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EQUITABLE INCLUSIVE SOCIETY: Evolving Strategies for Realisation of our Constitutional Vision in *Swatantra Bharat*

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EQUITABLE INCLUSIVE SOCIETY:
Evolving Strategies for Realisation of our Constitutional Vision in *Swatantra Bharat*

[With special reference to seven-judges bench judgment of the SC in the *State of Punjab* v. *Davinder Singh* (delivered on Aug 01, 2024)][*]

Virendra Kumar[**]

[Abstract: *Our critique of the Supreme Court seven-judge Constitution Bench judgment delivered on 1st August, 2024 reveals that it suddenly raised a sort of social and political upheaval amongst the members of Scheduled Castes and Scheduled Tribes, resulting into a Bharat Bandh. It also necessitated intervention of the Prime Minister, who, in turn, assured the ruling party Members of Parliament led by at least two Union Ministers. However, a sombre reflection on the holding of the Supreme Court judgment would instantly show that all what had happened could have been most easily averted. The only need was to construe and comprehend the judgment in its proper perspective. On a self-assured patient perusal of the judgment, it becomes evident and manifestly clear that permitting sub-classification of the Scheduled Castes and the Scheduled Tribes, the constitutional objective of building 'equitable inclusive society' is truly strengthened from within, rather than weakening it!*]

Keywords: *Constitution, preamble, equitable inclusive society, strategy, reservation, creamy layer, quotas within quota, Supreme Court etc.*

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[*] This paper is substantially based upon the Special Lecture delivered by the author under the aegis of Indian Council of Social Science Research North Western Regional Centre at Panjab University, Chandigarh, on December 18, 2024.

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I

The Vision of Equitable Inclusive Society

Since the very inception under the Constitution of Independent India, our primary promised objective vision was to establish an 'equitable inclusive society'. The primacy was given to this objective vision due to the exigencies of immediate historic past in which we were caught rather circumstantially. The reasons were in the nature of extremely complex socio-legal and political considerations that were lying embedded in historicity: historical realities! Those were most visible in the precipitant form of deep division of Indian social order on grounds of religion, race, caste, sex, place of birth, etc. Soon after attaining political independence of India, perhaps the most gigantic and formidable task before the newly born Nation was, therefore, how to reconstruct the severely fractured polity that we inherited from the colonial rulers on 15th of August 1947?

What should be the road map of reconstruction? This is what has been succinctly stated in the very Preamble of the Constitution that we, the people of India, adopted, enacted and gave to ourselves on twenty-sixth day of November, 1949, while assembled in the Constituent Assembly.[1]

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
> - JUSTICE, social, economic and political;
> - LIBERTY of thought, expression, belief, faith and worship;
> - EQUALITY of status and of opportunity;
> - and to promote among them all
> - FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
> - IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

A bare perusal of the preambulatory statement reveals that, we, the people of India, assembled in the Constituent Assembly on twenty-sixth day of November, 1949, solemnly resolved to give to ourselves a constitutional document, *The Constitution of India*. This document, born on November 26, 1949 (as indicated in the closing part of the Preamble), envisions the road-map of new India, that is Bharat.[2] This is in terms of two related strategies for reconstruction of Indian polity. The opening

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[1] This is the official version of preambulatory statement of our Constitution without a change even of a comma or a full stop.

[2] Article 1 of the Constitution of India, which defines in its Clause (1) India as Bharat: 'India, that is Bharat, shall be a Union of States.'

statement of the Preamble discloses the first strategic notion or idea, namely, the very complexion the new emerging State in the comity of Nations, called India (that is Bharat). It boldly proclaims that the complexion of the Indian State shall bear the composite character of at least five attributes; namely, 'SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC',[3] but all rolled into one! This means, when it is stated, say, that India is a 'secular State', it implies that India is not just a 'secular State' simpliciter in terms of its dictionary meaning, but it is also at the same time the State, which is 'sovereign socialist democratic republic'. Likewise, when we say that India is a 'socialist State,' it is not a socialist State simpliciter as literally defined in a dictionary, but it is also at the same time 'sovereign secular democratic republic;' and so on and so forth.

The middle part of the preambulatory statement reveals the second strategic idea, namely the functional objective of the Constitution, which is to be fulfilled through the powerful instrumentality of the STATE. In fact, the multi-faceted Indian State, bearing the composite complexion of 'Sovereign Socialist Secular Democratic Republic', is obligated, rather commanded, to achieve that objective. And that objective enshrined in the Preamble is 'to secure to all its citizens' 'JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.' Thus, we see that securing the objective to all its citizens is in the most comprehensive integrative sense, and that the point of convergence is the attribute of 'fraternity', which would fructify by assuring the 'dignity' of each individual member of the Indian polity, without losing sight of 'unity and integrity of the Nation'.

The primacy, as well as the centrality, of the 'functional objective' enshrined in the Preamble was brought out by Dr. B.R. Ambedkar, the chief architect of our Constitution, in his concluding statement that he made in the Constituent Assembly on 25th November, 1949; that is on the day prior to the formal adoption of the Constitution on 26th November 1949. Elaborating the nuanced objective, Dr Ambedkar, *inter alia*, said:

> '… On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of *one man one vote and one vote one value.* In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of *one man one value*. How long

[3] Substituted. by the Constitution (Forty-second Amendment) Act, 1976, S.2, for 'SOVEREIGN DEMOCRATIC REPUBLIC' (w.e.f. 3-1-1977). However, through a catena of judicial decisions it has been emphasized that there is nothing new in the addition of 'socialist and secular' in the Preamble; it is merely a restatement of what is already implicit in the Constitution.

> shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up'.

This concluding statement of Dr. Ambedkar needs our most serious, contemplative consideration. It is simply so, because this elucidation, in our view, expounds not only the innate value of 'equitable inclusive society', but also reveals the urgency as well as the explicit direction to move towards the realization of that value! However, the proverbial 'million-dollar' or critical question is: what is that strategic direction, which would eventually enable us to establish 'equitable inclusive society' for happy and prosperous living of all, irrespective of any other consideration of religion, race, caste, sex, etc.?

Dr. Ambedkar's cryptic, but prophetic, prescription was: transform, as soon as possible, 'political democracy' into 'social democracy.' However, what is this 'social democracy', we may ask? How do we perceive it in the real-life-situation in a politically organized society? According to Dr. Ambedkar's perceptive prescription, 'social democracy' means 'a way of life which recognizes liberty, equality, and fraternity as the principles of life.' Such an exposition of 'social democracy', in our view, is only a replica of *Mitakshara* coparcenary under Hindu Law, in which literally, the Ambedkar's principles of 'liberty, equality and fraternity' constitute the foundational principles of joint family living for centuries!

In the context of Dr. Ambedkar's statement regarding the lingering prospect of 'life of contradiction' at the very threshold of inauguration of our Constitution on 26th of January 1950, we may pose another question: What is the functional or utilitarian relationship between 'political democracy' and 'social democracy'? The emerging answer from Dr Ambedkar's conclusion is that though the 'political democracy' is a powerful means to attain 'social democracy', nevertheless it should not be construed, constructed or considered as an end in itself. Let us see how far we have hitherto faired in the realization of the objective of 'equitable inclusive society' during the past 75 years since the inauguration of our Constitution in 1950 through the invocation and construction of various constitutional strategies!

II

Strategies of 'Affirmative Action'

The evolving strategies for the realisation of 'equitable inclusive society', inhering social and economic equality, chiefly centre around the fundamental right to

equality, involving the trinity of articles 14, 15, and 16 read with articles 46, 335, 338, 341 and 342 of the Constitution. These strategies are in the nature of 'affirmative action' providing to the hitherto underprivileged members of society some 'special privileges' as their fundamental right, enabling them to join the mainstream of our social life. Such 'special privileges' invariably include making of 'special provisions', including reservations, for the underprivileged in the matters of admission in educational institution and public employment.

The provision of article14 of the Constitution is an elaboration of the universal principle of formal equality by stating that the State 'shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' However, the provisions of articles 15 and 16 are expositions of the same general principle of equality reflected in article 14, but in the typical context of Indian polity. This exposition of the generic principle of equality is contextualised in the two parts of the latter articles, seemingly contradictory or opposite of each other, but essentially integrative or complementary in nature. The reconciliation of apparently antagonistic parts has resulted in the evolution and development of, what came to be known as, constitutional strategies of 'affirmative action' for transforming 'formal equality' into 'substantive', 'real' or 'factual equality.'[4] These strategies under article 15 and article 16, which substantive may be abstracted as under:

> Article 15 deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth specially in relation to admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions.

Clause (1) of article 15 of the Constitution, contextualising the universal principle of equality in relation to Indian social set up states that, 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'[5] Clause (2) of article 15, further, eschews discrimination caused by specifically prevailing derogatory practices by stipulating:

> 'No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard

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[4] Under 'formal equality' every person is treated equal irrespective of his or her circumstances; whereas the principle of 'substantive', 'real' or 'factual' equality insists that two persons can be treated alike only when they are similarly situated.

[5] Clause (2) of article 15 of the Constitution further eschews discrimination caused by specifically prevailing derogatory practices by stipulating:
'No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.'

> to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.'

Clauses (3) to (6) of article 15 are the provisions that are in the nature of 'affirmative action', as each one of these clauses opens with the non obstante statement, 'nothing in this article shall prevent the state from making any special provision.' As an integral part of the constitutional strategy of 'affirmative action', the special provisions are meant for 'women and children',[6] 'for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes',[7] and 'for the advancement of any economically weaker sections of citizens other than the scheduled sastes, the scheduled tribes and non-creamy layer of other backward class of citizens.[8]

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[6] See, Clause (3) of article 15: 'Nothing in this article shall prevent the State from making any special provision for women and children.'

[7] See, Clauses (4) of article 15. Clause (4): 'Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes' [Added by the Constitution (First Amendment) Act, 1951, s. 2 (w.e.f. 18-6-1951)]
Clause (5): 'Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30. [Inserted by the Constitution [Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. 20-1-2006).

[8] See, Clause (6) of article 15: 'Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,— (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.
Explanation: For the purposes of this article and article 16, 'economically weaker sections' shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage. [Inserted. by the Constitution (One Hundred and Third Amendment) Act, 2019, s. 2 (w.e.f. 14-1-2019).]

Article 16 of the Constitution deals with equality of opportunity in matters of public employment. Clauses (1) and (2) of article 16 state the generic principle of equality enshrined in article 14 of the Constitution by specifically stipulating that there 'shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state,'[9] and that no citizen ' shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the state.'[10]

Clauses (3), (4), (4A), (4B), (5), and (6), like in the case of clauses (3) to (6) of article 15, are the provisions that are in the nature of 'affirmative actions', as each one of these clauses open with the non obstante statement, 'nothing in this article shall prevent the State from making any special provision.'

Clause (3) widens the power of Parliament (as distinguished from the usage of the usual term 'state') to make 'any law' 'in regard to a class or classes of employment or appointment to an office under the government of, or any local or other authority within, a state or union territory, any requirement as to residence within that state or union territory prior to such employment or appointment,' even if the same seemingly impinges upon the generic notion of equality principle.[11]

Clause (4) empowers the state to make any special provision 'for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.'[12]

The provision of clause (4A) was inserted by the Constitution amendment in 1995,[13] and later its provision was partly substituted by further amendment of the Constitution in 2001[14] by empowering the state to make any provisions 'for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the state in favour of the scheduled castes and the scheduled tribes which, in the opinion of the State, are not adequately represented in the services under the State.'

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9 Constitution of India, 1950, article 16(1).

10 Constitution of India, 1950, article 16(2).

11 See, Clause (3) of Article 16, as partly modified and substituted by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch., for 'under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State' (*w.e.f.* 1-11-1956).

12 This is what is envisaged since the inception of the Constitution under Clause (4) of Article 16.

13 See, insertion by the Constitution (Seventy-seventh Amendment) Act, 1995, s. 2 (*w.e.f.* 17-6-1995).

14 See, substitution by the Constitution (Eighty-fifth Amendment) Act, 2001, s. 2, for certain words (retrospectively *w.e.f.* 17-6-1995).

Clause (4B) was a new insertion by the Constitution amendment in the year 2000,[15] which elaborated the affirmative provision by further empowering the State to consider making 'any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.'

Clause (5) strengthens the fundamental right to freedom of religion by taking it out of the ambit of generic principle of formal equality in matters of public employment by stating clearly and categorically that nothing in this article 16 of the Constitution 'shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.'

Clause (6) widens the arena of reservation beneficiaries by enabling the state to make 'any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.'

This Clause (6) of article 16 along with clause (6) of article 15, which was introduced by the 103rd Amendment of the Constitution in 2019,[16] yielded, what has come to be known as the strategy of affirmative action for Economical Weaker Section (EWS). However, the constitutional validity of this amendment came to be pronounced by the five-judge Constitution Bench of the Supreme Court only on November 7, 2022 in *Janhit Abhiyan* v. Union of India,[17] on the touchstone of basic structure doctrine (BSD) of the Constitution. The Constitution bench led by the Chief Justice dealt with the issue of constitutionality of 103rd Amendment of the Constitution, providing reservation for EWS by excluding SCs, STs, and non-creamy layers of OBCs.

The Constitution bench in *Janhit Abhiyan* was deeply divided. The minority of two judges (U.U. Lalit, C.J.I., and S. Ravindra Bhat, J.) had held that exclusion clause, excluding SCs, STs, and non-creamy layers of OBCs, was not warranted by the BSD, and, therefore 103rd Amendment was unconstitutional. Whereas, the three judges

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[15] See, insertion by the Constitution (Eighty-first Amendment) Act, 2000, s. 2 (*w.e.f.* 9-6-2000).

[16] See insertion by the Constitution (One Hundred and Third Amendment) Act, 2019, s. 3 (*w.e.f.* 14-1-2019).

[17] *Janhit Abhiyan* v. *Union of India*, per U.U. Lalit, C.J.I., Dinesh Maheshwari, S. Ravindra Bhat, Bela M. Trivedi and J.B. Pardiwala, JJ. MANU/SC/1449/2022. Hereinafter. simply *Janhit Abhiyan case*.

constituting majority (Dinesh Maheshwari, Bela M. Trivedi and J.B. Pardiwala, JJ.) had held that such an exclusion was in accordance with the BSD, and, therefore, 103rd Amendment of the Constitution could pass the muster of constitutionality.

The majority Court for their opinion, however, cited author's research article on BSD published in 2007 by the Indian Law Institute, New Delhi, in the two consecutive paragraphs of their judgment. The two cited paras of the majority judgment are as under:

Janhit Abhiyan, para 317 (per JB Pardiwala, J.):

> 'I am of the view as Prof. Satya Prateek rightly puts that …. the fundamental tenets or the core principles of the Constitution are foundational - they are at the core of its existence. They are seminal to the Constitution's functioning. The Constitution retains its existence on these foundations as they preserve the Constitution in its essence. This is not to mark out the possibilities of structural adjustments in the foundations with time. The foundations may shift, fundamental values may assume a different meaning with time but they would still remain to be integral to the constitutional core of principles, the core on which the Constitution would be legitimately sustained.' (*Reference: Virendra Kumar, Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance, 49:3, Journal of the Indian Law Institute, 365, 385 (2007*).'

Janhit Abhiyan, para 318 (per JB Pardiwala, J.) –

> 'Prof. Virendra Kumar believes that there is a difference between the fundamental rights and the values that structure such fundamental rights. He views the values to have an overarching influence and says that it is totally possible to hold that violation of the fundamental rights in certain situations, may not infringe the fundamental values in their backdrop.'

Acting on this premise, it was held that exclusion of SCs, STs, and OBCs from the benefit of reservations given to EWS, even if considered violation of the fundamental right to equality, nevertheless, the same was not violative of BSD, as it was invoked to fulfil the larger objective of extending the ambit of 'inclusive society' in the Social Welfare State.[18]

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[18] The cited article of the author by the Supreme Court on Basic Structure Doctrine of the Constitution in *Janhit Abhiyan case* (2022) represented his major Critique of a unanimous judgment of the 9-Judge Constitution Bench of the Supreme Court in I.R. Coelho (dead) by *L.Rs* v. *State of Tamil Nadu*, AIR 2007 SC 861 [Per Y.K. Sabharwal, C.J. (for himself and on behalf of Ashok Bhan, Dr. Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, and D.K. Jain, JJ.]. The author presented his Critique in the Special Lecture organized under the aegis of Indian Council of Social Science (ICSSR) North-Western Regional Centre P.U. Chandigarh in their ICSSR Special Lecture Series on September 3, 2007. The title of his Critique was, 'Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From His Holiness

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III

Strategy of Quotas Within Quota'

In the string of evolving strategies for the realisation of 'equitable inclusive society', we may add the latest constitutional strategy, popularly known as 'quotas within quota' or 'reservations within reservation'. This strategy has come to the fore as a sequel to the latest seven-judge Constitution bench judgment in *the State of Punjab* v. *Davinder Singh* (hereinafter, simply *Davinder Singh* 2024*).*[19] The pivotal constitutional question to be considered in *Devinder Singh* (2024) is, whether in the pursuit of protecting the right to equal opportunity guaranteed by the Constitution, sub-classification of the scheduled castes for reservation is constitutionally permissible.[20] This, indeed, is the issue that emanated from the enactment of *Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 2006*,[21] which, *inter alia*, provides 'that fifty percent of the vacancies of the quota reserved for the Scheduled Castes in direct recruitment shall be offered to *Balmikis* and *Mazhabi Sikhs*, if available, as a first preference from amongst the scheduled castes.'[22] The provision

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Kesavananda Bharati (1973) to I.R. Coelho (2007). In his Critique he did the full-length analysis of the landmark judgment, and shared how the concerns raised by him earlier in his earlier published article, 'The Proposed Perspective of the Doctrine of Basic Structure of the Constitution.' *All India Reporter* 1982 Journal 55-59, stood dissolved. The Special Lecture was chaired by Hon'ble Mr. Justice Ashok Bhan, Judge, Supreme Court of India. It was immediately published as such in *Journal of the Indian Law Institute*, Vol. 49 No. 3 (2007) 365-398.

On the strength of citation of this published article of 2007 by the Constitution Bench of the Supreme Court in their judgment in *Janhit Ahhiyan* (2022), The Indian Law Institute invited the author to do a critique of the *Janhit Ahhiyan* (2022) case share his reflections on BSD with their Faculty and Students at the Institute, which he did on January 31, 2023 in an extended interactive session. The author's analysis of *Janhit Ahhiyan* (2022) has now been published in the latest issue of their journal: See, Virendra Kumar, Reservation for EWS under 103rd Constitutional Amendment via Basic Structure Doctrine of the Constitution: A critique of 5-Judge bench judgment of the Supreme Court in *Janhit Abhiyan* v. *Union of India* [Delivered on November 7, 2022] 65(4) JOURNAL OF THE INDIAN LAW INSTITUTE 351 (2023).

[19] Civil Appeal No. 2317 of 2011, delivered on August 1, 2024. MANU/SC/0816/2024 :2024 INSC 562, The Bench consisted of Dr. D.Y. Chandrachud, C.J.I., Manoj Misra, B.R. Gavai, Vikram Nath, Bela M. Trivedi, Pankaj Mithal and S.C. Sharma, JJ.

[20] See, *Davinder Singh* (2024), para 1 (*per* Dr. D.Y. Chandrachud, C.J.I.)

[21] Act 22 of 2006. Hereinafter, simply *The Punjab Act, 2006*.

[22] See, Section 4(5) of *The Punjab Act, 2006.* Under Section 4(2) of the Punjab Act, it is stipulated that reservation of twenty-five percent shall be made for the members of the Scheduled Castes and twelve percent for Backward Classes while filing up vacancies by direct recruitment in services. Thia implies that under sub-section (5) of Section 4, in

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of section 4(5) of the Punjab Act, 2006, making 'reservations within reservation' or 'quotas within quota' was held unconstitutional in a writ petition under article 226 of the Constitution by the High Court of Punjab and Haryana.[23] For its decision, the High Court essentially relied upon the judgment of the Constitution Bench of the Supreme Court in *EV Chinniah* v. *State of Andhra Pradesh*,[24] which, in a similar fact matrix had held that reservations within reservation is constitutionally impermissible, and that the law earlier laid down by the nine judge bench of the Supreme Court in this respect in *Indra Sawhney* v. *Union of India*[25] was applicable

direct recruitment preference to the extent of 50% of 25% of vacancies reserved for Scheduled Castes shall be given to Balmikis and Mazhabi Sikhs, if available.

[23] Vide judgment dated 29 March 2010. Earlier also on 6 July 2006, in a similar fact matrix in a case coming from the State of Haryana, the High Court of Punjab and Haryana quashed the notification issued on 9 November 1994 on the ground that the sub-classification of castes placed in the list of Scheduled Castes is unconstitutional in view of the judgment of the Supreme Court in *Chinnaiah* case (2005). The Hayana Notification of 1994, like the Punjab Act of 2006, also sub-classified all the Scheduled Castes into two categories – Block A and Block B - for the purposes of reservation; Block B consisted of Chamars, Jatia Chamars, Rahgars, Raigars, Ramdasias or Ravidasias, and Block A consisted of the remaining thirty-six castes in the list of Scheduled Castes for the Haryana State. Within the quota reserved for Scheduled Castes in direct recruitment for Government jobs, fifty percent of the vacancies were to be offered to candidates from Block A and the other fifty percent were to be offered to candidates from Block B. In case suitable candidates were not available in either of the two Blocks, the preference would be given to the castes belonging to the other Block, A or B within the limit of fifty per cent earmarked for them. The pending Special Leave Petitions challenging the judgment of the High Court of Punjab and Haryana came to be tagged with the appeals involving the challenge to the Punjab Act. For the reference, see *Davinder Singh* (2024), para 9 (per Dr. D.Y. Chandrachud, C.J.I.)
Likewise, proceedings directly under Article 32 of the Constitution were instituted before the Supreme Court for challenging the constitutional validity of the Tamil Nadu Act of 2009 - *The Tamil Nadu Arunthathiyars (Special Reservation of seats in educational institutions including private educational Institutions and of appointments or posts in services under State within the Reservation for the Scheduled Castes) Act 2009* - .on the ground that it contravenes the judgment of the Supreme Court in *Chinnaiah case* (2005) by making sub-classification of the list of seventy-six Scheduled Castes notified by the President under Article 341 into two categories: the castes of Arunthathiyar, Chakkiliyan, Madari, Madiga, Pagadi, Thoti and Adi Andhra, collectively called Arunthathiyars on the one hand, and the rest of the castes on the other, and apportioning reservations separately within the list of 76 notified castes. The batch of matters challenging the Tamil Nadu Act was also tagged with the batch of matters challenging the Punjab Act. See, *Davinder Singh* (2024), para 10 (per Dr. D.Y. Chandrachud, C.J.I.).

[24] (2005) 1 SCC 394. Hereinafter, *E.V. Chinniah (2005),*

[25] (1992) Supp (3) SCC 217. Hereinafter, simply *Indra Sawhney (1992)*

only to 'other backward classes', and the category of scheduled castes was excluded from its purview.

The State of Punjab appealed to the Supreme Court against the judgment of the High Court, *inter alia*, chiefly on the plea that *Chinnaiah case* (2005), on which the High Court itself relied, is 'not consistent with the judgment of the nine-judge bench in *Indra Sawhney*.'[26] The three-judge bench, which heard the appeal, 'referred the correctness of *Chinnaiah* (supra) for consideration by a larger bench[27] by observing 'that the judgment needs to be revisited, considering article 338, the judgment of this Court in *Indra Sawhney* (supra) and the interplay between article 16 and articles 338 and 341 of the Constitution.'[28]

The Supreme Court's three-judge bench reference was considered by the five-judge bench, which, in turn, referred the matter to be taken up by the seven-judge bench. Reliance upon the Constitution bench judgment in *Chinnaiah case* (2005) represents the commonality in all the proceedings emanating from the States of Punjab, Haryana, and Tamil Nadu, in which the respective States felt the need of rationalizing the benefits of reservation percolating amongst the members of the scheduled castes themselves from within.[29]

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[26] See, *Davinder Singh* (2024), para 7 (*per* Dr. D.Y. Chandrachud, C.J.I.)

[27] Vide judgment on August, 20, 2014.

[28] See, *Davinder Singh* (2024), para 8 (*per* Dr. D.Y. Chandrachud, C.J.I.)

[29] In *Chinnaih case* (2005), a Constitution Bench of the Supreme Court, unanimously held that the Andhra Pradesh Act aiming towards 'Rationalisation of Reservations,' apportioning the benefits of reservation among the Scheduled Castes of the State themselves from within is constitutionally impermissible. Rationale of the Judgment may be abstracted as under:

(i)The 'Scheduled Castes,' notified in the Presidential List under Article 341 of the Constitution, 'form a class by themselves,' implying thereby a 'homogenous class of persons', and, therefore, by reason of homogeneity it does not admit any sub-classification. And if any re-grouping is made, that would 'amount to reverse discrimination and violative of article 14' by treating equals as unequals

(ii) Any sub-classification of the Scheduled Castes by the State 'would amount to tinkering with the Presidential List,' which is impermissible under the Constitution. (Article 341(2)?)

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

(iv) The 9-Judge Bench judgment in Indra Sawhney (supra), which permitted sub-classification of 'backward classes' into 'more backward' and 'backward' classes, 'was not dealing with Scheduled Castes', but only with 'Other Backward Classes.' This means, the rationale of Indra Sawhney (supra), to the extent that it permitted sub-classification of the Other Backward Classes, did not apply to the Scheduled Castes.

In the light of this background, the seven-judge bench identified the following issues for their consideration in *Davinder Singh* (2024):[30]

(a) Whether article 14 of the Constitution permits sub-classification of a class which is not similarly situated for the purpose of the law.
(b) Whether sweep of Indra Sawhney (supra) is limited to application of sub-classification only to the other backward class.
(c) Whether castes included in the list under article 341(1) bear homogeneous character? What is the connotation of 'deemed' fiction.
(d) Whether Sub-classification within the scheduled castes violates article 341(2).
(e) Whether historically and empirically evidence demonstrates that the Scheduled Castes are a socially heterogenous class or homogeneous?
(f) Whether the holding in *Chinnaiah* (supra) that sub-classification of the Scheduled Castes is impermissible is right?

The crystalized central issue that emerged before the seven-judge bench is: whether the sub-classification of scheduled castes for the purpose of providing affirmative action, including reservation, under articles 14, 15 and 16, read with article 341 of the Constitution is valid? Emanating from this issue, the critical question, eventually to be considered is, whether article 341 creates a homogenous class through the operation of the deeming fiction,[31] so as to prohibit the exercise of undertaking sub-classification? For providing due response to this specific question, the seven-judge bench summarised the scope of sub-classification of the scheduled castes as under:[32]

i. The objective of any form of affirmative action including sub- classification is to provide substantive equality of opportunity for the backward classes. The State can sub-classify, inter alia, based on inadequate representation of certain castes. However, the State must establish that the inadequacy of representation of a caste/group is because of its backwardness;
ii. The State must collect data on the inadequacy of representation in the 'services of the State' because it is used as an indicator of backwardness; and
iii. Article 335 of the Constitution is not a limitation on the exercise of power Under Articles 16(1) and 16(4). Rather, it is a restatement of the necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services. Efficiency of administration must be viewed in a manner which promotes inclusion and equality as required by Article 16(1).

The seven-judge bench in *Davinder Singh* (2024) by an overwhelming majority of 6:1,[33] has dismantled the notion of homogeneity brought in by virtue of deeming

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[30] See, *Davinder Singh* (2024), para 205 (sub-paras 'a' to 'f'), *per* Dr. D.Y. Chandrachud, C.J.I.
[31] *Id.*, para 43.
[32] *Id.*
[33] The leading judgment has been authored by Dr. D.Y. Chandrachud, C.J.I., (for himself and Manoj Misra, J') B.R. Gavai, J. wrote the separate, but concurring judgment; Vikram

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fiction. The connotation of the phrase 'deemed' in the provision of article 341(1) of the Constitution[34] merely mean 'that that the castes or groups notified by the President shall be 'regarded as' the scheduled sastes.'[35] It does not create and confer separate and distinct 'identity'. And, even if 'it is accepted that the deeming fiction is used for the creation of a constitutional identity, the only logical consequence that flows from it is that castes included in the list will receive the benefits that the Constitution provides to the scheduled castes.'[36] Be that as it may, '[t]he operation of the provision does not create an integrated homogenous class.'[37]

The Supreme Court seven-judge Constitution bench also dispelled the notion that sub-classification results in violation of the constitutional safeguard specifically provided to Scheduled Castes under clause (2) of article 341[38] by categorically empowering the Parliament, and Parliament alone, to cause any inclusion or exclusion 'from the list of scheduled castes specified in a notification issued under clause (1)' by the President in the first instance.[39] In no way, the provision of sub-

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Nath, Pankaj Mithal and S.C. Sharma, JJ. made their respective concurring observations by substantially agreeing with both Chandrachud, CJI, and Gavai, J.; whereas Bela M. Trivedi, J. wrote the dissenting judgment.

[34] Constitution of India, 1950 article 341 dealing with the exposition of the expression, 'Scheduled Castes', provides in its sub-clause (1): 'The President may with respect to any State or Union Territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes, or parts of or groups within castes, races, tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.' The Constitution does not define the expression 'Scheduled Castes,' nor it was defined under The Government of India Act 1935. However, its genesis of could be traced to The Government of India (Scheduled Castes) Order, 1936, notified under the Government of India Act 1935, which formed the basis of the Constitution (Scheduled Castes) Order, 1950 issued under Article 341(1) after the commencement of the Constitution, see, *Davinder Singh* (2024), para 125, *per* Dr. D.Y. Chandrachud, C.J.I. See also, *id.*, para 37, *per* BR Gavai, J.

[35] See, *Davinder Singh* (2024), para 205 (sub-para 'c'), *per* Dr. D.Y. Chandrachud, C.J.I., while summing up his rationale that Article 341(1) does not create a deeming fiction.

[36] *Id*.

[37] *Id*.

[38] Constitution of India, 1950 article 341(2): 'Parliament may by law include or exclude from the list of Scheduled Castes specified in a notification issued under Clause (1) any caste, race, or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said Clause shall not be varied by any subsequent notification.'

[39] As a matter of safeguard, the limitation imposed is this: that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by

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classification results either in inclusion or in exclusion of any caste from the list of scheduled castes. 'Sub-classification would violate the provision only when either preference or exclusive benefit is provided to certain castes or groups of the scheduled castes over all the seats reserved for the class.'[40] It merely rationalises the listed group or category of scheduled cases, we may add.

Otherwise also, the notion of homogeneity is our own social construct. It is conceived and created to effectuate the principle of equality *via* theory of reasonable classification by stipulating that 'like should be treated alike'. Here 'homogeneity' bears the notion of 'likes'; that is, treating a group of persons, sharing some common characteristics, as a 'homogeneous' group for serving certain social purpose, say, for conferring certain special benefits as in the case of scheduled castes for building up an inclusive social order. In a way, we seek 'homogeneity' to serve some social purpose in 'heterogeneity', the latter, indeed, is being the inexorable Rule in the scheme of Nature! Fortuitously, our own Constitution recognises this very rule of Nature in the form of protecting the innate integrity of each individual with which he or she is born as his or her Fundamental Right! Theory of reasonable classification is, thus, a contrivance, which represents a continuum of sub-classifications for progressively seeking equality (homogeneity) amongst un-equals (socially heterogenous class). Moreover, historically, there has come to the fore 'empirical evidence', which 'demonstrates that the scheduled castes are a socially heterogenous class.'[41] If so, there is nothing that prohibits the state in exercise of power under articles 15(4) and 16(4) of the Constitution to 'further classify scheduled castes if (a) there is a rational principle for differentiation; and (b) the rational principle has a nexus with the purpose of sub-classification.'[42] Besides, the exercise of power under the provisions of these Articles is not controlled or limited

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Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.' See, *Davinder Singh* (2024), para 39, *per* BR Gavai, J., citing Dr B.R. Ambedkar.

[40] See, *Davinder Singh* (2024), para 205 (sub-para 'd'), *per* Dr. D.Y. Chandrachud, C.J.I.

[41] See, *Id.*, 205 (sub-para 'e'), *per* Dr. D.Y. Chandrachud, C.J.I. See also, *Id*., para 139: 'Field researchers have also accounted that the Scheduled Castes are not one homogenous class. Studies indicate that certain castes of the Scheduled Castes are not only sociologically backward *vis-à-vis* the forward castes but also amongst the Scheduled Castes themselves. AM Shah recounts that there was much less interaction between two Dalit castes in Gujarat than there was between a Dalit caste and a forward class. The author observes that the priests for the Dalits are placed high amongst the Dalit castes and the scavengers are placed the lowest, with the leather-workers and the rope makers occupying the intermediary positions,' citing AM Shah,s work, *The Dalit Category and its Differentiation*; and , 'Untouchability, the Untouchables and Social Change in Gujarat in Dimensions of Social Life,' *Essays in Honor of David G Mandelbaum* (edited by Paul Hockings).

[42] *Ibid*.

by article 335 of the Constitution,[43] inasmuch as 'it is [merely] a restatement of the necessity of considering the claims of the scheduled castes and the scheduled tribes in public services.'[44] And, '[e]fficiency of administration must not be viewed in terms of the narrow lenses of scores in an examination which a priori excludes certain classes but in terms of inclusivity and equality as required by article 16(1).'[45]

Accordingly, the Supreme Court seven-judge bench upheld the preferential provision of the Act of 2006 on the basis of 'more backward' than 'other backwards' in their judgment of August 1, 2024, by overruling their earlier five-judge Constitution bench judgment of 2005 in *E.V. Chinnaih case*,[46] implying thereby clearly that henceforth, 'sub-classification of the scheduled castes for the purpose of reservation *inter se* is constitutionally permissible.[47] And, of course, 'for doing so, the State will have to justify that the group for which more beneficial treatment is provided is inadequately represented as compared to the other castes in the said List,'[48] and that the existence of such inadequacy is duly supported 'on the basis of empirical data.'[49]

IV

Responses to the Strategy of Quotas Within Quota'

The Supreme Court seven-judge bench judgment of 1st August, 2024 suddenly evoked a strong reactive response. The very first reaction came from the Union

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[43] Article 335, dealing specifically the claims of Scheduled Castes and Scheduled Tribes to services and posts, provides: 'The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:
Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.' [As amended by the Constitution (Eighty-second Amendment) Act, 2000, s. 2 (w.e.f. 8-9-2000) in inserting a proviso.]

[44] *Id.*, para 69, *per* Dr. D.Y. Chandrachud, C.J.I.

[45] *Id.*

[46] See, *Davinder Singh* (2024), para 205 (sub-para 'f'), *per* Dr. D.Y. Chandrachud, C.J.I. See also, *id,.* para 296(i): *E.V. Chinnaih case,* prohibiting sub-classification, 'does not lay down a good law,' *per* BR Gavai, J., *Id.*, para 1, *per* Vikram Nath, J.

[47] See, *Davinder Singh* (2024), para 296(ii), *per* BR Gavai, J.

[48] *Id.*, para 296(iii), *per* BR Gavai, J,

[49] Id., para 296(iv), per BR Gavai, J

Minister Ramdas Athawale from Maharashtra (head of the of Republican Party of India, having its roots in the Scheduled Castes Federation led by B. R. Ambedkar), who opposed any move to apply creamy layer criteria to quota for scheduled castes and scheduled tribes.[50] While adressing media in Mumbai on August 3, 2024, he said, 'The reservation for SCs/STs is based on caste. We will strongly oppose any move to apply the criteria of creamy layer to quota for SCs and STs.'[51]

Mayawati, Bahujan Samaj Party (BSP) Chief and former Chief Minister of Uttar Pradesh (UP) opposed the judgment by saying that the scheduled castes were a homogenous group that had been historically discriminated against and any classification would be unjust.[52] 'We do not agree with the verdict,' she said.[53] Likewise, the Union minister Chirag Paswan, who is LJP (Paswan) chief, vehemently opposing the Supreme Court judgment had gone so far as to say that his party would challenge the verdict in the highest court and seek a review.[54]

On August 9, 2024, a delegation of ruling party's SC/ST MPs met Prime Minister Narendra Modi in New Delhi for registering their resentment against the seven-judge bench judgement of the Supreme Court.[55] And the Prime Minister assured the MPs that the concept creamy layer would not be implemented in respect of SC/ST quotas.[56]

Again, another news flashed by the national press on August 9, 2024, this time from the State of Telangana, reflecting the opposite reaction about the Supreme Court judgment.[57] Chief Minister Telangana, A Revanth Reddy, along with other leaders of the State rejoiced after the Supreme Court verdict on sub-classification of

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[50] PTI, *Athawale to oppose creamy layer criteria in SC-ST quota*, THE TRIBUNE (Aug. 4, 2024) *available at*: https://www.tribuneindia.com/news/india/athawale-to-oppose-creamy-layer-criteria-in-sc-st-quota/.

[51] Athawale's party - Republican Party of India (Athawale) - is a constituent of the BJP-led NDA.

[52] Tribune News Service, *BJP, Cong silent on sub-classification of SCs/STs; Maya, Chirag oppose order*, THE TRIBUNE (Aug. 5, 2024) *available at*: https://www.tribuneindia.com/news/india/bjp-cong-silent-on-sub-classification-of-scs-sts-maya-chirag-oppose-order/.

[53] *Id*.

[54] *Id*.

[55] Tribune News Service, *Won't bring in creamy layer clause for SC/ST quota: PM Modi*, THE TRIBUNE (Aug. 10, 2024) *available at*: https://www.tribuneindia.com/news/india/wont-bring-in-creamy-layer-clause-for-sc-st-quota-pm-modi/.

[56] *Ibid*.

[57] Editorial, *Don't make some 'unequals' more equal than others*, THE TRIBUNE (Aug. 10, 2024) *available at*: https://www.tribuneindia.com/news/comment/dont-make-some-unequals-more-equal-than-others/.

scheduled castes and scheduled tribes.[58] It was argued by them that the question of economic differentiation within castes and communities needed to be addressed.[59]

From the State of Punjab, there emerged two opposite reactions amongst the *Dalits* about the Supreme Court judgment: the Ravidassia community held protests across the Dalit-dominated Jalandhar district expressing dissent over the Supreme Court orders, whereas the Valmiki community distributed sweets to welcome the decision regarding bifurcation of 25 per cent reservation between the two groups.[60]

On August 21, 2024, there was a daylong nationwide bandh (strike) called by some Dalit and Adivasi groups against the Supreme Court's verdict on the sub-classification of Scheduled Castes, which affected normal life in Bihar and Jharkhand as well as tribal areas of various states.[61] Bharat Bandh in Patna even took an ugly turn, and the police personnel were prompted to lathi charge the protesters.[62]

V

The Problem of 'Creamy Layer' and Politics of Implementation

However, why the social and political upheaval was caused by the seven-judge Constitution Bench Judgment of the Supreme Court that constitutionally permitted the State to undertake sub-classification of the scheduled castes? To put it more specifically, it may be asked: What is the point of most worrying concern of the scheduled castes resulting from the Supreme Court judgment that led the scheduled caste-MPs, including two Union Ministers of the present coalition Government, to meet the Prime Minister Narendra Modi for his immediate intervention?

Our own finding on this count is: It was the lingering fear of the scheduled castes that by allowing sub-classification of their castes, they would face the ominous prospect of being deprived of the benefits of affirmative action (reservation) through the guillotine process of 'creamy layer.' However, the Prime Minister Modi instantly

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[58] *Id.*

[59] *Id.*

[60] Deepkamal Kaur, *Ravidassias protest, Valmikis exult: Quota order divides Punjab Dalits*, THE TRIBUNE (Aug. 22, 2024) *available at*: https://www.tribuneindia.com/news/punjab/ravidassias-protest-valmikis-exult-quota-order-divides-punjab-dalits/.

[61] PTI, *Supreme Court order on quota: Bharat Bandh affects life in Bihar, Jharkhand, tribal belts*, THE TRIBUNE, (Aug. 22, 2024) *available at*: https://www.tribuneindia.com/news/india/supreme-court-order-on-quota-bharat-bandh-affects-life-in-bihar-jharkhand-tribal-belts/.

[62] *Id.*

allayed or overcame their fear by assuring the ruling party's SCs-MPs that the concept of 'creamy layer' would not be implemented in respect of SC/ST quotas.

What does the Prime Minister's assurance mean? Does it mean that the PM's assurance, that the concept of 'creamy layer' would not be implemented in respect of SC/ST quotas, a clear negation of the Supreme Court ruling by the Government? If it is so, then it raises a very serious question of far-reaching constitutional consequences!

If we go by the media reporting of the judgment of the Supreme Court, conveying that it is constitutionally permissible to equally apply the creamy layer concept to the scheduled castes on the analogy of the OBCs, then the PM's assurance given to ruling party MPs apparently runs contrary to the Supreme Court's ruling. In that case, it would raise a serious question of constitutionality and constitutional governance, because the PM would not be able to implement his assurance till he gets the holding of the Supreme Court reversed by going through the grilling process of amendment of the Constitution! If he still goes ahead to fulfil his promise without the formal amendment of the Constitution, his implementing action, if challenged in the Supreme Court, is most likely to be declared unconstitutional right in the first instance! What, then, is the way to get out in this political tension and turmoil! What is the academic course to follow, we ask ponderingly?

The academic response as a matter of course invariably always is to undertake a close and critical appreciation and appraisal of the seven-judge bench judgment *de novo*: afresh, from the beginning. On this count, it is somewhat intriguing to find, our own critical reading and understanding of the judgment of the Supreme Court is at variance with that of hitherto propagated media's perception! This is in terms of application of the concept of 'creamy layer' to the category of scheduled castes. 'Creamy layer' is the judicially conceived concept by the nine-judge bench of the Supreme Court in *Indra Sawhney case* (1992), wherein it was developed specifically with reference to OBCs. By virtue of application of the creamy layer concept, all those amongst OBCs, who, after availing the benefit of reservation, come within the ambit of top layer, called 'creamy layer', shall be excluded thenceforth from the quota benefits reserved for OBCs. However, when the same concept of creamy layer is applied to the category of the SCs on the analogy of OBCs in absolute terms, totally or unconditionally, we enter the domain of 'misconception'!

In our own understanding, the concept of 'creamy layer' operates entirely differently *vis-à-vis* the scheduled castes, and the difference is substantive. Unlike in the case of OBCs, the creamy layer concept in the case of SCs neither results in their exclusion from the category of SCs beneficiary of reservation; nor does it deprive

them totally of the benefit of reservation![63] By virtue of sub-classification, it simply rationalises the conferment of reservation benefits by preferring 'the most backward' to 'other backwards' within the fold of Scheduled Castes themselves! And the development of heterogeneity within the fold of reserved category itself is caused by the reservation benefits themselves, which indeed is the intended natural consequence of affirmative action.

It is this misapprehension of outright exclusion of the scheduled castes from the benefit of reservation on the analogy of OBCs, which was, most seemingly in our view, sought to be allayed by the President in her Address to the Nation on the eve of 78th Independence Day (August 14, 2024, just 5 days after the meeting of SCs-MPs with PM on August 9, 2024).[64] Citing Dr. Ambedkar, President said, 'we must make our political democracy a social democracy as well.'[65] 'The spirit of inclusion pervades every aspect of our social life. We move together as a cohesive nation with our diversity and plurality. *Affirmative action must be strengthened as an instrument of inclusion*. In a vast country like ours, tendencies that stoke discord based upon perceived social hierarchies have to be rejected. *Social justice is a top priority of the government*.'[66]

President's Independence-Day Address to the Nation set the right tone to solemnly resolve to implement the seven-judge Constitution Bench judgment of August 1, 2024 by the BJP led government, both in letter and spirit, and thereby effectively eschewing any misapprehension of an impending constitutional crisis seemingly caused by Prime Minister's assurance given to SCs-MPs on August 9, 2024.

Subsequently, it is this resolve of the government to strengthen the affirmative action, which is sought to be reinforced by the State of Haryana, who took the lead in implementing the seven-judge Bench judgment:[67]

> Chief Minister Nayab Singh Saini announced that the Haryana Government would implement the Supreme Court's decision allowing states to make sub-classifications within the Scheduled Castes for reservation in government jobs. Accordingly, acting

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[63] See, *Davinder Singh* (2024), para 296(v ad vi), per BR Gavai, J.: 'while providing for sub-classification, the State would not be entitled to reserve 100% seats available for Scheduled Castes in favour of a sub-class to the exclusion of other castes in the List,' and that such a sub-classification would be permissible only if there is a reservation for a sub-class as well as the larger class.'

[64] Tribune News Service, *Social justice government's priority: President*, THE TRIBUNE (Aug. 15, 2024) *available at*: https://www.tribuneindia.com/news/india/social-justice-governments-priority-president/.

[65] *Id*.

[66] *Id.* Emphasis added.

[67] Tribune News Service, *Saini announces sub-classification of SCs for job quota*, THE TRIBUNE (Oct. 19, 2024) *available at*: https://www.tribuneindia.com/news/haryana/saini-announces-sub-classification-of-scs-for-job-quota/.

> on the recommendations of the Haryana State Commission for SCs, reserved posts for the Scheduled Castes shall be divided into two categories: the Deprived Scheduled Castes (DSC) and Other Scheduled Castes (OSC). The DSC category includes 36 castes such as Balmikis, Dhanaks, Mazhabi Sikhs, and Khatiks, while the OSC category includes castes such as Chamar, Jatia Chamar, Rehgar, Raigar, Ramdasi, Ravidasi, Jatav, Mochi, Ramdasia. The sub-classification envisages that 50% of the SCs- job quota shall be for DSCs, as they are under-represented in government employment.

Likewise, Karnataka Government is also gearing up to take the benefit of the judgment of the Supreme Court by providing internal reservation amongst the scheduled castes:[68]

> The Karnataka cabinet has decided to constitute a commission, which will be tasked with collecting empirical data necessary for providing internal reservation among Scheduled Castes. The need for internal quota gained momentum after Supreme Court landmark verdict on August 1, 2024, which held that 'states are constitutionally empowered to make sub-classifications within the Scheduled Castes, which form a socially heterogeneous class, for granting reservation for the uplift of castes that are socially and educationally more backward.'

In the light of the above, we may round up the whole problematic issue by raising and responding a question in retrospect. How come a constitutional catastrophe was caused by misconstruing or misunderstanding the Supreme Court seven-judge bench judgment of 1st August 2024, which resulted in raising a sort of social and political upheaval? And such a turmoil necessitated the immediate meeting with the Prime Minister, who assured the contingent of SCs MPs led by two Union Ministers by telling them categorically on August 9, 2024 that the Government won't bring in and implement the creamy layer clause in respect of SCs/STs quota. Not only this, misconstruing the Supreme Court judgment also led to the observance of Bharat Bandh on August 21, 2024.

However, soon thereafter, we saw retrieval in the realization that the principle of sub-classification of the SCs did not affect their interests; rather it strengthened them *from within*, as is evident from the immediate adoption of the sub-quota principle by the State Governments of Haryana and Karnataka. The murmur of this realization in the Government stand first appeared when the President Droupadi Murmu in her Independence-Day address called for 'strengthening affirmative action as an instrument of inclusion,' and that 'Social justice is a top priority of the government.' In this sense, the President said, what the Prime Minister had truly meant in his assurance to the delegation of SCs/STs Members of Parliament on August 9, 2024!

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[68] Express News Service, *Karnataka Congress govt okays internal reservation for SCs; forms 1-man commission*, THE INDIAN EXPRESS (Oct. 29, 2024) *available at*: https://indianexpress.com/article/cities/bangalore/karnataka-congress-govt-internal-reservation-scs-commission-9643289/.

This rounding-up leads us to raise the last concluding, perhaps the most critical, question that would be of immense help, we believe, in averting the possible similar misgiving-crisis in future, as has happened in the case of seven-judge bench judgment. That question, in retrospect, is: What is the most productive source that resulted in creating misapprehension about the judgment in the minds of public at large; nay, even in the mind of the Government?

As we see it, the inducing source of such misinformation could, in all probability, be traced to *social media*, which spread it with a lightning speed instantly, thanks to modern internet computer technology, causing incalculable damage to the social-fabric! We say spreading misinformation unwittingly (as distinguished from disinformation, wherein misinformation is spread and shared intentionally), because every citizen is entitled to form an opinion about the judgment of the Supreme Court, and share the same with others in exercise of his fundamental right to freedom of speech and expression guaranteed by the Constitution. If so, then where does lie the lacuna or lapse that needs to be avoided or that helps us in overcoming the mischief? Or, simply stated, why did the media resort to misconstruing the Supreme Court judgment unwittingly?

In tracing the mischief-misconstruction to social media, we may legitimately derive some significant support from a very recent observation of Justice Chandrachud, the former Chief Justice of India, which he made while dilating upon the theme, how 'Social Media is being used to influence case outcomes (in courts)'![69] He lamentingly said:[70]

> 'Today, there are special interest groups and pressure groups who are trying to use social media to affect the minds of the courts and the outcomes of cases. Every citizen is entitled to understand what is the basis of a decision and to express their opinions on the decisions of the court. But when this goes beyond the decisions of the court and targets individual judges, then it sort of raises fundamental questions about - Is this truly freedom of speech and expression?'
> 'Everybody, therefore, wants to form an opinion in 20 seconds of what they see on YouTube or any social media platform. This poses a grave danger because the process of decision-making in the courts is far more serious. It is really nuanced that nobody has the patience or the tolerance today on social media to understand, and that is a very serious issue that is confronting the Indian judiciary.'

This indeed is a clear case of disinformation, in which the source of misinformation is assuredly traced to social media, wherein opinions about the ongoing proceedings of a case in the court of law of are formed on the basis of, say, just 20- second exposure of what people see on YouTube or any social media platform. Justice Chandrachud's lament is that judicial decision-making is a 'serious' matter and its understanding required patience and time, which was not duly devoted and spent.

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[69] See, *The Tribune*, November 24, 2024.

[70] *Id*.

If it is true about disinformation, wherein misinformation was spread and shared with some specific design, malice or ill will, then in the case when misinformation was passed on casually without any 'intent' or dubious design, as had most seemingly happened in respect of the judgment, far less little attention was paid to understand and comprehend the intricacies and nuances inherent in the judgment by the social media, resulting into avoidable social and political predicament.

VI

Summations

Our Summation: 'Quotas within quota' or 'Reservations within Reservation' is relatively a newer constitutional strategy in the string of strategies that have hitherto evolved during the past 75 years since the inauguration of our republic in 1950. Its singular objective is, not to expand but, to *consolidate* the reservations of scheduled caste community *from within*. Such a measure would strengthen the preambulatory objective of our Constitution for establishing 'equitable inclusive society', as expounded by Dr. Ambedkar himself, by cultivating the culture of 'social democracy' as 'a way of life which recognizes liberty, equality, and fraternity as the principles of life.' In our estimation, the proposition of sub-quotas or 'reservations within reservation' represents a continuum, wherein the first beneficiaries of reservation yield the reserved seats in favour of the next prospective beneficiaries, who are 'more backward' than 'other backwards' within the cohort of reserved category of Scheduled Castes themselves. This is to be done and accepted in the spirit of a member of a large 'joint family', as a 'way of life'. Here, 'yielding the reserved seat' in favour of others in the group is also somewhat akin to passing the 'baton' in a relay race in a true 'team spirit'. This is precisely what is intended to be done by the seven-judge bench of the Supreme Court by allowing sub-classification of the Scheduled Castes under the Constitution!