

**NATIONAL LAW SCHOOL OF INDIA
UNIVERSITY, BANGALORE**

**DISSERTATION SUBMITTED IN THE PARTIAL FULFILLMENT
OF ONE YEAR LL.M. DEGREE PROGRAMME
2020-2021**

DISSERTATION ASSIGNMENT ON
“THE CASTE-STRUGGLE WITHIN SCHEDULED CASTE AND SCHEDULED
TRIBE: THE NEED FOR SUB-CLASSIFICATION AND CREAMY LAYER”

UNDER THE GUIDANCE OF
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CERTIFICATE

This is to certify that this Dissertation “**The Caste-Struggle within Scheduled caste and Scheduled Tribe: The Need for Sub-classification and Creamy Layer**” submitted to National Law School of India University, Bangalore by Anupam Shivam (Id No. LLM/924/2020) for the degree of Masters of Law (LL.M.) is certified record of the bonafide and original work done by the candidate carried out under my supervision and guidance.

I considered this thesis to have met the standard and requirements of the rules and regulation concerning the nature of the degree. This dissertation or any part of the same has not been submitted elsewhere for any other degree/diploma in any University

Date: 01/09/2021

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DECLARATION

The undersigned solemnly declare that this dissertation entitled “**The Caste-Struggle within Scheduled Castes and Scheduled Tribes : The Need for Sub-classification and Creamy Layer**” is the outcome of original work done by myself under the supervision of my guide **Prof. (Dr.) Sudhir Krishnaswamy** at National Law School India University for the degree of LL. M. I also declare that this is my own original work except such help from such authorities as have referred at appropriate places for which necessary acknowledgements have been made. I also declare that this work has not been submitted either in part or in whole in any other University for any degree or diploma.

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Human Rights Law

ACKNOWLEDGMENT

I express my earnest gratitude and regard to **Prof. (Dr.) Sudhir Krishnaswamy**, National Law School India University, Bangalore for helping me completing the work. He gave an opportunity to work on this dissertation and with his guidance, knowledge and patience this work was possible. He encouraged me at every stage keeping my motivation high. I also thank NLSIU, Bangalore for providing e-library which we can access from the comfort of our home. I would also like to thank my family and friends for constantly keeping an eye on my working hours and helping me.

With Utmost Gratitude

Anupam Shivam

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LIST OF ABBREVIATIONS

S. No.	Abbreviation	Full Form
1.	SCs	Scheduled caste
2.	STs	Scheduled Tribe
3.	EPW	Economic and Political weekly
4.	EWS	Economic weaker Sections
5.	Art	Article
6.	OBCs	Other Backward Classes
7.	Vol	Volume
8.	A.P.	Andhra Pradesh
9.	SCC	Supreme Court Cases
10.	SCR	Supreme Court Reporters
11.	IJSRP	International Journal of Scientific and Research Publications
12.	CALQ	Constitutional and Administrative Law Quarterly
13.	HC	High Court
14.	SC	Supreme Court
15.	SEBCs	Socially and Educationally Backward Classes
16.	NCBC	National Commission for Backward Classes

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1. INTRODUCTION

The issue of the “sub-classification” and “creamy layer” among the existing scholarship on affirmative action in India has been always much debated.¹ This issue is not only confined to hypothetical exercise but relevant to society as a whole. The Indian Judiciary played an important role on balancing the affirmative action in conformity with the equality principles. Indian Judiciary played two fold roles while dealing with the affirmative action under Indian context- first, to adjudicate upon the matter comes before the Court and second, to bridge the gap between textual interpretation and social reality.² In pursuance to this, in the recent case of *State of Punjab v Davinder Singh*,³ the Court notably changed its earlier shift from the *E.V Chinnaiah*⁴ with respect to “Sub-classification”. Addressing the needs of changing society, the Court substantially disagreed with the 2004 judgment of the *E.V Chinnaiah* and referred the issue of “sub-classification” to the seven Judge Benches.

The *E.V Chinnaiah* decision based on textual interpretation of Article 341 and Article 342 of the Constitution is devoid of the social reality and ignoring the empirical data questioning the homogeneity of the Scheduled Castes and Scheduled Tribes notified under Article 341 and 342 of the Constitution.

In this paper, the research revolves around the questions of applicability of sub – classification and creamy layer with respect to SCs/STs. Notwithstanding the presence of many empirical data and statistical report by the various commission and committee constituted by the government which shows the inequalities within the Scheduled and Scheduled Tribes notified under Articles 341 and 342 of the Constitution of India, the ghost of *E.V Chinnaiah* is forbidding the state from “sub-classifying” the list in consonance with equality principle under Article 14. There is need to rationalize the

¹ Anup Surendranath, ‘Judicial Discourse on India's Affirmative Action Policies : The Challenge and Potential of Sub-Classification’(Ph.D. thesis, Balliol College, University of Oxford 2013)

² Pratik Kumar, ‘State of Punjab v. Davinder Singh: A Step Towards Transfiguration of Sub-Classification of Scheduled caste’ (2021) 5(2) CALQ 107

³ *State of Punjab v Davinder Singh* (2020) 8 SCC 1

⁴ *E.V. Chinnaiah v State of A.P* (2005) 1 SCC 394

reservation policies and *E.V Chinnaiah* decision which puts blanket ban on sub-classification of Scheduled Castes and Scheduled Tribes.

The *M. Nagaraj* which observed that “creamy layer” is a facet of equality and later affirmed by *Jarnail Singh* poses potential question that whether without exclusion of creamy layer within Scheduled Castes and Scheduled Tribes , the benefits of the reservation is reaching to the deserving population of the society? The *Davinder Singh* also pointed out that the “exclusion of the creamy layer” is necessary for the benefits of reservation to percolate down to lower strata of society.

The author argues that the Sub-classification of the Scheduled Castes and Scheduled Tribes into “backward” and “more backward” class on the reasonable basis is not prohibited by the Constitution. In fact, Article 14 advocates “substantial equality” rather than “formal equality”. Equality principle does not mere envisaged negative action on the behalf of State rather it advocates affirmative action on the behalf of State to advances the rights of “backward class” of people.⁵

The author has argued that the determination of backwardness under Articles 15 and 16 as “caste” being the criteria without applying the creamy layer is violative of “equality among equal principle”. The Scheduled Castes and Scheduled Tribes notified under Article 341 doesn’t consist as a homogenous class without excluding the creamy layer. *M. Nagaraj* and later affirmed by the *Jarnail Singh*, the requirement of “creamy layer” is a implicit requirement under Article 15 and Article 16 before considering the claims of members for granting them the benefits of reservation.⁶ The *M. Nagaraj* upheld the Constitutional validity of 77th Constitutional Amendment Act, after observing that compelling reasons must be fulfilled before granting the benefits of reservation, that are, “ceiling limits of 50 %, creamy layer, inadequacy of representation and overall administrative efficiency” , without which the equality principle will collapsed.⁷

⁵ CONSTITUENT ASSEMBLY OF INDIA DEBATES, vol. 10 (October 17, 1949)

⁶ *Jarnail Singh v Lacchmi Narain Gupta* (2018) 10 SCC 396

⁷ *M. Nagaraj v Union of India* (2006) SCC 212

After the enactment of 102nd Constitutional Amendment, all three categories, that is, “Scheduled Castes, Scheduled Tribes and Other Backward Caste” has become “*pari-materia*”.⁸ The *Maratha Judgment* while upholding the validity of 102nd constitutional Amendment affirms that all three classes under the scheme of Constitution has become *pari-materia*.⁹ Therefore, when *Indra Swahney* has applied the concept of “creamy layer” and “sub-classification” to the Other Backward caste, then it becomes mandatory to apply these both concepts to the Scheduled Castes and Scheduled Tribes also.

1.1. STATEMENT OF PROBLEM

The Constitutional makers have incorporated the provisions of reservation in favor of certain communities who have been historically discriminated and availed less opportunity for proper representation in the administration. After Independence, the government has effectuated reservation policies aiming to provide “social justice” to those backward classes and from time to time Judiciary kept vigilance over those policies to remain it intact in true spirit of “social-justice” and devised many mechanisms to check that reservation shall pour down to the needy ones. Many requirements were suggested by the Judiciary from time to time to rationalize the reservation policies such as “exclusion of creamy layer”, classification of backward class into “backward and more backward”, and robust mechanism for identification of backwardness. In the recent decision of *Davinder Singh*, the court has referred the *E.V Chinnaiah* decision to larger Bench after noticing that *E.V Chinnaiah* which puts blanket ban on “sub-classification” and “creamy layer” proved a hurdle for the rationalizing of reservation policies with respect to SCs & STs. Even after continuous application of reservation with respect to SCs & STs for more than 75 years of Independence, the condition of the SCs & STs has become from bad to worse. The benefit of reservation is consumed by the “advanced” within the SCs & STs, thus resulting in heterogeneity within that class. As a whole, the class still remains backward but the difference within the class is increasing day by day. Those who are defending that existing reservation policies and arguing that reservations are devised not for “socio-economic benefits” but based on the identity of the person

⁸ *Davinder Singh* (n 3)

⁹ *Jaishree Laxmanarao Patil v the Chief Minister Maharashtra* 2021 SCC OnLine SC 362

belonging to “backward class” and for adequate representation of that class in the government services, ignores the fact that all castes within that class has not faced the same level of discrimination and oppression. They are using the numeric of “backwardness” as a whole of the Class to defend their easy way out of representation in services in the form of reservation. There is need to rationalize reservation policies with respect to Scheduled Castes and Scheduled Tribes by excluding the creamy layer and “inner-classification” so that the benefits of reservation could percolate down to the needy one within that class.

1.2. AIMS AND OBJECTIVES

The aim of the present research is to analyze the “inequalities” within the Scheduled Castes and Scheduled Tribes that is hindering the effectual implementation of the reservation as the benefits of the reservation are “un-reservedly” consumed by the advanced members of that class, thereof preventing the growth of the “backward class” within Scheduled Castes and Scheduled Tribes.

The objectives of the present research are following:

1. To study the scheme of reservation for SCs & STs under the Constitution for the purpose of determination of backwardness within the permissible limits of Articles 14, 15 & 16 of the Constitution.
2. To argue and advocate for the “sub-classification” and application of the “creamy layer” principle to the SCs & STs for percolating down the benefits of reservations to the real deserving under the Constitution.
3. To analyze landmark judicial precedents to determine the extent upto which sub-classification and principles of creamy layer could be made applicable to SCs & STs for the purpose of reservation under the Constitution.
4. To analyze the impact of the Constitution (One hundred and Second Amendment) Act, 2018 on the scheme of reservation of SCs & STs under the Constitution.

1.3. HYPOTHESIS

The present scheme of reservation with respect to SCs & STs without “sub-classification” and exclusion of creamy layer is preventing the benefits of reservation to percolate down to deserving one within the groups.

1.4. RESEARCH QUESTIONS

1. Whether the determination of Backwardness under Articles 15 and 16 in relation to SCs & STs without applying the principles of “creamy layer” test is violative of Article 14 of the Constitution?
2. Whether the Sub-classification and application of creamy Layer among SCs & STs is permissible within the Constitution?
3. Whether 102nd Constitutional amendment obligates the application of “sub-classification” and exclusion of “creamy layer” with respect to SCs & STs?
4. Whether the “Sub-classification” of the Scheduled Castes and Scheduled Tribes on reasonable grounds is necessary according to the principle of proportional equality under Article 14?

1.5. RESEARCH METHODOLOGY

The methodology adopted for the present legal research is combination of descriptive and analytical methods. It also includes doctrinal method of research. The aid of both the primary and secondary sources of data has been taken for the present research. Primary sources such as Constitution, statutes, Parliamentary debates, reports of various committees and commissions, judgments etc have been used for the purpose of this legal research. Books, articles, online and offline journals, online data base such as Jstor, SCC Online, Manupatra have been used as secondary sources.

1.6. MODE OF CITATION

The mode citation followed in the present legal research is “Oxford Standard for the Citation of Legal Authorities (OSCOLA)”.

1.7. SCOPE AND LIMITATIONS OF THE STUDY

This research study is limited to the study of reservation with respect to Scheduled Castes and Scheduled Tribes. This paper focuses on the existing “inequalities” within the Scheduled Castes and Scheduled Tribes thereof, only arguing on the application of concept of “creamy layer” and “sub-classification” with respect to Scheduled Castes and Scheduled Tribe.

1.8. REVIEW OF LITERATURE

1. **Anant Sangal, Whipping up the “Cream” – Indian Supreme Court and its decision in B.K Pavitra –II, Whipping up the ‘cream’? (2020).** In this paper, the author has argued that in the case of *M. Nagaraj*, which first introduces the concept of creamy layer must have distinguished itself from the earlier Constitutional Bench decision which held that “sub-classification” of the Scheduled Castes and Scheduled Tribes is not permissible as both the decision have dealt with the issue of “sub-classification”. Justice Chandrachud, after relying on the *Indra Swahney* observed in *B.K Pavitra* that “concept of creamy layer” is a principle of equality emanating from Article 14 and 16(1) of the constitution. According to author, the *Indra Swahney* specifically applied the concept of “creamy layer” with respect to “Other Backward caste” and not with respect to “Scheduled Castes” and “Scheduled Tribes”. Therefore, in that scenario, the best recourse would have been to refer the issue of “applicability of creamy layer” with respect to SC and ST to the 7 Judges Bench.
2. **Surinder S. Jodhka and Avinash Kumar, Internal Classification of Scheduled Castes: The Punjab Story, (2007).** The author has discussed that the Punjab government has recognized the internal classification within the Scheduled list from long back 1975. It has successfully worked for 30 years. The “Gurnam Singh Commission” for Haryana has showed that sub-classification and fixing the quota of representation of the most backward Scheduled Castes i.e “Mazhabi Sikhs and Balimki” among the various Scheduled Castes notified for the Punjab and Haryana

State, proved beneficial for these communities that got fair representation in the various government jobs .

3. **Basavaraju , Reservation under the Constitution of India: Issues and Perspectives (2009)** In this paper, the Author has argued that “Reservation” is covered under “socio-economic programme” for the development of the “backward class” including SCs/STs. The judiciary should be more cautious in interfering with the reservation policies as regular interference gives serious setbacks to the government in implementing these programmes. He further argued that 50 % ceiling limits fixed by the *Indra Swahney* is vogue and need to be modified by the parliament to 65 % limit keeping the considerations the growth of population of backward class since 1963.
4. **Pratik Kumar, State of Punjab v. Davinder Singh: A Step towards the Transfiguration of Sub-classification of Scheduled caste (2021).** In this article, the author has argued that *E.V.Chinnaiah* has erred in putting blanket ban on the “sub-classification” of the Scheduled Castes and Scheduled Tribes. In this judgment, the court has no where considered the socio-logical finding based on empirical data suggesting the “sub-classification” of the SCs & STs. This blanket ban on “sub-classification” refuted the future genuine needs for fixing each “sub-quota” within SCs & STs based on empirical data. The Court while reviewing the empirical data for rationalizing the reservation policies has shown judicial restraints but the decision in *E.V Chinnaiah* did not consider the empirical data presented by the state and gave textual interpretation to Article 341 devoid of social reality and setting a unpersuasive precedent. This decision forbids the state from rationalizing the reservation policies to improve the conditions of marginalized section of population with the SCs & STs. *Davinder Singh* which referred the decision of *E.V Chinnaiah* to the larger bench was a welcome step and effectuated reservation in its true spirit. The Court has observed that *E .V Chinnaiah* was contrary to the binding precedent of *Indra Swahney* and *K.C. Vasant Kumar* that ruled that State has the power to sub-classify between the backward class on reasonable grounds.
5. **Pradipta Chaudhary, the Creamy layer – Political Economy of Reservation (2004).** In this paper, the author discusses that Caste is an “inappropriate measure of

backwardness". He further discusses that "Caste" is not only taken as a criterion for framing the reservation policies but the categories like Other Backward Caste and SCs & STs are treated as a homogenous class which is contrary to Article 14. He presented many reports which show the pertinent inequalities within the Other Backward, SCs & STs categories. The literacy rate for the various OBC ranges from 8 % to 0.14 %. The same heterogeneity with respect to economic condition can also be visible. The major benefits of reservation are being absorbed by the privileged among the lower caste. The caste based reservation helped the State to put the debate of the real economic problems faced by the poor at back stage in the Indian Politics.

6. **Parmanand Singh, Some Reflections on Indian Experience with policy of reservation (1983)** In this paper, the author argued that neither the altering of the criteria for selecting the "backwardness" under Articles 15 and 16 nor augmenting judicial check on reservation policies will help the "poor" among the backward group to secure the social justice. There is need to re-orient reservation policies that are based on some concrete studies that shows all India picture on the impact of reservations. The current scheme of reservation is advancing the social conflict rather minimizing the hostilities between the groups. The continuous increasing of the reservation quota shows that it has become a mere political tool and lack moral strength to rationalize the reservation policies on real terms of Article 14. The implementation of reservation contrary to its intention perpetuating the same inequalities which it sought to avoid. The state should focus more on the long term development goals and once after achieving some success, the State shall gradually withdraw the reservation quota.
7. **Suhas Palshikar, Challenges before the Reservation Discourse (2008)** In this paper, the author argued that the reservation policy must be framed in the manner so that benefits must percolate down to the targeted people as envisaged by the policymaker. To effectuate reservation on rights terms, there is need to have a robust and effective mechanism for identification of backwardness based on some systematic investigation, exclusion of the advanced class within the class by applying creamy layer and periodic revision of the list and division of the class after fixing the fixed quota to each sub group. Within Scheduled Castes, there is serious

disenchantment among that class that only some Sections or Castes takes away all the benefits of reservation. There is one popular demand among the SCs that separate reservation quota shall be fixed to each category but this “sub-classification” requires some introspection like if we divide sub-category within SCS, will it be more useful for the more backward class? , will this classification will break the “larger political unity” within that class? and how to provide benefits of reservation to most needy within that sub-divided group?

8. **P. Ishwara Bhat, The Means and Limits of Rationalizing Reservation: A Critical Comment on E.V. Chinnaiah v. State of Andhra Pradesh (2010)** In this paper, the author argued that the *E.V. Chinnaiah* decision proved as a major hindrance for the benefits of the reservation to percolate down to the deserving one within the Scheduled Castes. *The E.V Chinnaiah* decision has proved as a major hurdle for the application of “creamy layer” and “inner-classification” within that class. The decision of the Court was problematic as putting blanket ban on the state competence to rationalize the reservation policies with respect to Scheduled Castes and Scheduled Tribes notwithstanding the empirical evidence of the “heterogeneity” of the class acted contrary to the judicial precedent of minimal interference with the “socio-economic policies” framed by the State. Further, the author argued that limiting the state powers to rationalize the “social –justice policy” according to the local needs of the region and only stressing on the central power to make any changes in the list is an attack on the federal structure which recognizes the coordination and integrated measure for securing the “socio-economic justice’. The Court denying the exclusion of creamy layer within the Scheduled Castes sets an unpersuasive precedent which does not recognizes the principle that the weakest among the class is marginalized by the competition put by strongest because of their “social and economical advancement”.

2. SUB-CLASSIFICATION WITHIN SCHEDULED CASTE & SCHEDULED TRIBE

The question of “sub-classification” within the backward class has been addressed by the various states from time to time. In *K.C Vasant Kumar* and later affirmed in *Indra Swahney* the Court allowed the “sub-classification” based on reasonable grounds within the backward class after fixing the quota of each category within that class. Before the Judgment of *E.V Chinniah*, the various states were “sub-categorizing” within the Scheduled Castes also based on empirical evidences. The *E.V Chinniah* was an unpersuasive precedent contrary to the rationale taken by the Court in *Indra Swahney* and puts blanket ban on sub-classification within the Scheduled Castes and Scheduled Tribes on the false pretext of “homogeneity” within the Scheduled Castes. In the last section of this chapter, In order to rebut the presumption of the “homogeneity” of the class, relied on the various commission and committee report constituted by the State governments from time to time which suggested the division of class is necessary to percolate the benefits of reservation to the “most backward” within that class, and the sub-classification is necessary on consideration of “proportional equality” under Article 14.

2.1. DIVISION OF CLASS INTO BACKWARD AND MOST BACKWARD CLASS- PERMISSIBLE WITHIN THE CONSTITUTION?

In *M.R Balaji v State of Mysore*, the Court held that the division of class under Backward and Most backward in not justified under Article 15 (4). The impugned order granted 90 % of population the benefits of reservation by treating them as backward. This led into division of all population into two classes as most advanced and the rest, and later divided the rest into two categories as “backward” and “most backward”. The Court held that the provision of Article 15 (4) is incorporated in the Constitution for the advancement for the “really backward class”. This resulted into division of all categories into two classes as “advanced” and “less advanced” class. The scope of Article 15 (4) is

not for the advancement of less advanced class but for the advancement of backward class.¹⁰

State of Kerala v N.M Thomas ruled that there cannot be any objection to “further classification” within the class. They stressed on the proportional equality to allow the sub-classification within the class. Classification within the class into “backward” and “most backward” is said to be reasonable if it treats similarly situated people alike. The classification must be based on reasonable ground. A classification is said to be reasonable if the distinction have rational relation with the object sought to be achieved by the Act. If the distinction within the class has been based on intelligible differential and has reasonable nexus with the object sought to be achieved, then the classification is said to be according to law. Further classification within the class will enable the proportional equality to have a better shape as those who have common characteristic under a class will be treated alike. The members belonging to Scheduled Castes and Scheduled Tribes are not Caste but a class, where sub-classification is permissible under Article 16 (1) for the adequate representation of each member within the class.¹¹

In *KC Vasanth Kumar v State of Karnataka*, the court observed that there is no principle under Articles 15 and 16 which prohibit the division of the backward class into Backward Class and more backward class, if both the classes are far behind the advanced class. This division will be eventually fruitful for the “more backward class” to get the benefits of the reservation or else, the more backward class will walk away with all the seats reserved for the class. The sub-classification is permissible if the people within the classes are behind the advanced group but ahead the “most backward” classes within the group to enable the “most-backward” to reap the benefits of reservation”.¹²

Indra Swahney, while deciding on the Issue that “backward Class” under Article 16 (4) can be divided into “Backward class” and “more backward class”, observed that there is no Constitutional or legal bar for the same.¹³ The court relied on Mandal Commission¹⁴

¹⁰ *M.R. Balaji v State of Mysore* 1963 (1) Supp SCR 439

¹¹ *State of Kerala v N.M. Thomas* (1976) 2 SCC 310

¹² *KC Vasanth Kumar v State of Karnataka* 1971 (1) SCC 38

¹³ *Indra Sawhney & v Union of India* AIR 1993 SC 477

and observed that while calculating the “backwardness” used the various criteria and assigned different, caste, groups different points where those caste, class or groups scored more than 11 are treated as backward class. There were many groups, caste and class who have scored more than 20 points and there were many who scored 11 to 13. If we look into Article 16 (4), it provides that reservation shall be made for the “backward class” of citizen. It itself does not make classification between “other Backward Caste”, “Scheduled Castes” and “Scheduled Tribes”. It is undoubtedly clear that when the State will frame reservation policy, it shall treat “Scheduled Castes” and “Scheduled Tribes” as separate class form “Other Backward Class”. The logic behind this categorization is that they are grouped together then all the benefits provided by the reservation shall be taken away by the “Other Backward Class” and hence this mandates this classification. The same principle applies with the division of “Other Backward Class” into “Backward Class” and “more Backward Class”.¹⁵

If backward class is divided into “More Backward Class” and “Backward Class”, the separate quota is necessary to be fixed so that all members within the Caste can get the benefits of reservation. Without fixing the separate quote for “backward” and “more backward”, the reservation shall be contrary to the equality principle.¹⁶

In *E.V Chinnaiah* the Court held that once a Scheduled Castes has been notified under Article 341 and 342, no further sub-classification can be done to that list, except by the parliament. *Davinder Singh*, doubted the validity of the Judgment and held that *E.V chinnaiah* is contrary to the binding precedent of *K.C Vasanth Kumar*, *N.M Thomas* and *Indra Swahney* as in all cases, It has been accepted that the classes can be further divided into “sub-class” on the reasonable grounds so that the “more-backward” within the class could get benefits of the reservation.¹⁷ *Davinder Singh*, as having equal bench strength as that of *E. V Chinnaiah*, referred this “sub-classification” issue to the seven Judges bench. Therefore, to enable the reservation to benefits all members of the SCs & STs, sub-classification shall be done on the reasonable basis.

¹⁴ Backward Classes Commission, *Investigate Conditions of Socially and Educationally Backward Classes in India* (Commission No 2, 1979)

¹⁵ *Indra Swahney* (n 13)

¹⁶ *Ibid*

¹⁷ *Ibid*

2.2 E. V CHINNAIAH V STATE OF ANDHRA PRADESH: AN UNPERSUASIVE PRECEDENT

In *Indra Sawhney* it was laid down by the majority that “Caste itself may be seen as a class” in the case of SCs.¹⁸ The observation of Justice Jeevan Reddy that “as a matter of fact, neither the several Castes/Groups/Tribes within the Scheduled caste and Scheduled Tribe are similarly situated nor are the Scheduled caste and Scheduled Tribe similarly situated”. On combined reading of both these views gives rise to the presumption that there is presence of sub-classes within the SCs. To rebut this argument *E.V.Chinnaiah* gave the reasoning that the distinctions among the Sub-classes are micro-distinctions, and thus there is homogeneity among these castes.¹⁹ The Court Cautioned against such sub-classification within the SCs in the *E V Chinnaiah*.

Arun Mishra’s observation in *Davinder Singh* that the current arrangement of SCs as a homogeneous class needs modifications²⁰ is very much in line with the new developments. The Decision in *E.V. Chinnaiah* suffers from serious infirmities. But, it seems that the Court in *E. V. Chinnaiah* ignored the changed scenario, where there are several empirical evidences proving presence of substantial difference within SCs.²¹ Along with it the use of reservation as a vote-bank politics and gradual “creation of hierarchy” of certain castes among the SCs²² has resulted in a considerable distinction within the SCs, that cannot be ignored.

It must be noted that for true ascertainment of benefits of reservations to the lower strata within a class, it should be done on the basis of the empirical and sociological evidences collected by various Governmental Commissions. Thus, for the purpose of deciding upon the sub-classification, the court should adopt an approach that is not only textual or abstract but is based on the empirical evidences and the same has been followed for years by the Judiciary in the form of scrutinizing the quantifiable data in favour of the

¹⁸ *Indra Sawhney* (n 13)

¹⁹ *E.V. Chinnaiah* (n 4)

²⁰ *Davinder Singh* (n 3) [64] (Arun Mishra)

²¹ *E.V. Chinnaiah* (n 4)

²² Rajesh Sharma & Sandhya Dixit, ‘Scenario of Sanskritization at Shaktipeeths- A step towards empowerment of Marginalized’, (2014) 4 (10) IJSRP 1

beneficiary of the reservations.²³ But, in *E.V.Chinnaiah* the Apex Court limited its scope by resorting to the textual approach and chose to ignore the empirical evidences for ascertaining the benefits of the reservation within a class.²⁴ In *E.V. Chinnaiah* the Court, did not allowed micro-classifications based on the micro distinctions.²⁵ But, while doing so it ignored the vast statistical data showing that the differences among the SCs are no longer based on micro-distinctions only. This approach of the Court opens the possibility of narrow interpretation.²⁶

In *E.V.Chinnaiah*, the reasonableness of sub-classification of SCs was also examined on the touchstone of equality clause. The observation of the Court that “to overdo Classification is to undo equality”²⁷, arises only when either there is neglect of equality before law guaranteed under Article 14 or from the erroneous application of method of classification. But in *E.V.Chinnaiah* none of them were present. In fact inner compartmentalization created by the state for the deprived within SCs puts them as equal before the law and is also essential. The report of the Ramachandra Raju Commission clearly shows no homogeneity among the castes in the SCs in terms of “economic, educational and social characteristics”, and there was no equality of sharing of benefits of reservation among them.²⁸ The presumption that SCs constitutes a homogeneous class for the purpose of reservation would be oversimplification.

Another infirmity in the decision of *E.V. Chinnaiah* is the adoption of the narrow interpretation by the Apex Court by limiting itself to the textual approach. In *E.V.Chinnaiah* the Court held that “interpretation of the Constitution is subject to textual Consideration”.²⁹ By doing so it missed that, in cases of interpretations of the provisions providing for the affirmative action, the Court should construe such provisions liberally by widening the search to “true meaning, purport and ambit of the provisions under Constitution”³⁰, so that the benefits would reach to the lower strata.³¹ And the same has

²³ Pratik Kumar (n 2)

²⁴ *E.V. Chinnaiah* (n 4)

²⁵ Ibid

²⁶ Pratik Kumar (n 2)

²⁷ *E.V. Chinnaiah* (n 4)

²⁸ *E.V. Chinnaiah* (n 4) (Ramachandra Raju Commission)

²⁹ *E.V.Chinnaiah* (n 4)

³⁰ *GVK Industries Ltd. v CIT* 2011 4 SCC 36

been followed by the Apex Court in *Davinder Singh*, by adopting the liberal construction of Article 341 of the Constitution of India.³² Also, by adopting the textual approach, *E.V.Chinnaiah* practically ended the scope of further discussions on the attempts of reasonable classifications.

E.V.Chinnaiah forbids the state legislature to make any sub-classification within the SCs on the ground that such action of the state would amount to tinkering with the presidential list under Article 341 of the Constitution. This was done by drawing a corollary that only the Parliament has the power to exclude even of a part or group of Castes from the list under Article 341.³³ Here, the Court erred in placing sub-classification and exclusion on similar position. What amounts to disturbance of the list under Article 341 of the Constitution must be interpreted from Constitutional perspective of integrated approach.³⁴ It must be noted that while sub-classifying, the state does not excludes the remaining Castes from the presidential list. The position of the caste remains the same in the list under Article 341 of the Constitution, it is only the distribution of the benefits of reservation that is changed on the basis of the need. Also, there appears no bar on the state to sub-classify castes within SCs without denying reservation to any Castes. The states have discretion under Articles 15(4), 16(4) & 46 of the Constitution to decide the manner in which quotas are fixed to further the cause of social justice and protect the interest of the weaker amongst the weakest. The sub-categorization for the purpose of allocation of quantum of shares on the basis of the facts is distinct from the disturbance of the list under Article 341. Thus, in order to avoid any hostile competition among the SCs it should be permissible for the state to sub-categorize.

In *E.V.Chinnaiah* the Apex Court relied on the political interference that could be caused if the states are allowed to disturb the Presidential list. But, failed to recognize and appreciate the role of the “National Commission for Scheduled caste” under Article 338 that has to be consulted by the states. In spite of the application of mind by the National

³¹ Ibid

³² *Davinder Singh* (n 3)

³³ *E.V. Chinnaiah* (n 4)

³⁴ P Ishwara Bhat, ‘The Means and Limits of Rationalising Reservation: A Critical Comment on E.V. Chinnaiah v. State of Andhra Pradesh’ (2010) 1 CNLU 84

Commission for SCs in case of Andhra Pradesh Reservation Policy, the Court in *Chiannaih* chooses to stick to rigid position.

Another important aspect that was ignored in *E.V.Chinnaiah* by the Apex Court is the federal structure by according the structural superiority of the Union. Under entries 25 & 41 of list III of the Seventh Schedule of the Constitution, the states have the competency to enact laws governing education and services under state. By denying the state to participate in rectification of injustices caused due to unequal competition within SCs that too in matters of “services and education under the state, is to deny them even the meagre position of subordinately useful entities”.³⁵

Therefore, the decision in *E.V.Chinnaiah* diverged from the settled principles of law and has only acted as an impediment towards the weaker sections/castes within the SCs by providing a blanket ban on sub-classification.

2.3 INEQUALITIES AMONG SCs & STs

There are several castes among the Scheduled Castes and Scheduled Tribes such as Jatavs (North) North, Mahars and Meena (West);Namasudras (east) ; Malas (South) had got an early opportunity to the modern education and largely get the benefits of the reservations. They are many such communities such as Balmiki (north); Musahars and Domas (Bihar and Uttar Pradesh); Arunthatiyars (Tamil Nadu) are still lacking in many aspects and has little access to education thereby hindering them from getting the benefits of reservations.³⁶

According to Article 341, the president notifies the SCs & STs list with respect to any Union territory and the State. The difference of growth within the state can also be visible among the various SCs & STs. For example in Bihar, the Mushar communities member still engages in the manual scavenging and in many stigmatized occupation while the

³⁵ Ishwara Bhat (n 34)

³⁶ Yogendar Yadav, ‘India needs SC-ST sub-quota and Supreme Court just removed one key roadblock’ *The Print* (9 September 2020) <<https://theprint.in/opinion/india-needs-sc-st-sub-quota-and-supreme-court-removed-roadblock/498913/>> accessed on 23 July 2021

Dhobi community members are availing the benefits of reservation and present in many high reputation and government services.

Literacy rate of All SCs in Bihar –³⁷

Literacy Rate	All SCs(Bihar)	Dhobi	Pasi	Dausadh	Chamar	Bhuiya	Musahar
Persons	28.5	43.9	25.3	18.5	16.8	6.5	3.9

This graph clearly illustrates that the Dhobi which has literacy rate of 43.9 % is much above placed than the Mushars community which has only 3.9 % literacy only. The subdivision among the class which help the Musahar community to get the benefits of reservation and they can also be adequately placed in various services/job.

Educational level attained by the Majors SCs- Most Backward- Table 1							
Category	Literate without educational Level	Below primary	Primary	Middle	Matric/Secondary/ Higher Secondary /	Technical and non-Technical	Graduate and Above
Balmiki (Haryana)	2.2	37.4	35.8	13.0	10.4	0.2	1.0
Mushar (Bihar)	15.3	44	27.8	6.7	5.5	Nil	0.8
Thori(Rajasthan)	10.4	48.7	26	14.5	11	0.1	0.8
Arunthathiyar (Tamil nadu)	10.5	23.6	34	16.1	13.5	0.5	0.7

Source- Table on Individual Scheduled caste (SC) and Scheduled Tribe (ST), Census 2001

³⁷ ‘Tables on Individual Scheduled caste (SC) and Scheduled Tribe (ST) 2002’ <https://censusindia.gov.in/tables_published/SCST/scst_main.html> accessed on 18 July 2021

Educational level of Majors SC – Forward within the Groups- Table 2							
Category	Literate without educational Level	Below primary	Primary	Middle	Matric/Secondary/Higher Secondary /	Technical and non-Technical	Graduate and Above
Khatik (Uttar Pradesh)	4.3	32.8	28.8	16.7	13.4	0.1	3.9
Mahars (Maharashtra)	2.0	28.2	24.9	17.2	22.1	0.3	5.3
Mala (Andhra Pradesh)	4.2	26.9	32.2	11.3	19.6	1.2	4.6
Jatavs (Uttar Pradesh)	4.3	32.5	26.9	18.8	14.1	0.1	3.3

Source- Table on Individual Scheduled caste (SC) and Scheduled Tribe (ST), Census 2001

These two charts clearly depict the difference of growth among the various SCs & STs communities. In the **Table 1**, you can observe that number of percentage of population acquired education till the graduation is in between 0-1% compared to the **Table 2** (forward groups within SCs), their percentage is more than 3%. You can also observe that the education attained by the Caste in **Table 1** after secondary level is comparatively less than the Forward groups within SCs. Therefore, this Chart shows the difference of educational attainment by the various SCs & STs communities. Their sub-classification will provide the backward communities like Mushars, Balmiki to have a fix percentage of representation in the various posts which will help them to get the benefits of reservation. Not sub classifying within the SCs & STs groups will keep the more backward groups at disadvantageous stage and they won't be able to compete with the already developed caste in the SCs & STs, thereby preventing the benefits of reservation to percolate to the deserving ones.

There were many committees who suggested for the sub –classification of the Scheduled Castes and Scheduled Tribes. Justice M.S Janarthanam Committee³⁸ argued for the special reservation for special reservation for Arunthathiyars in Tamil Nadu³⁹. Arunthathiyars consist of 16 % of the Scheduled Castes but they were not able obtain representation in proportion to their population. In another report of Justice Ramchandra Raju Commission Report,⁴⁰ it was found that the Reli Community is the most backward among the other Scheduled Castes.⁴¹ Further in Justice Usha Mehra Committee report observed that the Scheduled Castes does not consist as a homogenous class of “social, educational and economic” backwardness.⁴²

Different states have also felt the need for the need of sub-division among the Scheduled Castes and Scheduled Tribes so that the benefits of reservation could percolate down to the unrepresented communities who were not able to acquire the benefits of reservation. The Punjab government has enacted Punjab Act in 2006, to sub-divide the quota among the Scheduled Castes. Under the Act, Section 4(5) provides that 50% of seats reserved for Scheduled Castes in direct recruitment shall be reserved for unrepresented community, Balmikis and Mazhabi Sikhs.⁴³ Other communities shall not be preferred for the 50% of seats reserved to Balmikis and Mazhabi, subject to their availability. The one category of SCs in the Punjab consists of “Mazhabhi” and “Balmiki” comprised of 41.9% of total SC population and the other category consists of “ad dharmis, chamars, ravidasis, ramdasi Sikhs comprises of other 41.59% of total population of Scheduled Castes population. The second category of the Scheduled Castes was succeeded in educating their population, politically active and considered as most progressive among the Scheduled Castes while

³⁸ Tamil Nadu Backward Classes Commission (Government Order Ms. No. 30, Backward Classes, Most Backward Classes & Minorities Welfare Department, 14 July 2006)

³⁹ Tamil Nadu Arunthathiyars (Special Reservation of seats in educational Institutions including Private Educational Institutions and of appointments or posts in the services under the State within the Reservation for the Scheduled caste) Act 2009

⁴⁰ *E.V. Chinnaiah* (n 4) (Ramachandra Raju Commission)

⁴¹ Andhra Pradesh Scheduled caste (Rationalization of Reservations) Act 2000

Four groups of all the SCs of A.P. were made under the impugned Andhra Pradesh Act which shared the 15% SC quota between them –Group A – “Reli community consisted of 12 castes received 1%; Group B – Madiga community consisted of 1 Castes received 7%; Group C consisted of Mala community comprised of 25 Castes received 6%; and Group Dconsisted of Adi-Andhra community comprised of 4 Castes received - 1% respectively).

⁴² *Davinder Singh* (n 3) [10] (Justice Usha Mehra Committee Report 2008)

⁴³ The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 2006

the first category were less mobilized, closely related with agriculture as “tied servants” of major landlords and enjoined in traditionally related occupation related to caste, scavenging.⁴⁴ The Punjab and Haryana High Court ordered the termination of the quota granted to “Balmikis and Mazabi Sikhs” after being bind by the principle of stare decision of *E.V Chinnaiah* decision, there was sudden agitation and revolt by the “balmiki and Mazhabi” of Punjab.⁴⁵ From 1975 to 2005, the internal classification among the Scheduled Castes as “depressed” and “more depressed” in Punjab and Haryana was proved to be a successful measures for uplifting the “most depressed” among the Scheduled Castes and Scheduled Tribes. According to Gurnam Singh Commission for Haryana, they showed that the most depressed among the Scheduled Castes, comprises of Balmikis and Mazhabis, the representation of those caste in class I job went from 17.6% to 46.4%, in case of class II the representation of those caste went up from 8 % to 48 % and in class III, the representation went upto 49 %.⁴⁶

Andhra Pradesh has accepted the Justice Ramchandra Raju report where the all 57 enumerated Scheduled caste has been categorized in 4 groups based on their “inter-se backwardness” and fixed the reservation quota for them as 1%, 7%, 6% and 1%.⁴⁷ The State of Andhra Pradesh enacted the Scheduled Castes (rationalization of reservations) Act, 2000 considering the suggestion of Justice Ramchandra Raju Commission Report.⁴⁸ Later, this Act has been held unconstitutional in the case of *E.V Chinnaiah* which held that the State has no competence to amend in the list enumerated under Articles 341 and 342 notified by the President as it consists as a “homogenous class” and only change in the list can be done by the parliament according to Article 341(2). In 1965, an advisory committee has been formed to suggest changes in the SCs & STs list. As untouchability was banned in 1955, the committee used “extreme social, educational and economic backwardness” criterion to determine the backwardness of a community. The advisory committee observed that certain communities included in the 1950 list can be excluded from the benefits of the reservations. They also suggested phase manner removal of the

⁴⁴ Surinder S. Jodhka and Avinash Kumar, ‘Internal classification of Scheduled Castes-The Punjab Story’ (2007) 42(43) EPW 20

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Andhra Pradesh Reservations Act (n 41)

⁴⁸ Ibid

certain caste or tribe from the status of SCs & STs.⁴⁹ Supreme Court also emphasized on the periodic revision of the list so that the real deserving one could get benefitted through reservation.⁵⁰

⁴⁹ Report of Advisory Committee, 'Revision of List of Scheduled caste and Scheduled Tribe' (1965)

⁵⁰ *Ashok Kumar Thakur v Union of India*(2008) INSC 613

3. APPLICATION OF CREAMY LAYER WITH RESPECT TO SCs & STs

3.1 INTRODUCTION

The concept of creamy layer is an exclusionary principle that sets a threshold within which the benefits of reservations provided under the Constitution is applicable. The basis of application of this exclusionary principle is based on the idea that to percolate down the benefits of reservations to the deserving sections within a class, state should exclude those who have achieved certain “political or economic” status and has become more advanced than rest of the class. They ceases to be the depressed classes and thus on the basis of principles of “equality” embodied under Articles 14 and 16 they should be excluded.⁵¹ This concept of “creamy layer” was first introduced by the Sattanathan Commission in 1971. The Sattanathan Commission recommended that there should be exclusion of creamy layer from the benefits of reservation in public services.⁵² The application of the concept of creamy layer while providing for reservations to the OBCs has been mandated by the decision of the Apex Court in *Indra Sawhney*.⁵³

Indra Sawhney holds a very crucial place in the jurisprudence of the creamy layer concept. A perusal of the majority judgment indicates that the “economic criteria” or “means test” were considered as the major component. Justice Jeevan Reddy and Justice Kuldip Singh in his majority decision applied the “means test” based on imposition of certain “income limit” for the exclusion of creamy layer.⁵⁴ Whereas Justice Sawant applied the “capacity to compete test” and for the same regarded “economic criterion” as

⁵¹ K Ravi Srinivas, ‘Demystifying the Anti-Creamy Layer’ (2007) 42(4) EPW 326-327

⁵² Manuraj Shunmugasundram, ‘Karunanidhi And Reforms; landmark Reforms’ *Frontline* (31 August 2018) < <https://frontline.thehindu.com/cover-story/article24704122.ece> > accessed 3 July 2021

⁵³ *Indra Sawhney* (n 13)

⁵⁴ *Indra Sawhney* (n 13) [790] (Jeevan Reddy J.) [385] (Kuldip Singh J.)

an indicum. On similar lines Justice Thommen also agreed to exclude those who have achieved certain financial strength to compete with the forward class.⁵⁵

There are guidelines and criteria issued by the Union for the purpose of determining that whether one belongs to the creamy layer or not. These guidelines have been issued by Central Government on the recommendations of Commission headed by Justice R N Prasad and are in line with the majority judgment of *Indra Sawhney*. Broadly these guidelines are based on “economic status based on the rank” or “income limit” of one’s parents. As it sets out that those whose parents are employed under central government as class I officer before age of 40 years then those people are considered as creamy layer. Similarly those whose parents are not a government employee, with an annual income of less than 8 lakhs are also considered as creamy layer.⁵⁶ There has been no change in the criteria for deciding the creamy layer, but only the income limit has been increased from time to time.

3.2 EVOLUTION OF CONCEPT OF “CREAMY LAYER” WITH RESPECT TO SCs & STs

Notwithstanding, the *Indra Swahney* Judgment which has been constituted to authoritatively settle all the issues related with the reservation held that “means test” shall only be applicable to Other Backward Class and didn’t apply this “means test” with respect to Scheduled Castes and Scheduled Tribes. But, later the *M. Nagaraj* while dealing with the Constitutional Validity of 77th Amendment Act⁵⁷ relying on the *Indra Swahney* has applied this concept of creamy layer with respect to Scheduled caste and Scheduled Tribe. The *Jairnal Singh* later affirmed this concept as an inherent limitation present under Article 16 and a facet of equality under Article 14. This development can be understood after observing the series of tussle between parliament and Supreme Court

⁵⁵ *Indra Sawhney* (n 13) [287] (Thommen)

⁵⁶ Shyamlal Yadav , ‘ How Creamy Layer OBCs is Determined; why its revision is struck’ *Indian Express* (New Delhi, 7 August 2021) <<https://indianexpress.com/article/explained/creamy-layer-obc-reservation-quota-7430996/>> accessed 8 August 2021

⁵⁷The Constitution (Seventy Seventh Amendment) Act 1995

in providing reservation in promotion with respect to Scheduled caste and Scheduled Tribe.

In *Indra Swahney*, the Court has overruled the decision of *Rangachari* for providing reservation in favor of Scheduled Castes and Scheduled Tribes. According to the Court, the Article 16(4) which talks about “reservation in appointment or posts”, here appointment does include “appointment by direct appointment, appointment by promotion and appointment by transfer.” But the Court emphasizes that Article 16(4) should not be read alone and it must be interpreted considering the Article 335 also.⁵⁸

In the case of *Union of India v Virpal Singh Chauhan*, the Court applied the rule of “Catch-up Rule” and observed that “if a person belonging to Scheduled Castes and Scheduled Tribes is promoted earlier on the benefits of reservation and application of roster, then that person would get seniority to the senior belonging to the unreserved category in the feeder post but if that unreserved person who were earlier senior in the feeder post gets subsequently promotion to higher post would regained his seniority to the person who got promotion through reservation.”⁵⁹ It is pertinent to note that the Court through the decision of *Virpal Singh Chauhan* had tried to maintain balance between promotion by the benefits of reservation and seniority so to avoid the “reverse discrimination”.

In the case of *Jagdish Lal v State of Haryana*, a three judge bench took contrary views from the *Virpal Singh Chauhan* and held that “by virtue of principle of continuous officiation” a candidate in reserved category who gets promotion earlier than the unreserved category due to “accelerated promotion” will not lose seniority in higher cadre.⁶⁰

In order to resolve two conflicting decision, the Supreme Court constituted 5 Judges Bench in *Ajit Singh v State of Punjab (II)*, wherein it was observed by the Court that person belonging to the reserved category get promoted due to accelerated promotion could not count their seniority from the date of office continuation in the promoted

⁵⁸ *Indra Sawhney* (n 13)

⁵⁹ *Union of India v Virpal Singh Chauhan* (1996) SC 448

⁶⁰ *Jagdish Lal v State of Haryana* (1997) 6 SCC 538

category to a unreserved category candidate who were senior in the feeder cadre. If that unreserved candidate gets promotion to the promoted category later than the reserved, he would regain his seniority in the promoted category with respect to the reserved candidate who got promotion earlier due to roster point promotions. Therefore, the Constitutional bench has affirmed the “Catch-up” rule for determining seniority with respect to the promoted candidate due to accelerated promotion who got earlier promotion than the unreserved Category candidate.⁶¹

The parliament determinant to dispense with the “*Catch Up*” came up with the 85th Amendment Act⁶² which introduced reservation in promotion with “*Consequential Seniority*”. Therefore, with the introduction of “*Consequential Seniority*” the reserved category candidate who got promotion due to accelerated promotion in application roster point promotion will not lose his seniority even if the unreserved candidate senior in the lower candidate gets appointed in the promoted category later than the reserved candidate. This “*Consequential Seniority*” allowed the principle of “*Continuous officiation*”.

The validity of the 77th and 85th Constitutional Amendment has been challenged in the case of *M. Nagaraj*. The Court examined the issue that replacement of “Catch-up” with “Consequential Seniority” is violative of basic Structure of the Constitution. The Court upheld the validity of the 85th Amendment holding that Catch-up rule and Consequential Seniority is “judicial evolved concept based on service jurisprudence” which can be dispensed away with the constitutional amendments. These rules neither be made equivalent to Constitutional limitations such as “Secularism”, “Constitutional Sovereignty” etc, nor we can say that equality concept has been destroyed by the replacement of “catch-up” rule with the “Consequential Seniority”.⁶³

The Court in this case held that “Article 16(4-A) of the Constitution is an enabling provision” and the government can make special provision providing them with benefits of reservation, if they find compelling reasons to do so. Government is not bound to

⁶¹ *Ajit Singh (II) v State of Punjab* (1999) 7 SCC 209

⁶² The Constitution (Eighty fifth Amendment) Act 2002

⁶³ *M. Nagaraj* (n 7) [122]

provide the reservation under Article 16(4A). If the government wishes to provide reservation under Article 16(4A) has to collect quantifiable data compiling with three requirements⁶⁴

A- “Backwardness of the class”.

B- “Showing the inadequacy of representation in that services or post”.

C- “Article 335 i.e. ‘maintaining the efficiency of administration’ shall not be affected”.

In addition to this, *M. Nagaraj* ruled that if the State finds that there are compelling reasons to provide reservation under Article 16(4A), the state has to examine that the reservation does not exceed the ceiling limit of 50% or eliminate the principle of creamy layer or extend the benefits of reservation indefinitely. The *M.Nagaraj* Bench ruled that these are “Constitutional requirements” which is necessary to be fulfilled to protect the “structure of equality of opportunity under Article 16 of the constitution of India.”⁶⁵

3.3 APPLICATION OF PRINCIPLES OF CREAMY LAYER TO SCs & STs

Application of creamy layer with respect to Scheduled Castes and Scheduled Tribes does not amount to tinkering with the presidential list under Article 341 and Article 342. After the exclusion of members belonging to creamy layer, the list continues to exist as it were before. It excludes only those members who have come out of backwardness has been ruled out of the list.⁶⁶

The exclusion of creamy layer is applied with respect to the principle contained under Articles 14 and 16 which mandates that the creamy layer within the group shall be excluded from the benefits of reservation.⁶⁷

E.V Chinnaiah has held that the state does not have the power to tinker away with the presidential list under Articles 341 and 342, except by the parliament. If the parliament

⁶⁴ *M. Nagaraj* (n 7) [121-123]

⁶⁵ *Ibid*

⁶⁶ *Jarnail Singh v Lacchmi Narain Gupta* (2018) 10 SCC 396

⁶⁷ *Indra Sawhney* (n 13)

has been given the power to make changes in this list, then the constitutional Court after applying the principles contained in Article 14 and Article 16 of the Constitution of India can surely exclude creamy layer from the list enumerated under Article 341 and Article 342 from getting the benefits of reservation.⁶⁸ Applying the principle of “Harmonious Construction” between two constitutional provisions, that is Article 14 and 16 on one hand and Article 341 and Article 342 on other hand, the parliament surely on reasonable grounds can exclude the creamy layer from the list notified under Article 341 and Article 342. Therefore, on the same corollary, the Constitutional Court after applying the principle of harmonious construction between Article 14 and 16 on one hand and Articles 341 and 342 on second hand, can exclude the creamy layer notified under the presidential list of Articles 341 and 342.⁶⁹

The requirement of “inadequate representation”, “efficiency of administration under Article 335 of the Constitution”, the principle of creamy layer, 50% ceiling are the implicit limitation specified under the Articles 14 and 16 of the Constitution. Therefore, whenever State provides reservation to any community has to show with adequate data that all these requirements have been met and that community deserve the benefits of reservation.⁷⁰ This implicit requirement is also applicable with respect to “Scheduled caste” and “Scheduled Tribe”. Also, in the case of *M. Nagaraj*, the court has applied the principle of “creamy layer” under Article 14 and 16 to test the constitutional validity of Article 16(4A) and Article 16(4B) as a part of basic structure to uphold the constitutional validity of those amendments. Those who have attained advancement and further are no more “educationally and socially backward” can perpetually ripe the benefits of reservation under the garb of “backwardness”. Those socially and educationally educated members must be excluded in the form of creamy layer by the Court after applying the principle of equality contained in Articles 14 and 16.⁷¹

⁶⁸ *Davinder Singh* (n 3)

⁶⁹ *Ibid*

⁷⁰ *M. Nagaraj* (n 7)

⁷¹ Manish Rao, ‘Sub- Categorization of Backward Classes for the Purpose of Reservation: A step Towards equitable Appointment’ (2021) 4(1) IJLHM 1322

In case of *Jagdish Negi v State of U.P.*⁷², The Court observed that no class of citizen can be considered as “socially and educationally backward” till eternity. The backwardness of the class shall always be judged on the existing fact situation present on given point of time. Thereafter the Court has recognized that every class of citizen has a right to develop and no class can be perpetually considered as backward. Therefore, it is an onus on the state to judge on the present state of fact whether a particular class of citizen shall be considered as backward and for this determination the periodic review of the reservation policy is necessary. The concept of “once a mortgage shall always be considered as mortgage” shall not be applicable for determining the backwardness of a citizen. Hence, the state is not bound to treat a particular class of citizen as backward till its eternity.⁷³

3.3.1. JARNAIL SINGH V LACCHMI NARAIAN GUPTA: AFFIRMING “CREAMY LAYER” AS FACET OF EQUALITY

In 2017, for reconsideration of *M.Nagaraj*, the three judge bench of the Apex Court made a reference to the larger bench. Constitutional bench in *Jarnail Singh v Lacchmi Narain Gupta*, referred the two Issues⁷⁴

- 1- Whether the application of Creamy layer with respect to Scheduled Castes and Scheduled Tribes is contrary to the mandate of *Indra Swahney*?
- 2- Whether the State is required to collect the quantifiable data to show the backwardness of the Scheduled Castes and Scheduled Tribes before providing reservation and is it contrary to the nine Bench decision in *Indra Swahney*?

M. Nagaraj has upheld the Constitutional validity of 77th Constitutional Validity after holding that the concept of “Catch-up” rule or “Consequential seniority” are not constitutional requirements and it does not violate the “Basic Structure” of constitution.⁷⁵ These rules are not implicit in clauses of Article 16(1) and Article 16(4). Obliteration of these concepts does not change the equity code present under the Articles 14, 15 and 16 of the Constitution of India. Both the clauses of Articles 16(1) and 16(4) is the

⁷²(1997) 7 SCC 203 723

⁷³ Ibid

⁷⁴ *Jarnail Singh* (n 6)

⁷⁵ *M. Nagaraj* (n 7)

restatement of equality principle present in Article 14. Article 16 (4) provides the discretionary power on the state to affirmative action by giving the backward class reservation in the services where they find that they have not been adequately represented. The court has applied the “Width” and “Identity” test to find out that there is no Obliteration of constitutional requirements and no alteration of equity code.⁷⁶ The State before providing reservation under Article 16(4), is required to show the presence of two circumstances, namely the Backwardness and the Inadequate representation.⁷⁷ Equity, justices and efficiency are variable factors which are context specific. Further the Court noted that before exercising power under Article 16(4) or 16 (4-A), there are certain constitutional requirements implicit under Article 16 (4) that is “compelling reasons, namely, backwardness and inadequacy of representations and keeping in mind the overall efficiency of administrations under Article 335 ; the ceiling limit of 50 % , the differential treatment between OBC on the one hand and Scheduled Castes and Scheduled Tribes on the other hand; the concept of creamy layer; and last the concept of roster based reservation” which State required to consider while giving the benefits of reservation.⁷⁸ If these parameters were not considered by State before providing the benefits of reservation then that reservation shall be void. As 77th amendment does not interfere with these parameters, thereby the equality principle remains intact even after the insertion of 77th Constitutional Amendment Act. Therefore, there is no interference with the Constitutional limitations by the insertion of 77th, 81st Amendment, 82nd Amendment, and 85th Constitutional Amendment.⁷⁹

3.3.2. ASHOK KUMAR THAKUR V UNION OF INDIA : NOT RESTRICTING THE APPLICATION OF CREAMY LAYER WITH SCHEDULED CASTES AND SCHEDULED TRIBES

Ashok Kumar Thakur has dealt with constitutional validity of 93rd Amendment Act, 2005 in which Article 15(5) was under challenge. Balakrishnan J., specifically ruled that creamy layer principle is inapplicable with respect to Scheduled Castes and Scheduled Tribes. It also observed that application of “Creamy layer” principle is not a principle of

⁷⁶ *Jarnail Singh* (n 6)

⁷⁷ *Ibid*

⁷⁸ *M.Nagaraj* (n 7)

⁷⁹ *Jarnail Singh* (n 6)

equality but merely a test for determination of backwardness.⁸⁰ Later, in the case of *Jarnail Singh*, the Court has observed that this observation of Balakrishna J. in *Ashok Kumar Thakur* is contrary to the law and Creamy layer is a principle of equality under Article 14 and 16 of the constitution.⁸¹

Justice Pasayat, speaking himself and for Justice Thakker, J. eschewed himself from commenting anything in relation to the application of Creamy Layer with respect to Scheduled Castes and Scheduled Tribes. He observed that, the instant case is related to discussion with respect to Other Backward Caste and in *Indra Swahney* the exclusion of creamy layer made applicable to Other Backward Class.⁸²

Justice Reddy, while speaking for the majority, held that the entire discussion in this case is confined only to Other Backward Class. He expressed no opinion with respect to application of creamy layer with respect to Other Backward Caste.⁸³

Justice Raveendran, after referring to *M. Nagaraj* held that for determination of Social and educational backwardness under Article 16 (4), when a caste sheds off their creamy layer then only it becomes a Social and educational backwardness Class.⁸⁴

3.3.3. M. NAGARAJ V UNION OF INDIA : IN CONFLICT WITH E.V CHINNAIAH?

In *Jarnail Singh*, the issue was been raised before the Court that *M. Nagaraj* decision is in conflict with the decision in *E.V. Chinnaiah* as it does not refer the Constitutional bench decision given in the *E.V Chinnaiah* which held that no division in the Scheduled Castes and Scheduled Tribes list can be made under Article 341 and Article 342, save by the parliament. *E.V.Chinnaiah* while adjudging the validity of Andhra Pradesh Scheduled Castes (Rationalizations of reservation) Act, 2000 held that the sub-division of Scheduled Castes and Scheduled Tribes into four categories is violation of Article 341(2)

⁸⁰ *Ashok Kumar Thakur* (n 50)

⁸¹ *Jarnail Singh* (n 6)

⁸² *Ashok Kumar Thakur* (n 50) (Pasayat J.)

⁸³ *Ibid* (Jeevan Reddy J.)

⁸⁴ *Ibid* (Raveendran J.)

because it is alone parliament has the power to make changes in the list notified by the president and State legislature has no power to make any changes in the list.⁸⁵

As, in *M. Nagaraj* the Apex Court was dealing with the Constitutional validity of 77th, 82nd, 85th Constitutional amendments and *E.V.Chinnaiah* dealt with the statutory validity of an Act. In fact, it is true that *E.V.Chinnaiah* has held that enactment was violative of Article 14 but its construction was based on the Interpretation of Article 341(2). Therefore, *E.V.Chinnaiah* has dealt with completely separate issue than the one dealt in *M.Nagaraj*.

3.4 SCs & STs NOT A HOMOGENOUS CLASS WITHOUT APPLICATION OF CREAMY LAYER

In India, Scheduled Castes and Scheduled Tribes were considered as marginalized and Backward Class who faced historical discrimination and Injustices. To readdress the historical injustices that resulted in “social, economic and educational” backwardness, two step actions are required, first is, they should not be discriminated on the basis of caste and second is, State shall take affirmative condition to ameliorate the conditions of Scheduled Castes and Scheduled Tribes.⁸⁶

In *state of Mysore v M.R.Balaji*, the Court has accepted that caste may be a relevant factor for deciding the social backwardness but it cannot be the sole criterion. It Court emphasized on the “economic backwardness” as the root cause for “Social Backwardness”.⁸⁷

In the case *Triloki Nath and Anr. v State of Jammu and Kashmir*, the Court observed that, “In its ordinary connotation the expression “class” means a homogeneous section of the People grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining

⁸⁵ *E.V. Chinnaiah* (n 4)

⁸⁶ Paramanand Singh, *Equality, Reservation and Discrimination in India* (Deep & Deep 1982)

⁸⁷ *M. R. Balaji* (n 10)

whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent place of birth or residence cannot be adopted, because would directly offend the Constitution.”.⁸⁸In *K.S. Jayasree & Anr. v State of Kerala*, The Court held that Social backwardness which results from poverty is likely to be magnified by the caste consideration”. All these cases have emphasized on the economic consideration as the main reason for the social backwardness which can be amplified by the Caste factor.⁸⁹

NM Thomas observed that Under Article 16(2), “Caste” does not include Scheduled Castes. Although Scheduled Castes consists of “caste, tribe or race”, but they acquire new status after being notified under Article 341 and Article 342 of the Constitution. Combined reading of Article 46 and Article 365 (24) and (25) depicts that Scheduled Castes and Scheduled Tribes must be presumed backward class of citizen particularly when Constitution gives examples “Scheduled Castes and Scheduled Tribes being the weaker section of society”.⁹⁰

In *Akhil Bharatiya Soshit Karamchhari Sangh*, the Court opined that “The president notifies Scheduled caste and Scheduled Tribe not with reference to any caste characteristics, but their abysmal backwardness, as is evident from the Scheme of Part XVI. The Court noted that a Caste may be equated to a backward class where the “degree of dismissal is dreadful”.⁹¹ The Court also emphasized on the Article 338, where an officer is need to appoint to investigate all matters in order to promote the Interest of the Scheduled Castes and Scheduled Tribes.

Indra Swahney though the court accepted that “caste can be a quite often a social class/group in India, and can constitute as a Backward class” under Article 16 (4) of the Constitution of India but applied the creamy layer to exclude the forward ones within the class so as to benefit of reservation percolate to the deserving ones.⁹² The Court has accepted that “Caste can be a socially and occupationally homogenous group”.⁹³ In *Indra*

⁸⁸ *Triloki Nath v State of Jammu Kashmir* (1969) 1 SCR 103

⁸⁹ *K.S. Jayasree v The State of Kerala* (1976) AIR SC 231

⁹⁰ *N.M. Thomas* (n 11)

⁹¹ *Akhil Bharatiya Soshit Karamchhari Sangh v Union of India* (1981) SCC 246

⁹² *Indra Sawhney* (n 13)

⁹³ *Ibid*

Sawhney, the Court has noticed the “caste-occupation poverty” nexus for recognizing the caste as beneficiary for the reservation but in the recent times it would be a fallacious understanding to assume that economically rich members of Scheduled Castes would involve in such in the lower occupation and thus breaches this cycle.⁹⁴ In *Narayan rao and Anr.v. State of A.P and Anr.* ,the Court has held that “excluding those who have already attained such economic well-being (inter-linked as it with social and educational advancement) from the special benefits provided under these clauses cannot be called unreasonable or discriminatory or arbitrary much less contrary to intention to the founding fathers”.⁹⁵

The Court held that the exclusion of socially and educationally advanced within the backward class is permitted. Exclusion of those socially and educationally advanced within the class will make the class a truly “backward” class for the purpose of Article 16(4).⁹⁶For determining the backwardness under Article 16(4), the Court negated the “a priori notions” with respect to OBC as similarly situated with the Scheduled Castes and Scheduled Tribes. Infact, neither various “caste, groups, tribes” are similarly situated within the Scheduled Castes and Scheduled Tribes nor various SCs & STs across country are similarly situated. All those class, groups and tribe vary in their growth and social advancement. Therefore, there is no need for comparison for the OBC in relation to social backwardness with the SCs & STs for determining the backwardness under Article 16(4).

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3.4.1 WEALTH INEQUALITIES WITHIN SCs & STs

The wealth among the top 1% of the ST augmented by 4.4% points from 2002-2012 while among the Scheduled Castes, the top 1% augmented its wealth by 2.5% points. The 10% of the Scheduled Tribes has 51% of wealth while top 10% of SC has 46.7% of

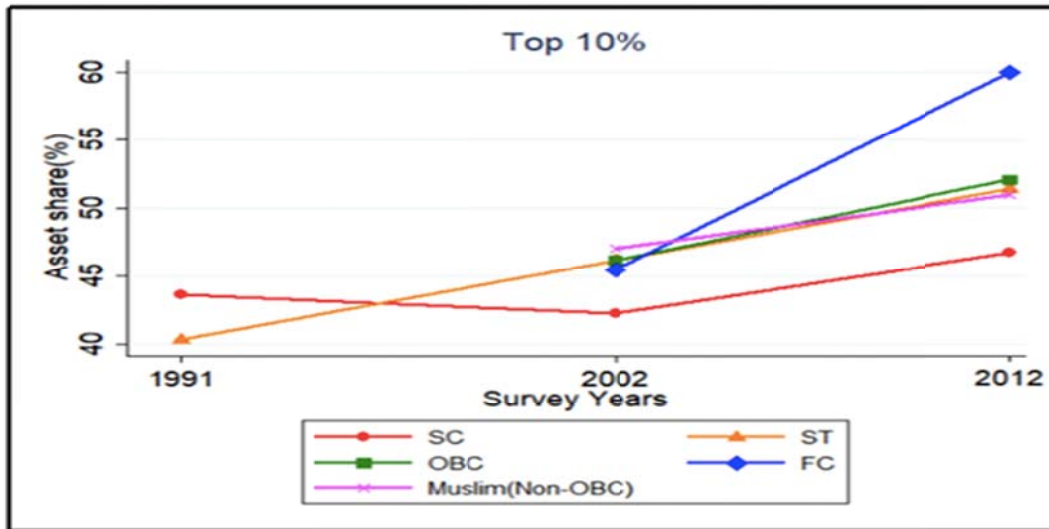
⁹⁴ Ibid (“lower the occupation-the lower the status in the Society”) [802]

⁹⁵ *V. Narayana Rao v State of Andhra Pradesh* (2002) AIR SC 1644

⁹⁶ *Indra Sawhney* n [800] (Jeevan Reddy J.)

⁹⁷ *Indra Sawhney* (n 13)

wealth. Within the Scheduled Castes, Mushars are much below placed than the other Caste such as Chamars and Dusadh via-a-vis concentration of wealth.⁹⁸



Source: Indian Income Inequality, 1922-2015- Lucas Chancel, Thomas Piketty, 2017, World Inequality database.

This inequality in wealth accumulation within the different Caste clearly attacks on our assumption as “caste” being the determinative factor for providing the benefits of reservation. This negates our assumption that “Caste” being a homogenous group. The wealth share among the 10% within every caste is more than 45%. This data also shows the augmenting wealth division among the forward caste where 10% of Forward caste owns more than 60% of Assets share. This data also suggest that there in need to provide reservation to the “poor” among the forward caste as there is huge income difference within the forward caste also. This need has been addressed by the parliament by incorporating 103rd Amendment in the Constitution by providing 10% reservation to “economically weaker section” among the “forward caste”.

This data clearly illustrates that much benefits of the reservation are being captured by the creamy layer within the caste. The exclusion of “creamy layer” with respect to “Other

⁹⁸Shreehari Paliat, ‘Income Inequality In India : Top 10% upper caste households own 60% wealth’ *Business Standard* (14 January 2019) <https://www.business-standard.com/article/current-affairs/income-inequality-in-india-top-10-upper-caste-households-own-60-wealth-119011400105_1.html> accessed on 25 July 2021

Backward Caste” is somehow addressing the problem but there is a need to correct the criteria for determining the person who belongs to “creamy layer”. The creamy layer criterion for the “Other Backward caste” is still too high.⁹⁹ There is also need to exclude “creamy layer” within the Scheduled Castes and Scheduled Tribes, so that the benefits of reservation could percolate down to deserving ones among that group. Economically well off within the Scheduled Castes and Scheduled Tribes gets all the benefits of reservation, which hinders the growth of the members of Scheduled Castes and Scheduled Tribes.

In the recent case of *Cherbolu*,¹⁰⁰ where Court has observed that members within the SCs/STs are raising their voices against the developed one among that group as they are preventing them from acquiring the benefits of reservation and hindering their overall development. Excluding the “creamy layer” within that group will help the deprived within the Caste to avail the benefits of reservation. Reservation cannot be treated as a “tag” and perpetually allowed to exist.¹⁰¹ A member belonging to SCs & STs cannot claim perpetually to get the benefits of reservation because once they got birth into that Caste. Framers of the Constitution has envisaged the reservation to continue only for 10 years as once who got the benefits of the reservation and come on the same level field to compete with the general candidate , they will not be allowed to get the benefits of reservation.¹⁰² After 70 years of Independence, we can see that there exist two classes within the SCs & STs groups, first consist of 10% of population within that caste who have all the resources and acquiring all the benefits of reservation while the latter consist of 90% of population who still working as day to day workers and scavengers and not getting the benefits of reservation and vehemently fighting with the caste based oppression.

⁹⁹ Children of persons having a gross annual income of Rs. 800,000 or above for a period of three consecutive years would fall under the ‘creamy layer’ category and would not be entitled to the benefit of reservation available to OBCs.

¹⁰⁰ *Cherbolu Leela Prasad Rao & Ors v State of Andhra Pradesh* (2020) SCC Online SC 383

¹⁰¹ V.K.S. Chaudhary and Kunal Ravi Singh ‘Reservation now of any kind is of unconstitutional’ (2003) 8 SCC J 35

¹⁰² All reservation and special provisions were to cease after a period of 10 years (vide Para 305 of the draft Constitution). This period was changed to 15 years by a constitutional amendment. Thereafter the Constitution has been amended from time to time under Article 368 thereof, the latest being the Constitution (One hundred four Constitutional Amendment) Act 2019, which has extended the period to 70 years.

“Caste based reservation” policy without applying the “creamy layer” principle prevents the benefits of reservation to percolate down to deserving one within the class. It fails to accept the evolving nature of the Caste. In the recent times of Globalization, Social backwardness cannot be presumed to be existing because only of Caste. Income, Gender, occupation, all constitute to define the parameters for social backwardness and deprivation.¹⁰³ Earlier, the relation between Caste and Social backwardness was much intrigued than it present now.¹⁰⁴ Those among the group of Scheduled Castes and Scheduled Tribes who merged with the forward class after acquiring the benefits of reservation need to be excluded from the list so that the benefits may be channelized to weakest of weaker.¹⁰⁵ Therefore, it is the time to extend the application of “Creamy test” with respect to Scheduled Castes and Scheduled Tribes. As parliament has been disposed of with the task to rationalize reservation policy from time to time but due to lack of political will it is less likely to be implemented by the parliament. If we look into the definition of Scheduled Castes Under Article 366 [24]¹⁰⁶, which clearly indicates that the parliament has been given the duty to find the “races, tribes or groups within such caste, races or tribes” under Article 341 to provide them the benefits of the reservation but notwithstanding the repeated warning from the Supreme Court¹⁰⁷, due to lack of political will, parliament is not framing reservation policies to identify the groups within the Scheduled Castes to channelizes the benefits for the real deserving ones.

In the recent case of *B.K Pavitra*¹⁰⁸, the Court affirmed the view of *M. Nagaraj* and *Jarnail Singh* that “Creamy layer” as a principle of equality under Article 14. Also in the recent Constitutional Bench Judgment of “*Chebrolu Leela Prasad Rao*, although no direct question has been raised by the petitioner for the application of “creamy layer” with respect to SCs/STs, yet the Court in his conclusion observed that “ Now there is a cry within the reserved classes. By now, there are affluent and socially and economically advanced classes within Scheduled caste and Scheduled Tribe. There is voice by deprived

¹⁰³ Vani K Borooah, ‘Social Exclusion and Job Reservations in India’ (2010) 45(52) EPW 31

¹⁰⁴ Parmananda Singh, ‘Some reflections on Indian Experience with Policy of Reservation’ (1983) 25 JILI 46

¹⁰⁵ *Davinder Singh* (n 3)

¹⁰⁶ Constitution of India 1950, art 366(24)

¹⁰⁷ *Ashok Thakur* (n 50). *Chebrolu* (n 100)

¹⁰⁸ *B.K. Pavitra v Union of India* (2017) 4 SCC 620

persons of social upliftment of some of the Scheduled caste/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of Scheduled caste and Scheduled Tribe and other backward classes.”¹⁰⁹ Recently, in 2019 a petition has been moved by the Central Government for reconsidering the *Jarnail Singh* which obligated the state to exclude “Creamy layer” within SCs & STs.¹¹⁰ But the Court rejected this application. These instances clearly indicate the firm stand of the Supreme Court to allow “Creamy Layer” within SCs & STs, so that the benefits of reservation could percolate down to lower strata of SCs & STs.¹¹¹ The Supreme Court is acting as the “*sentinel of qui vive*” and within its institutional capacity upholding the principle of equality so that reservation could not become a mere tool for political mileages.

¹⁰⁹ *Chebrolu* (n 100)

¹¹⁰ *Jarnail Singh v Lacchmi Narain Gupta* Review petition (C) No.243 of 2018

¹¹¹ Anant Sangal, ‘Whipping up the “Cream” – Indian Supreme Court and its decision in B.K Pavitra –II’ (2020) 4(4) Comparative Const. L. Administrative L. Quarterly 68

4. EFFECT OF THE CONSTITUTION (ONE HUNDRED AND SECOND AMENDMENT) ACT 2018

4.1. INTRODUCTION

In 2018, Constitutional 102nd Amendment¹¹² was brought in to bring the position of SEBCs in line with that of the SCs & STs and thus for that purpose Articles 342A and 338B was inserted in the Constitution of India. Article 338B provides for a nodal agency to deal with issues regarding SEBCs by National Commission for Backward Classes (NCBC)¹¹³ and Article 342A provides for the manner of identification of SEBCs.¹¹⁴ The President has been given the power to notify a community as SEBC with respect to the states or union territory under Article 342A (1). And under clause (2) of Article 342A the parliament has the power to include or exclude such SEBCs from the “Central list” as it deems fit. Article 342A (1) is analogous to Article 341 and 342 of the Constitution. Furthermore, through 102nd Amendment clause (26C) is also added in Article 366 to provide that term “Socially and educationally Backward Classes” means such classes which are so deemed under Article 342A for the purpose of the Constitution.¹¹⁵

4.2. STATE OF PUNJAB V DAVINDER SINGH: INTERPRETING THE CONSTITUTION (102ND AMENDMENT) ACT

The Constitution bench of the Supreme Court in the landmark decision of *Davinder Singh* has interpreted Article 342A inserted by 102nd Amendment to the Constitution. The Court made a comparison of the provisions of Articles 341 & 342 and clauses (24) & (25) of Article 366 to the newly inserted Articles 342A and 366(26C). And held that the

¹¹² The Constitution (102nd Amendment) Act 2018

¹¹³ Constitution, art 338B

¹¹⁴ Constitution, art 342A

¹¹⁵ Constitution, art 366(26C)

provisions of Article 342A providing for manner of identification of SEBCs are *pari materia* to that of Articles 341 and 342 that provides for the manner of identification of SCs & STs respectively.¹¹⁶

The bench observed that how two different opinions can be adopted for the purpose of the classification of SCs & STs and SEBCs, when the provisions of Articles 16(4) and 342A indicates that it is not permissible to adopt different criteria for SCs, STs & SEBCs. Considering *Indra Sawhney*, that allowed sub-classification of SEBCs and as provisions of Articles 341, 342 and 342A has become *pari materi*, the question that arises is whether the sub-classification is permissible only with respect to SEBCs under Articles 342A and 366(26C) and not with respect to SCs & STs under Articles 341 and 342 read with Articles 366(24) and 366(25). However, a need of authoritative pronouncement on the effect of the provisions inserted by 102nd Amendment to the Constitution was felt by the Court.¹¹⁷

4.3. JAISHREE LAXMANRAO PATIL V THE CHIEF MINISTER, MAHARASHTRA : AFFIRMING THE PARI MATERIA REASONING

In *Jaishree Laxmanrao Patil*, the Apex Court has interpreted the impact of the provisions inserted by the 102nd Amendment to the Constitution. The main issue before the court was regarding the impact of insertion of Article 342A on power of the states to notify the SEBCs within the states. The Constitution Bench of the Apex Court while interpreting the provisions of Article 342A held that under Article 342A there shall be only one list that is to be notified by the President of India after consultation with the Governor of the state.¹¹⁸ Article 366(26C) also makes it clear that only one list as “Central list” is to be notified by the President under Article 342A. And the power of the state to notify SEBCs within the state does not exist after the 102nd Amendment. While interpreting the provisions of Article 342A and 366(26C) of the Constitution the Court adopted the strict and literal interpretation and denied to look at the external aids such as parliamentary

¹¹⁶ *Davinder Singh* (n 3)

¹¹⁷ *Ibid*

¹¹⁸ *Jaishree Laxmanrao* (n 9)

debates and the Selection Committee Reports that were relied on by the Attorney General.¹¹⁹

Furthermore, the majority placed great emphasis on the similarity in wordings of provisions of Articles 341, 342 and 342A of the Constitution. Also, it was observed that the definition of SCs & STs under Articles 366(24) & (25) for the purpose of the Constitution is similar to that of SEBCs as inserted by 102nd Amendment to the Constitution. By emphasizing upon the *pari materia* it was held that as under Articles 341 and 342 the Union has the exclusive power to determine the Community as SCs & STs in the same manner under Article 342A also the Union has the exclusive power to determine SEBCs for the purpose of the Constitution. This clearly indicates that effect of the 102nd Amendment is to place SEBCs in the same scheme under the Constitution.¹²⁰

Therefore, after this landmark decision of the Apex Court it can be clearly concluded that through 102nd Amendment to the Constitution, the scheme of SEBCs under Article 338, 342A and 366(26) are *pari materia* to that of SCs & STs under Article 341 & 342 and Article 366(24) & 366(25). Thus the criteria of sub-classification and creamy layer applied in case of SEBCs in Indra Sawhney must be adopted in the case of SCs as well.

4.4. THE CONSTITUTION (ONE HUNDRED AND FIFTH AMENDMENT) ACT, 2021: NOT DEFEATING THE PURPOSE

Through this Amendment Bill the power of the States Governments to identify and specify SEBCs within the state has been restored. The bill proposes to amend Article 342A to the extent that the power of the President to specify SEBCs is limited to the “Central list for the purpose of Central Government”. Clause (3) to Article 342A is also added to explicitly provide for the power of the State Governments and Union Territories to identify and specify SEBCs for their own purposes that may differ from the “Central List”.¹²¹

¹¹⁹ Ibid

¹²⁰ *Jaishree Laxmanarao* (n 9)

¹²¹ The Constitution (One Hundred and fifth Amendment) Act 2021

However, the Bill does not in any way alters the fact that the purpose of 102nd Amendment to the Constitution was to bring the scheme of the SEBCs under Articles 342A & 366(26C) in line with scheme of SCs & STs and newly inserted Articles 342A, 338B and 366(26C) is *pari materia* to the provisions of Articles 341, 342, 338, 338A, 366(24) and 366(25) of the Constitution even after the proposed amendment bill. The main purpose behind introduction of 127th Amendment Bill is to save the “federal structure” by restoring the power of the state governments in identifying the SEBCs as states are in better position to identify SEBCs.

5. CONCLUSION & SUGGESTIONS

5.1. CONCLUSION

In this paper under chapter 2, the author has discussed the question of “sub-classification” within SCs & STs. The author has analyzed the stand of the Indian Judiciary with respect to division of class into backward and more backward. The Indian Judiciary in cases like *N.M Thomas*, *K.C Vasant Kumar* and *Indra Swahney* has allowed the division of class into “backward and more backward” after fixing the quota of each category based on empirical evidence. Later, *E.V Chinniah*, has taken the narrow Interpretation of Article 341 and Article 342 and acted on the false presumption of the “homogeneity” of the class notified under Article 341 and Article 342 of the Constitution of India. The *E.V Chinnaiah* decision which puts blanket ban on the “inner-classification” within SCs & STs list is contrary to the rationale adopted by the Court in *Indra Swahney* and *K.C Vasant Kumar*. *E.V Chinnaiah* decision did not notice the empirical data presented by the State on which such division of class into backward and more backward has been adopted. The blanket ban of division of the list by the state is in comprise of the federal structure envisaged by the Constitutional makers where both Union and State were supposed to act in coordinated and integrated manner to deliver the “socio-economic” justice to its citizens.¹²²

The “Inner-classification” within the SCs & STs is necessary to effectuate benefits of reservation to percolate down to lower strata within that class. According to the Census of India, 2001, data on “Individual Scheduled Castes and Scheduled Tribes”, clearly depicts the inequalities within the SCs & STs. For example, Scheduled Castes notified for the state of Bihar, Literacy rate of Caste such as “Bhuiya” and “Musharas” has literacy

¹²² Ishwara Bhatt (n 34)

rate of 6.5 % and 3.9 % respectively while the Literacy rate of “Dhobi” is 43.9 % which shows the huge heterogeneity within the class. There were many committees and commission reports constituted by the various states from time to time to enable the benefits of reservation to reach the deserving one among the class suggested “inner-classification” within that class.¹²³

One of the main argument presented by the harbinger of existing “Caste politics” to counter the heterogeneity of the Class is that it is the identity of backward class that carries the “backwardness” and reservation is not a scheme for “economic backwardness” but to address the “social backwardness” prevalent in the society. But they forget that each Caste within the Scheduled Castes and Scheduled Tribes does not face the equal level of oppression. Not all members of Scheduled Castes faced equal level of “historical oppression”. In reality; we can observe that there is new emergence of hierarchy within the “Scheduled Castes and Schedule Tribe”. Many a times, the rich and economically well off within the Caste broke away from the earlier caste and formed a new caste and demands higher societal respect. For example, “Sainthwar” in Kurmi or “Jatav” from Chamar in U.P. has broke away from earlier caste and claimed higher rituals for themselves. The rich among any caste claimed higher status than any members of any other Caste. No one can imagine equality if the “deprived members “ within the Scheduled Castes were conceded as lower in “hierarchical status” than the advanced within that class.¹²⁴

In chapter 3, the author discusses the applicability of creamy layer with respect to Scheduled Castes and Scheduled Tribes. In the case of *M. Nagaraj*, the court applied the test of “creamy layer” as a part of basic structure to uphold the constitutional validity of 77th, 82nd and 85th constitutional amendment. Later, in *Jarnail Singh* the Court affirmed the views of *M. Nagaraj* of exclusion of creamy layer with respect to Scheduled Castes and Scheduled Tribes. Without the exclusion of creamy layer, all the benefits of reservation are beings absorbed by the economically rich within the class. It is necessary

¹²³ Tables on SC and ST (n 37)

¹²⁴ Pradipta Chaudhary, ‘The Creamy Layer’ Political Economy of Reservation’ (2004) 39(20) EPW 1989

to exclude that creamy layer , because they preventing the benefits of reservation from percolating to the deserving one within the class.

In chapter 4, the author discusses the effect of 102nd Amendment with respect to SCs & STs. 102nd Amendment made insertion of 338 B, Article 342A and Article 326 B which makes all the three classes that is “Other Backward Caste”, “Scheduled Castes” and “Scheduled Tribes” *pari-materia*. If principle of “sub-classification” and “creamy layer” is applicable to OBC after the Indra Swahney decision, then after 102nd amendment this principle shall also be applicable to SCs & STs. *Maratha Judgment* gives force to the above argument by stating that there shall be only one list for the OBC as similar to SCs & STs. Recently, 127th constitutional amendment Bill has been introduced to invalidate the decision of Maratha but still all the arguments of “pari materi” hold upright as the intention of the Bill is to give state the autonomy to decide the list of “OBC” as it is difficult to identify OBC than SCs & STs because they were the most backward and thereby easily identifiable. The 127th constitutional amendment Bill does not nullify the effect of 102nd amendment Act created in the Constitution through insertion of 338B, 342A and 366 26B in the Constitution.

5.2. SUGGESTIONS

In pursuance to the above research in the paper, the Author is making following suggestions in order to rationalize the reservation polices with respect to Scheduled Castes and Scheduled Tribes, so that the reservation benefits could reach to the deserving one within the class-

1. There is need to exclude members of “creamy layer” from the Scheduled Castes and Scheduled Tribes so that the class retains its homogeneity as a unit for determination of backwardness.
2. “Inner-classification” after fixing the quota of each “sub-groups” is necessary. All “sub-groups” notified under Article 341 and 342 of the Constitution are not equally stand at same socially disadvantageous position. There is need to cater those “hierarchy” created within that group.

3. Periodic review of list of beneficiary of reservation need to be conducted at continuous interval so that who have been socially and educationally advanced within that group shall be excluded to further percolate down the benefits of reservation to the “real backward” ones.
4. More robust system for identification of backward class is necessary. A national level study on the impact of reservation shall be done to analyze the “social-educational and economic standards” for those backward classes.
5. A members belonging to SCs & STs cannot claims this rights only because of its identity even though after attending certain level of social advancement. A time limit reservation policy is necessary as extending it for perpetuity will lead to “institutionalized reservation” which will be against the intention of constitutional makers.
6. The state shall endeavor to provide the all the educational facilities to SCs & STs from the primary level such as “book, financial aids, scholarship, hostel/residence facility” so that they become enough capable to compete in future with the advanced class without any benefits of reservations. Proper sensitization programme shall be conducted all through the society awakening the masses about the “equality and dignity”” principle enshrined in the Constitution. This will help the backward class by making them aware about their rights and may help in reduction of discrimination done by the advanced class.

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