted that the crucial language contained in Article 16(4-A) is that the word “which” would show that Scheduled Castes and Scheduled Tribes have to continue to be “backward”. If the expression “the Scheduled Castes and the Scheduled Tribes” in Article 16(4-A) would be read as “the Scheduled Castes and the Scheduled Tribes employees”, this would become even clearer. Therefore, according to the learned Senior Advocate, continued social backwardness of the Scheduled Castes/Scheduled Tribes employees has necessarily to be assessed. While making promotions to higher level posts, it becomes clear that a Scheduled Caste/Scheduled Tribe employee may have cast off his backwardness when he/she reaches a fairly high stage in a service, for example, the post of Deputy Chief Engineer, at which stage, it would be open for the State to say that having regard to the absence of any backwardness of the Scheduled Caste/Scheduled Tribe employee at this stage, it would be expedient not to reserve anything further in posts above this stage.

3 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

Shri Naphade, Shri Gopal Sankaranarayanan and other counsel followed suit and broadly supported the arguments of Shri Dhavan and Shri Dwivedi.

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*⁷. This Court said: (SCR pp. 921-22 : AIR p. 1644, para 23)

“23. ... [I]n reviewing and revising its earlier decision[†], 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

⁷ *Keshav Mills Co. Ltd. v. CIT*, (1965) 2 SCR 908 : AIR 1965 SC 1636

[†] **Ed.:** The reference is to *New Jehangir Vakil Mills Ltd. v. CIT*, (1960) 1 SCR 249 : AIR 1959 SC 1177 and *Petlad Turkey Red Dye Works Co. Ltd. v. CIT*, 1963 Supp (1) SCR 871 : AIR 1963 SC 1484

a 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.”

b 10. We may begin with the nine-Judge Bench in *Indra Sawhney (I)*⁴. In this case, the lead judgment is of B.P. Jeevan Reddy, J., speaking on behalf of himself and three other learned Judges, with Pandian and Sawant, JJ., broadly concurring in the result by their separate judgments. Thommen, Kuldip Singh, and Sahai, JJ., dissented. The bone of contention in this landmark judgment was the Mandal Commission Report of 1980, which was laid before Parliament on two occasions — once in 1982, and again in 1983. However, no action was taken on the basis of this Report until 13-8-1990, when an Office Memorandum stated that after considering the said Report, 27% of the vacancies in civil posts and services under the Government of India shall be reserved for the Socially and Economically Backward Classes. This was followed by an Office Memorandum of 25-9-1991, by which, within the 27% of vacancies, preference was to be given to candidates belonging to the poorer sections of the Socially and Economically Backward Classes; and 10% vacancies were to be reserved for other economically backward sections who were not covered by any of the existing schemes of reservation. The majority judgments upheld the reservation of 27% in favour of Backward Classes, and the further sub-division of more backward within the Backward Classes who were to be given preference, but struck down the reservation of 10% in favour of other economically backward categories. In arriving at this decision, the judgment of Jeevan Reddy, J., referred to and contrasted Article 16(4) with Article 15(4), and stated that when Article 16(4) refers to a Backward Class of citizens, it refers primarily to social backwardness (see para 774). Scheduled Castes and Scheduled Tribes, not being the subject-matter before the Court, were kept aside as follows: [*Indra Sawhney (I) case*⁴, SCC p. 716, para 781]

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

In dealing with the creamy layer concept insofar as it is applicable to Backward Classes, the last sentence of para 792 also states: (SCC p. 725)

g “792. ... (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).”

h In the summary of the discussion contained in paras 796-797, it is stated, “the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression “backward class of citizens.” Jeevan Reddy, J. then went on to

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

state that in certain posts, of specialities and super-specialities, provisions for reservation would not be advisable (see para 838). Ultimately, the judgment decided that reservation would apply at the stage of initial entry only and would not apply at the stage of promotion. a

11. It is important to note that eight of the nine learned Judges in *Indra Sawhney (1)*⁴ applied the creamy layer principle as a facet of the larger equality principle. In fact, in *Indra Sawhney (2) v. Union of India*⁸ [*Indra Sawhney (2)*⁸], this Court neatly summarised the judgments in *Indra Sawhney (1)*⁴, on the aspect of creamy layer as follows: [*Indra Sawhney (2) case*⁸, SCC pp. 85-88, paras 13-21] b

“13. In *Indra Sawhney (1)*⁴ on the question of exclusion of the “creamy layer” from the Backward Classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the “creamy layer” to be identified and excluded. c

14. The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment⁸ laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an “advanced social level or status”, he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate judgments. d

15. It will be necessary to refer to and summarise briefly the principles laid down in these five separate judgments for that would provide the basis for decision on Points 2 to 5. e

16. While considering the concept of “means-test” or “creamy layer”, which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, in para 791, the Court has noted that counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for the respondents strongly opposed any such distinction and submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criterion once again and sub-divide a backward class into two sub-categories. The Court negated the said contention by holding that exclusion of such (creamy layer) socially advanced members will make the “class” a truly backward class and would more appropriately serve the purpose and object of clause (4). f

17. Jeevan Reddy, J. dealt with the “creamy layer” under Question 3(d) (paras 790, 792, 793 of SCC) and under Question 10 (paras 843, 844). This is what the learned Judge declared: there are sections among the Backward Classes who are *highly advanced, socially and educationally* and they constitute the forward section of that community. These advanced g

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 h

8 (2000) 1 SCC 168 : 2000 SCC (L&S) 1

sections do not belong to the true backward class. They are (para 790) “as forward as any other forward class member”.

- a* ‘If some of the members are far too advanced *socially* (which in the context, necessarily means *economically* and, may also mean *educationally*) the connecting thread between them and the remaining class snaps. They would be misfits in the class.’ (SCC p. 724, para 792).

The learned Judge said: (SCC p. 724, para 792)

- b* ‘792. ... After *excluding* them alone, would the class be a compact class. In fact, such exclusion benefits the *truly* backward.’

- c* A line has to be drawn, said the learned Judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand is not taken away by the other. The basis of exclusion of the “creamy layer” must *not be merely economic, unless* economic advancement is so high that it necessarily means *social* advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a case, his income is a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural landholding. While fixing income as a measure, the
- d* limit is not to be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. There are again some offices in various walks of life — the occupants of which can be treated as socially advanced, *without further inquiry*”, such as IAS and IPS officers or others in All India services. In the case of these persons, their social status in society rises quite high and the person is *no longer* socially disadvantaged. Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or sections abovementioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The
- e* Central Government is, therefore, directed (para 793) to identify and notify the “creamy layer” within four months and after such notification, the “creamy layer” within the backward class shall “cease” to be covered by the reservations under Article 16(4). Jeevan Reddy, J. finally directed (see Question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. Income
- f* or the extent of property-holding of a person is to be taken as a measure of social advancement — and on that basis — the “creamy layer” within a given caste, community or occupational group is to be excluded to arrive at the *true* backward class. There is to be constituted a body which can go into these questions as follows: (SCC p. 757, para 847)
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- h* ‘847. ... We direct that such a body be constituted both at Central level and at the level of the States within four months from today. ...

there should be a periodic revision of these lists to *exclude* those who have ceased to be backward or for inclusion of new classes, as the case may be.’

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The creamy layer [see para 859, sub-para (3)(d)] can be, and must be excluded. Creamy layer has to be excluded and “economic criterion” is to be adopted as an indicium or measure of social advancement [para 860, sub-para (5)]. The socially advanced persons must be excluded [para 861(b)]. That is how Jeevan Reddy, J. summarised the position.

18. Sawant, J. too accepted (p. 553 of SCC) that “at least some individuals and families in the Backward Classes — however small in number — gain sufficient means to develop *capacities to compete* with others in every field. That is an *undeniable fact*”. (emphasis in original) Social advancement is to be judged by the “capacity to compete” with forward castes, achieved by the members or sections of the Backward Classes. Legally, therefore, these persons or sections who reached that level are not entitled any longer to be called as part of the backward class, whatever their original birthmark. Taking out these “forwards” from the “backwards” is “obligatory” as these persons have crossed the Rubicon (pp. 553-54). On the crucial question as to what is meant by “capacity to compete”, the learned Judge explained (para 522) that if a person moves from Class IV service to Class III, that is no indication that he has reached such a stage of social advancement but if the person has successfully competed for “higher level posts” or *at least* “near those levels”, he has reached such a state.

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19. Thommen, J. (paras 287, 295, 296, 323) observed that if some members in a backward class acquire the necessary *financial* strength to raise themselves, the Constitution does not extend to them the protection of reservation. The creamy layer has to be “weeded out” and excluded, if it has attained a “certain predetermined economic level”.

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20. Kuldip Singh, J. (para 385) referred to the “*affluent*” section of the backward class. Comparatively “such (sic rich) persons in the backward class — though they may not have acquired a higher level of education — are able to move in the society without being discriminated socially”. These persons practise discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not “chew up” the benefits meant for the true backward class. “Economic ceiling” is to be fixed to cut off these persons from the benefits of reservation. In the result, the “means-test” is imperative to skim off the “affluent” sections of Backward Classes.

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21. Sahai, J. (para 629) observed that the individuals among the collectivity or the group who may have achieved a “*social status*” or “*economic affluence*”, are disentitled to claim reservation. Candidates who apply for selection must be made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the

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a State. Income apart, provision is to be made that wards of those Backward Classes of persons who have achieved a particular *status* in society, be it *political* or *economic* or if their parents are in *higher services* then such individuals must be precluded from availing the benefits of reservation. Exclusion of “creamy layer” achieves a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.” (emphasis in original)

b 12. In para 27 of the said judgment, the three-Judge Bench of this Court clearly held that the creamy layer principle sounds in Articles 14 and 16(1) as follows: [*Indra Sawhney* (2) *case*⁸, SCC p. 190, para 27]

“(i) *Equals and unequals, twin aspects*

c 27. As the “creamy layer” in the backward class is to be treated “on a par” with the forward classes and is not entitled to benefits of reservation, it is obvious that if the “creamy layer” is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as *equals* (forwards and creamy layer of Backward Classes) *cannot be treated unequally*. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since *unequals* (the creamy layer) *cannot be treated as equals*, that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (SCC p. 553, para 520)

e ‘[T]o continue to confer upon such advanced sections ... special benefits, would amount to treating *equals unequally*.... Secondly, to rank them with the rest of the Backward Classes would ... amount to treating the *unequals equally*.’

f Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle.” (emphasis in original)

g 13. The next judgment with which we are directly concerned is the judgment in *Chinnaiah*⁶. In this case, the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, was challenged, and dismissed⁹ by a five-Judge Bench of the Andhra Pradesh High Court by a majority of 4:1. The 15% reservation that was made in favour of the Scheduled Castes was further apportioned among four groups in varying percentages — Group A to the extent of 1%; Group B to the extent of 7%; Group C to the extent of 6%; and Group D to the extent of 1%. In the lead judgment on behalf of the Constitution Bench, Hegde, J. set out three questions for consideration as follows: (*Chinnaiah case*⁶, SCC p. 409, para 12)

h ⁸ *Indra Sawhney* (2) v. *Union of India*, (2000) 1 SCC 168 : 2000 SCC (L&S) 1

⁶ *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

⁹ *Mallela Venkata Rao v. State of A.P.*, 2000 SCC OnLine AP 613 : (2000) 3 APLJ 320

“12. From the pleadings on record and arguments addressed before us three questions arise for our consideration:

(1) Whether the impugned Act is violative of Article 341(2) of the Constitution of India? a

(2) Whether the impugned enactment is constitutionally invalid for lack of legislative competence?

(3) Whether the impugned enactment creates subclassification or micro-classification of Scheduled Castes so as to violate Article 14 of the Constitution of India?” b

14. Article 341 was then referred to, in which the Presidential List of Scheduled Castes is to be notified. Any inclusion or exclusion from the said list thereafter can only be done by Parliament under Article 341(2) (see para 13). The Court then rejected the splitting up of Scheduled Castes on the basis of backwardness into groups, and distinguished *Indra Sawhney (I)*⁴ (see paras 19 to 21). It was then held: (*Chinnaiah case*⁶, SCC p. 412, para 26) c

“26. Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in *N.M. Thomas*¹⁰ it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.” d

15. *Indra Sawhney (I)*⁴ was then referred to and distinguished as follows: (*Chinnaiah case*⁶, SCC p. 417, paras 38-40)

“38. On behalf of the respondents, it was pointed out that in *Indra Sawhney case*⁴ the Court had permitted subclassification of Other Backward Communities, as backward and more backward based on their comparative underdevelopment, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in *Indra Sawhney case*⁴ for subclassification of Other Backward Classes can be applied as a precedent law for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments. e

39. Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the f

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 h

6 *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

10 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

a State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class.

b 40. Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when the claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered."

Finally, the Court held: (SCC p. 418, paras 43-44)

c "43. The very fact that the members of the Scheduled Castes are most backward amongst the Backward Classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that *d* exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained.

e 44. For the reasons stated above, we are of the considered opinion that the impugned legislation apart from being beyond the legislative competence of the State is also violative of Article 14 of the Constitution and hence is liable to be declared as ultra vires the Constitution."

f 16. In a separate concurring judgment, Sinha, J., after referring to *Indra Sawhney (1)*⁴ and the creamy layer concept in para 96, went on to state: (*Chinnaiah case*⁶, SCC p. 430)

"96. But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

g It was then concluded: (SCC p. 434, para 111)

"111. The Constitution provides for declaration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution. The object of the said provisions is to provide for grant of protection to the backward class of citizens who

h 4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1
6 *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 729

are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and educational backwardness wherefrom they suffer. The President of India alone in terms of Article 341(1) of the Constitution is authorised to issue an appropriate notification therefor. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive.”

Thus, the Court struck down the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000.

17. The judgment in *Chinnaiah*⁶ has been referred by a three-Judge Bench to a larger Bench by an order dated 20-8-2014. This is because, according to the three-Judge Bench, *Chinnaiah*⁶ is contrary to Article 338 of the Constitution of India and *Indra Sawhney (I)*⁴. Since the correctness of *Chinnaiah*⁶ does not arise before us, we need say no more about this reference which will be decided on its own merits.

18. Close on the heels of this judgment is the judgment in *Nagaraj*³. In this case, the addition of Articles 16(4-A) and 16(4-B) were under challenge on the ground that they violated the basic structure of the Constitution. After referring to the arguments of the counsel for both sides, the Court held that equality is the essence of democracy and accordingly, part of the basic structure of the Constitution (see SCC p. 246, para 33). The working test in the matter of application of this doctrine was then applied, referring to Chandrachud, J.’s judgment in *Indira Nehru Gandhi v. Raj Narain*¹¹ (see paras 37 and 38). After dealing with reservation and its extent, the Court then went into the nitty-gritty of the constitutional amendments and held as follows: (*Nagaraj case*³, SCC pp. 268-270, paras 101-02 & 104)

“Whether the impugned constitutional amendments violate the principle of basic structure?”

101. The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is — whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the “width test” and the test of “identity”. As stated hereinabove, the concept of the “catch-up” rule and “consequential seniority” are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16

6 *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

3 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

11 1975 Supp SCC 1

a of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, “backwardness” and “inadequacy of representation”. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word “amendment” connotes change. The question is—whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in *Virpal Singh*¹², *Ajit Singh (1)*¹³, *Ajit Singh (2)*¹⁴ and *Indra Sawhney*⁴ were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the “right”. The content is provided by the judgments of the Supreme Court. 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. Applying the “width test”, we do not find obliteration of any of the constitutional limitations. Applying the test of “identity”, we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the

h 12 *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1

13 *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540

14 *Ajit Singh (2) v. State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

impugned constitutional amendments. Equality has two facets — “formal equality” and “proportional equality”. Proportional equality is equality “in fact” whereas formal equality is equality “in law”. Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

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104. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those Articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).”

19. The Court then concluded as follows: (*Nagaraj case*³, SCC pp. 278-79, paras 121-24)

“121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the subclassification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*⁴, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*⁵.

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

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

⁵ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548

requirements without which the structure of equality of opportunity in Article 16 would collapse.

- a* 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.
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- c*

- d* 124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.”

- e* 20. We now come to the Constitution Bench judgment in *Ashoka Kumar Thakur v. Union of India*¹⁵. In this case, Article 15(5) inserted by the Constitution (Ninety-third Amendment) Act, 2005, was under challenge. Balakrishnan, C.J., after referring to various judgments of this Court dealing with reservation, specifically held that the “creamy layer” principle is inapplicable to Scheduled Castes and Scheduled Tribes as it is merely a principle of identification of the backward class and not applied as a principle of equality (see paras 177 to 186). Pasayat, J., speaking for himself and Thakker, J., stated that the focus in the present case was not on Scheduled Castes and Scheduled Tribes but on Other Backward Classes (see para 293). Bhandari, J., in paras 395 and 633 stated as follows: (SCC pp. 635 & 707)
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- g* “395. In *Sawhney (1)*⁴ the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.

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¹⁵ (2008) 6 SCC 1 : 3 SCEC 35

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

633. In *Indra Sawhney (I)*⁴, creamy layer exclusion was only in regard to OBC. Reddy, J., speaking for the majority at SCC p. 725, para 792, stated that

“[t]his discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes”.

Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.”

21. Raveendran, J., in a separate judgment, while referring to *Nagaraj*³, held as follows: (*Ashoka Kumar case*¹⁵, SCC pp. 716-17, para 665)

“665. The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in *Ashoka Kumar Thakur v. State of Bihar*¹⁶, *Indira Sawhney v. Union of India*¹⁷ and *M. Nagaraj*³. When *Indra Sawhney*⁴ has held that creamy layer should be excluded for purposes of Article 16(4), dealing with “backward class” which is much wider than “socially and educationally backward class” occurring in Articles 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore, when a caste is identified as a socially and educationally backward caste, it becomes a “socially and educationally backward class” only when it sheds its creamy layer.”

The Court ultimately upheld the Constitution (Ninety-third Amendment) Act, 2005, subject to the creamy layer test to be applied to Other Backward Classes. Bhandari, J., held that the amendment was not constitutionally valid so far as “private unaided” educational institutions were concerned.

22. At this stage, it is necessary to deal with the argument that *Nagaraj*³ needs to be revisited as it conflicts with *Chinnaiah*⁶. It will be noticed that though *Nagaraj*³ is a later judgment, it does not refer to *Chinnaiah*⁶ at all. Much was made of this by some of the learned counsel appearing on behalf of the appellants. It is important to notice that the majority judgment of Hegde, J. does not refer to the creamy layer principle at all. *Chinnaiah*⁶ judgment in essence held that the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, which it considered, could not further sub-divide Scheduled Castes into four categories, as that would be violative of Article 341(2) of the Constitution of India for the simple reason that it is Parliament alone that can make any change in the Presidential List and not the State

4 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

3 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

15 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : 3 SCEC 35

16 (1995) 5 SCC 403 : 1995 SCC (L&S) 1248

17 (1996) 6 SCC 506 : 1996 SCC (L&S) 1477

6 *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

- Legislatures. That this is the true ratio of the judgment is clear from a reading of the paragraphs that have been set out hereinabove. This being the case, as
- a *Chinnaiah*⁶ does not in any manner deal with any of the aspects on which the constitutional amendments in *Nagaraj case*³ were upheld, we are of the view that it was not necessary for *Nagaraj*³ to refer to *Chinnaiah*⁶ at all. However, it was further contended that apart from this ratio, *Chinnaiah*⁶ also decided that the subclassification of Scheduled Castes, created by the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, also
- b violated Article 14 of the Constitution of India. This was stated by *Chinnaiah*⁶ to be violative of Article 14 as the same would amount to tinkering with the List, which, as was held, could be done only by Parliament and not by the State Legislatures. In our opinion, the true *ratio* of the judgment flows from a construction of Article 341. It is true that the Andhra Pradesh Act in question
- c dealt with a completely different problem, apart from dealing with a State statute and not a constitutional amendment, as was dealt with in *Nagaraj*³.

23. This brings us to whether the judgment in *Nagaraj*³ needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the
- d class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to "class" is to the Scheduled Castes and the Scheduled Tribes, and their inadequacy of representation in public employment. It is clear, therefore, that *Nagaraj*³ has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly
- e contrary to the nine-Judge Bench in *Indra Sawhney (1)*⁴. Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held:

"[t]he test or requirement of social and educational backwardness cannot be applied to the Scheduled Castes and the Scheduled Tribes, who indubitably fall within the expression "backward class of citizens"." (See SCC p. 727, paras 796 to 797.)

- f Equally, Dr Justice Thommen, in his conclusion at para 323(4), had held as follows: (SCC pp. 461-62)

"323. Summary

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- g (4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as Backward Classes. To be accepted as Backward Classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article

h ⁶ *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied.”

24. In fact, *Chinnaiah*⁶ has referred to the Scheduled Castes as being the most backward among the Backward Classes (see para 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it is clear that when *Nagaraj*³ requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to *Indra Sawhney (1)*⁴ and would have to be declared to be bad on this ground.

25. However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The genesis of this principle is to be found in *State of Kerala v. N.M. Thomas*¹⁰. This case was concerned with a test-relaxation rule in promotions from lower division clerks to upper division clerks. By a 5:2 majority judgment, the said rule was upheld as a rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to Backward Classes. In para 124, Krishna Iyer, J. opined: (SCC p. 363)

“124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of “reservation”, it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the “backward” caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the “weaker section” label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher “backward” groups with a vested interest

⁶ *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

¹⁰ (1976) 2 SCC 310 : 1976 SCC (L&S) 227

a in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the “underdog” categories is essential lest a once deserving “reservation” should be degraded into “reverse discrimination”. Innovations in administrative strategy to help the really untouched, *most backward* classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed

b a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a “noble romance” [As Huxley called it in “Administrative Nihilism” (Methods and Results, Vol. 4 of Collected Essays).], the bonanza going to the “higher” Harijans. I mention this in the present case because lower division clerks are likely to be

c drawn from the lowest levels of Harijan humanity and promotion prospects being accelerated by withdrawing, for a time, “test” qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.” (emphasis in original)

d **26.** The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with

e the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be

f within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

g **27.** We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that constitutional courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept

h out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional

law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in *Ashoka Kumar Thakur*¹⁵ that the creamy layer principle is merely a principle of identification and not a principle of equality.

28. Therefore, when *Nagaraj*³ applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer *Nagaraj*³ to a seven-Judge Bench. We may also add at this juncture that *Nagaraj*³ is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

28.1. *Anil Chandra v. Radha Krishna Gaur*¹⁸ (two-Judge Bench) (see paras 17 and 18).

28.2. *Suraj Bhan Meena v. State of Rajasthan*¹⁹ (two-Judge Bench) (see paras 10, 50, and 67).

28.3. *U.P. Power Corpn. Ltd. v. Rajesh Kumar*²⁰ (two-Judge Bench) [see paras 61, 81(ix), and 86].

28.4. *S. Panneer Selvam v. State of T.N.*²¹ (two-Judge Bench) (see paras 18, 19, and 36).

28.5. *Central Bank of India v. SC/ST Employees Welfare Assn.*²² (two-Judge Bench) (see paras 9 and 26).

28.6. *Suresh Chand Gautam v. State of U.P.*²³ (two-Judge Bench) (see paras 2 and 45).

28.7. *B.K. Pavitra v. Union of India*²⁴ (two-Judge Bench) (see paras 17 to 22).

29. Further, *Nagaraj*³ has been approved by larger Benches of this Court in:

¹⁵ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 : 3 SCEC 35

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

¹⁸ (2009) 9 SCC 454 : (2009) 2 SCC (L&S) 683

¹⁹ (2011) 1 SCC 467 : (2011) 1 SCC (L&S) 1

²⁰ (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289

²¹ (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76

²² (2015) 12 SCC 308 : (2016) 1 SCC (L&S) 355

²³ (2016) 11 SCC 113 : (2016) 2 SCC (L&S) 291

²⁴ (2017) 4 SCC 620 : (2017) 2 SCC (L&S) 128

29.1. *General Categories Welfare Federation v. Union of India*²⁵ (three-Judge Bench) (see paras 2 and 3).

a **29.2.** *Rohtas Bhankhar v. Union of India*²⁶ (five-Judge Bench) (see paras 6 and 7).

b **30.** In fact, the tests laid down in *Nagaraj*³ for judging whether a constitutional amendment violates basic structure have been expressly approved by a nine-Judge Bench of this Court in *I.R. Coelho v. State of T.N.*²⁷ (see paras 61, 105, and 142). The entirety of the decision, far from being clearly erroneous, correctly applies the basic structure doctrine to uphold constitutional amendments on certain conditions which are based upon the equality principle as being part of basic structure. Thus, we may make it clear that quantifiable data shall be collected by the State, on the parameters as stipulated in *Nagaraj*³ on the inadequacy of representation, which can be tested by the courts. We may further add that the data would be relatable to the cadre concerned.

c **31.** Dr Dhavan referred to the judgment in *U.P. Power Corpn. Ltd.*²⁰, and placed before us the Constitution (One Hundred Seventeenth Amendment) Bill, 2012. This Bill was passed by the Rajya Sabha on 17-12-2012 but failed to get sufficient number of votes in the Lok Sabha and, therefore, could not become an Act. This Bill was tabled close upon the judgment in *U.P. Power Corpn. Ltd.*²⁰, and would have substituted Article 16(4-A) as follows:

e **“16. (4-A)** Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under Article 341 and Article 342, respectively, shall be deemed to be backward and nothing in this Article shall prevent the State from making any provision for reservation in matters of promotions, 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 to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.”

The Statement of Objects and Reasons for the said Bill read as follows:

f “The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of constitutional amendments in *M. Nagaraj v. Union of India*³, observed that 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 in promotion.

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²⁵ (2012) 7 SCC 40 : (2012) 2 SCC (L&S) 328

²⁶ (2014) 8 SCC 872 : (2014) 3 SCC (L&S) 122

h ³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

²⁷ (2007) 2 SCC 1

²⁰ *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289

Relying on the judgment of the Supreme Court in *M. Nagaraj case*³, the High Court of Rajasthan²⁸ and the High Court of Allahabad²⁹ have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld^{19, 20} the decisions of these High Courts striking down provisions for reservation in respective States.

It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise.”

32. It will be seen that this Bill contains two things that are different from Article 16(4-A) as already enacted. First and foremost, it clarifies that the Scheduled Castes and the Scheduled Tribes that are notified under Articles 341 and 342 shall be deemed to be backward, which makes it clear that no quantifiable data is necessary to determine backwardness. Secondly, instead of leaving it to the States to determine on a case-to-case basis whether the Scheduled Castes and the Scheduled Tribes are adequately represented in any class or classes of posts in the services under the State, the substituted provision does not leave this to the discretion of the State, but specifies that it shall be to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State. This amendment was necessitated because a Division Bench of this Court in *U.P. Power Corpn. Ltd.*²⁰ had struck down Section 3(7) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Rule 8-A of the U.P. Government Servants Seniority Rules, 1991, which read as under:

“3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.—(1)-(6) * * *

(7) If, on the date of commencement of this Act, reservation was in force under government orders for appointment to posts to be filled by promotion, such government orders shall continue to be applicable till they are modified or revoked.”

“8-A. Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes.—Notwithstanding anything contained in Rules 6, 7 or 8 of these Rules, a person belonging to the Scheduled Castes or Scheduled Tribes shall, on his promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also.”

33. This Court considered *Nagaraj*³ in detail and in para 81, culled out various principles which *Nagaraj*³ had laid down. We are concerned here with

²⁸ *State of Rajasthan v. Bajrang Lal Sharma*, 2010 SCC OnLine Raj 4735 : (2011) 3 Raj LW 2405

²⁹ *Prem Kumar Singh v. State of U.P.*, 2011 SCC OnLine All 17 : (2011) 3 All LJ 343

¹⁹ *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467 : (2011) 1 SCC (L&S) 1

²⁰ *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

principles (ix) and (x) in particular, which read as under: (*U.P. Power Corpn. Ltd.*²⁰, SCC p. 37)

- a “(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.
- b (x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.”
- c **34.** We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in *Indra Sawhney (1)*⁴. So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of
- d Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:
- e **“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.”
- f This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas “Backward Classes” in Article 16(4) is equivalent to the “weaker sections of the people” in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that
- g the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi’s argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore,

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²⁰ *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Articles 16(4-A) and 16(4-B) is to do away with the nine-Judge Bench in *Indra Sawhney (I)*⁴ when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in *Nagaraj*³. This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of *Nagaraj*³ be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of "creamy layer" which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.

35. The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that *Nagaraj*³ ought to have stated this, but has said nothing on this aspect. According to us, *Nagaraj*³ has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in *Indra Sawhney (I)*⁴, there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question. For this purpose, the contrast of Articles 16(4-A) and 16(4-B) with Article 330 of the Constitution is important. Article 330 reads as follows:

"330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.—(1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes;

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

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(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and

a (c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State or Union Territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union Territory in the House of the People as the population of the Scheduled Castes in the State or Union Territory or of the Scheduled Tribes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union Territory.

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(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.

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Explanation.—In this Article and in Article 332, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published:

d Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.”

e It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important, and we decline the invitation of the learned Attorney General to say any more in this behalf.

f **36.** Thus, we conclude that the judgment in *Nagaraj*³ does not need to be referred to a seven-Judge Bench. However, the conclusion in *Nagaraj*³ that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the nine-Judge Bench in *Indra Sawhney (I)*⁴ is held to be invalid to this extent.

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³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

⁴ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1