

## **RESERVATION IN PROMOTION**

### **FOR**

## **MEMBERS OF SCHEDULED CASTES**

1. As per Article 16(4) of the Constitution, reservations in direct recruitment and in promotions were admissible to SC/STs in the Central/State Government Services in proportion to their population till 15.11.92.
2. On 16.11.1992 in the case of Indra Sawhney, popularly known as Mandal Judgment, a 9 Judges Bench of the Hon'ble Supreme Court decided that Art. 16(4) of the Constitution did not provide for reservation in promotions to SCs/STs but ordered that since reservation in promotions were admissible to SCs/STs through various office orders since 1954, the same be continued for another period of 5 years only. This buffer period was provided to the executive to enable them to take appropriate measures to implement the Indra Sawhney order. In order to remove this anomaly, the Parliament, through 77th Amendment of the Constitution, added a new clause 4A in Art. 16 i.e. 16(4A) w.e.f. 17.06.1995 making provision for reservation in promotions for SCs/STs.
3. In the case of Veerpal Singh Chauhan, the Supreme Court through a 2 Judges Bench on 10.10.1995, 3 Judges Bench on 01.03.1996 and 5 Judges Bench on 16.09.1999 introduced the 'Catch up Rule' to enable general candidates to regain their seniority immediately on promotion over SCs/STs who had been promoted earlier through reservation and had gained seniority over general candidates. With a view to removing yet another anomaly, 85th Amendment of the Constitution was put into effect w.e.f.

17.06.1995 for giving consequential seniority to SCs in matters of reservation in promotion.

4. The 77th & 85th amendment in the Constitution were challenged by the General category employees before a 5 judge bench of the Supreme Court. The Court clubbed all the petitions challenging these amendments and in the case of M.Nagraj gave a decision that these amendments were Constitutionally valid with certain conditions as is evident in the following paras of Hon'ble Supreme Court judgment M.Nagraj case :-

Para 121

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

Para 122

Existence of power cannot be denied on the ground that it is likely to be abused. As against this, it has been held vide para 650 of

Kesavananda Bharati (1973) 4 SCC 225 that where the nature of the power granted by the Constitution is in doubt then the Court has to take into account the consequences that might ensue by interpreting the same as an unlimited power. However, in the present case there is neither any dispute about the existence of the power nor is there any dispute about the nature of the power of amendment. The issue involved in the present case is concerning the width of the power. The power to amend is an enumerated power in the Constitution and, therefore, its limitations, if any, must be found in the Constitution itself. The concept of reservation in Article 16(4) is hedged by three constitutional requirements, namely, backwardness of a class, inadequacy of representation in public employment of that class and overall efficiency of the administration. These requirements are not obliterated by the impugned constitutional amendments. Reservation is not the issue. What is the issue is the extent of reservation. If the extent of reservation is excessive then it makes an inroad into the principle of equality in Article 16(1). Extent of reservation, as stated above, will depend on the facts of each case. Backwardness and inadequacy of representation are compelling reasons for the State Governments to provide representation in public employment. Therefore, if in a given case the court finds excessive reservation under the State enactment then such an enactment would be liable to be struck down since it would amount to derogation of the above constitutional requirements.

### Para 123

At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of

equality, namely, “formal equality” and “proportional equality”. Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In Indra Sawhney 1992 Supp. (3) SCC 217 all the judges except Pandian, J. held that the “means test” should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In Indra Sawhney 1992 Supp. (3) SCC 217 this Court has, therefore, accepted caste as determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in Indra Sawhney 1992 Supp. (3) SCC 217. The question as to the “determinant” of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in Indra Sawhney 1992 Supp. (3) SCC 217 has evolved numerical benchmarks like ceiling-limit of 50% based on post- specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

#### Para 124

Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-Second Amendment) Act, 2000 and the Constitution (Eighty-Fifth Amendment) Act,

efficiency; After entering services, reservation in promotion of an existing officer is provided only if he is found fit for promotion. They are usually kept on probation for a certain period of time after which, like others, they can be reverted back if his work is not found satisfactory. Unfit persons cannot be promoted in the existing system. Even after this position of rules, these people are asked to prove their efficiency before they are actually appointed.

Administrative efficiency is adjudged on the basis of service record, which includes Annual Confidential Reports. The reserved category candidates are in no way to be adjudged differently. Moreover no example has ever come to notice that officers belonging to SC and ST were found inefficient. In fact they are generally handpicked for postings in difficult positions/locations where nobody else wants to go.

It is evidently clear that the existing system does not allow inefficient official to get promoted even through reservations. So, the propositions that reservation in promotion will affect efficiency in administration is highly misplaced and untenable.

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Krishnan, a general candidate, secured only 602. But in the interview Shri Krishnan secured 260 out of 300 and Shri Das got only 110. Thus ultimately, Shri Achyutananda Das was assigned the 48th position whereas Shri Krishnan topped the list.

2. Similarly, Shri Aniruddha Dasgupta, a general candidate was given 265 marks out of 300 in the interview when he had secured only 494 out of 1050 in the written examination. So ultimately he got the 22nd position against 48th position of Shri Achyutananda Das.
3. In 1954, a ST candidate Shri Nampui Jam Chonga of Assam scored 747 marks in written examinations. A general candidate Sh. Rabindra Nath Sengupta got only 692 marks. Sengupta got lowest & 2nd lowest marks in General English & General Knowledge, But still he managed to get 240 in interview & the 52nd rank but Sh. Chonga could only get 160 in interview & the 64th rank ultimately.
4. Even recently i.e. in 2004, after the U.P.Govt. passed order not to disclose the identity/surnames of the candidates to the interview board/s, a S.C. candidate Sh. Himanshu Gautam broke the record by scoring 80% marks in the interview of U.P.P.S.C. He got 9th rank ultimately.

In these cases, even though the SCs were appointed on their own merit and have secured highest marks in the written test but due to discrimination in viva-voce test/interview, they could not get the higher rank.

It is, therefore, clear that merit is wrongly construed & linked with surnames in this country. Prior to promotion of a person, it is not possible to adjudge/assume that his promotion will affect the administrative

5. Though, reservation in appointment and reservation in promotion has been found Constitutionally valid but at the same time conditions have been laid down. It was directed that the State should collect data on the following before the benefit of constitutional provision is made available to the members of the Scheduled Castes:

- a. Social Backwardness of SC/STs.
- b. Inadequacy of representation in the Government Services
- c. Effect of Reservation on Administrative Efficiency.

6. Because of such conditions, the benefit of reservation in promotions is not available to SC/STs since 1995 despite clear cut provisions in Art. 16(4A).
7. On 05.02.2010 the High Court of Rajasthan through divisional bench in the case of Shri Bajrang Lal Sharma directed the Rajasthan Government to first collect data as required by M.Nagraj decision. The Rajasthan Government preferred an appeal in the Supreme Court but the later refused to interfere with the order of the High Court. Allahabad High Court and some other High Courts have also passed orders on similar lines whereas, it is a matter of fact that Parliament had already evaluated the data on all India level for the representation of SCs/STs in promotions through the 77th Constitutional amendment and had concluded that representation of SCs/STs in services was not adequate. In Indra Sawhney case also, the 9 Judge Bench of Supreme Court had held that SCs/STs were definitely socially backward.

It is a fact that deprivation of safeguards to SCs/STs in matters of promotion for the last 15 years has taken place because of certain courts'

orders and this whole matter has been agitating the minds of SCs/STs for a long time now. A definitive study on all the three issues raised by court viz. status of social backwardness, inadequate representation and efficiency in governance which have been made a pre-requisite for reservation in promotions was needed. National Commission for SC/ST has attempted to answer all the three issues raised by the Courts through this study. These issues have been elaborated upon one by one in the subsequent chapters.

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The above observations made by Hon'ble Supreme Court in 1985 are still very relevant and essence of the whole issue.

Though the amendment was brought for providing relaxation in standard in case of reservation in promotion for SCs/STs w.e.f. 08.09.2000, the provisions of various legislations to implement the Constitutional provision and executive orders are not being allowed to be implemented by filing various Writ Petitions and the Courts are granting interim orders staying the operation of the provisions providing reservations for SCs/STs. For 16 years now, people belonging to SCs/STs have been deprived of their due and are not allowed to get promotion to higher posts to which they are entitled as per the Constitution of India.

These SCs/STs, who were kept out of administrative apparatus before the inception of the Constitution, are still sought to be excluded from the higher echelons of public services. In short, the objective behind Article 16(4) is empowerment of the deprived weaker sections of society to give them a share in the administrative apparatus and in the Governance of the country, which is very important.

Administrative efficiency cannot be prejudged before the appointment through promotion of a civil servant. It is strange that the courts are prejudging the efficiency of Scheduled Castes and Scheduled Tribes and assuming them as inefficient. There should be restrictive judicial review in cases relating to reservations in promotion.

Few examples are given below to show that merit and brilliance is not the property of forward castes alone:-

1. Shri Achyutananda Das, a SC candidate secured 613 out of 1050 in the written examination of IAS in 1950 whereas Shri N.

Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavors of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different posts and for admission to different courses of study and having regard to the requirements of the posts and the courses of study.” In clash of competing claims between general category employees on the one hand and SCs/STs on the other, what the authorities need to take into consideration is the aforesaid factors and their service record with an objective and dispassionate assessment. Their claims need to be considered in that perspective; they should be given promotion, if found eligible, to the posts or classes of posts in the higher cadre, grade, class or category etc. The selecting officer/Officers need to eschew narrow, sectarian, caste, religion or regional consideration or prejudices which were deleterious to fraternity, unity and integrity and integration of the nation as unified Bharat. What needs to be achieved by the SCs/STs officers so promoted is that they could, on par with others assiduously devote themselves with character, integrity and honesty in the discharge of the duties of the posts with added willingness and dedication to improve excellence.”

## CHAPTER - I

### Backwardness of SCs/STs

There are large number of findings to show that members of Scheduled Castes and Scheduled Tribes are backwards as a block or the community as a whole.

A constitution Bench of the Supreme Court in E.V. Chinnaiah Vs. State of Andhra Pradesh and others (2005 — 1 SCC 294) in Para 93 at page 430 observed as under :-

*“Scheduled Castes; however, is not a caste in terms of its definition as contained in Article 366 (24) of the Constitution. They are brought within the purview of the said category by reason of their abysmal backwardness. Scheduled Castes consists of not only the people who belong to some backward caste but also race or tribe or part of groups within castes, races or tribes. They are not merely backward but the backward most.”*

Article 15(4) is required to be read with Article 16(4) and 16 (4A), when it will be amply clear that SCs are notified by the President of India in accordance with Article 341. Therefore there should be no question of providing proof of their backwardness as required in Para 122 of the Judgment in M. Nagaraj Case.

A close reading of the judgment in Nagaraj's case makes it amply clear that none of the petitioners, had challenged the backwardness of SCs and STs and had it been done, some data might have been produced to show that they were now no more backward within the meaning of clause 16(4) of Article 16, the learned counsel's for the Union of India or for that matter the other respondents had no occasion to put forward the data or majority view in Indra Sawhney's case holding that they were

undisputedly backward for purposes of clause (4) of Article 16. In the opinion of the Commission, has the attentions of 5 judges bench, been drawn towards para 796-797 of 9 judges decision in Mandal case, the Hon'ble judges would not have mandated for retesting the backwardness of these classes, before extending the benefit under clause (4A) of Article 16.

The Judgment of Apex Court in M. Nagaraj case asking for a basis for backwardness does not match with the provisions of the Constitution. As far as SCs and STs are concerned, it is clear that in terms of Article 341 and 342 of the Constitution, 'backwardness' relates to castes and not persons. But in the M. Nagaraj case the Supreme Court has tried to define backwardness in relation to person/Govt. Servant, whereas in Indra Sawhney Case the Apex court in Para 779 specifically observed that :- “Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation and caste nexus is true even today. A few members may have gone to cities or even abroad but when they return they too, barring a few exceptions go into the same fold again. It does not matter if he has earned money. He may not follow the particular occupation but still the label remains. His identity is not changed for the purpose of marriage, death and all other social functions. It is his social class that is still relevant.”

It is clear from the above that caste determines the social status and is very much relevant even with the Govt. servant. Hence, there is no need to Judge the backwardness again and again.

In Para 788 at page 720 in Indra Sawhney Vs Union of India [1992 Suppl. 3 SCC 217), Justice B.P. Jeevan Reddy observed that:

*“The Scheduled Tribes and Scheduled Castes are without a doubt backward for the purpose of the clause; no one has suggested that*

“There is neither statistical basis nor expert evidence to support these assumptions that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinion are expressed entirely on an ad-hoc presumptive basis. The age long contempt with which the 'superior' or 'forward' castes have treated the 'inferior' or 'backward' castes is now transforming and crystallising itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means, for the 'superior' castes, parting with a bit of it.”

“Although in actual practice their virtual monopoly on elite occupations and post is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession.”

“It is so difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage, always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a Mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one who possesses amount of other qualities, the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after independence, the position of the Scheduled Castes, etc. has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District



*virtually the last among different countries in the world.*

*Upper caste rulers of India keep the country's vast original inhabitants- the Untouchables, Tribals, Backward castes and 'religious minorities' - permanently as slaves with the help of this 'merit' mantra. By 'merit and efficiency', they mean the birth. Merit goes with the Highborn - the blue blood. This is pure and simple racism. That Birth and skin-color have nothing to do with 'merit and efficiency' (brain) is a scientifically proved fact “.*

**Justice O. Chinnappa Reddy**, in *K.C. Vasanth Kumar vs. State of Karnataka* [1985 (Supp.) SCC 714 at 738- 740J had stated as under:

“Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceed 50%; efficiency, it seems, will suffer if the 'carry forward' rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts, From the protests against reservation exceeding 50% or extending to promotional posts and against the carry forward rule, one would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen elite, the very best may enter and may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper-castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitists classes.”

*they should satisfy the test of social and educational backwardness.”*

In Para 796-797 at page 727, it is further observed that:

*“It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340, it is much wider. The test of requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, which indubitably falls within the expression “backward class of citizens “.*

Therefore, the observation in the Judgment by a 5 Judges bench in *M. Nagraj* case runs counter to the law enunciated in the majority Judgment of 9 Judges bench in *Indra Sawhney* case, as also the decision of the Constitution Bench in *E.V. Chinnaiyah's* case.

It is also very relevant to take note that *Indra Sawhney* case was decided by 9 Judges Bench where as *M. Nagraj* case was decided by 5 Judges Bench only, and, therefore, the decision in *M. Nagraj* case cannot supersede the decision taken in the *Indra Sawhney* case. This decision was given per incurium as it was given in ignorance of earlier decision taken by the larger bench which dealt with the *Indra Sawhney* case. In case there is a perceived conflict between two decisions of Supreme Court, the decision of the larger bench alone will prevail. Therefore, *Indra Sawhney* case is the valid law of the land, which does not permit any further justification of backwardness of SC and ST.

Hon'ble Supreme Court in *M. Nagraj* case has also expressed a view that exclusion of creamy layer in reservation in promotion is the Constitutional requirement. Apparently decision of a 9 Judges bench in

Indra Sawhney case was not brought to the notice of Hon'ble Supreme Court during the hearing in M. Nagraj case.

The bracketed portion in para 792 of the Indra Sawhney judgment delivered by 9 judges bench in 1992 clearly states that the discussion about creamy layer has no relevance to SCs and STs. It is not understood as to how it was made relevant to SCs/STs in 2006 by a judgment in M.Nagraj case which was delivered by smaller bench of 5 judges only. Atleast M.Nagraj case does not enlighten us on this important point. The decision taken in M.Nagraj case without considering the law of the land as enunciated earlier by the 9 judge bench judgment in Indra Sawhney case is per incurium and not enforceable.

In Ashoka Kumar Thakur Vs. Union of India (2008-6 SCC 1), it was argued by Dr.K.Parasaran, Senior Advocate who appeared for the Union of India that creamy layer is not applicable to SCs and the Court accepted that the creamy layer is not applicable to SCs. Hon'ble the Chief Justice K.G.Balakrishnan discussed at length and in the conclusions in para 228 at 526 observed that:

“Creamy layer principle is not applicable to the Schedule Castes and Scheduled Tribes.”

Therefore, the observation in para 122 in M.Nagraj case that creamy layer is a Constitutional requirement, was specifically held to be not applicable to the members of the Scheduled Castes. Consequently there can be no exclusion of a section of SCs in the name of creamy layer, and for all purposes the entire community of Scheduled Castes and Scheduled Tribes is treated as one and backward.

There is no mandate for excluding such creamy layer among SC & ST at the time of initial recruitment, but such exclusions have been sought at the stage of promotion through reservation. **It is a glaring**

Therefore, the directions in M. Nagraj case, is not justified to direct that the State concerned should show in each case the existence of the compelling reasons viz backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation in promotion. Therefore, placing the burden of proof on the State to show such reasons is contrary to the settled principles of construction of the statute/interpretation of the Constitution made by the Parliament/legislature.

Article 335 of Constitution is part of the scheme of equality of opportunity in governance of the State in Chapter XVI, by a special provision, which enjoins upon the State that the claims of the members of the SCs/STs shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of the appointments to public services and posts in connection with the affairs of the Union or of a State.

It is pertinent to mention here that the reservation in promotion is provided to the members of Scheduled Castes and Scheduled Tribes who are already in service and by satisfying the minimum qualifying standard for such members of SCs/STs. The separate relaxation in standard for the members of SCs/STs is prescribed by keeping in view the minimum standard required for a particular job, to meet the deficiency in the reservation quota provided they are otherwise found fit for such post. Article 335 is meant to provide jobs for members of SC and not restrict it in the garb of efficiency or merit.

**V.T. Rajshekar** in his book “*Merit' My Foot*” (A reply to Anti-Reservation Racists), 1996 published by **Dalit Sahitya Academy**, Bangalore, has stated as under:

*“Nowhere in the world 'merit and efficiency' are given so much importance as in India, which is now pushed to the 120th position -*

Scope of Article 335 is not unlimited and cannot be applied universally in individual and specific cases. This relates to fixing of overall policy parameters. It is just to avoid the possibility of appointing anyone without any merit or qualification because the vacancies are available. The proviso added to Article 335 w.e.f. 8.9.2000 stipulates minimum qualifying standard and relaxation in those qualifying standard was provided for members of scheduled castes. When the provisions are being followed in letter and spirit, there is hardly any scope left for judicial intervention in such matters. And it is very strange to link this issue of reservation in promotion to those members of scheduled castes who are already in service and are promoted on the basis of their past performance or merit and only those are promoted who are otherwise found fit.

While considering validity of the Constitutional (77th, 81st, 82nd and 85th) Amendments, the Hon'ble Supreme Court in **M. Nagraj vs. Union of India** upheld the Constitutionality of the provisions which were inserted by the aforementioned amendments, but imposed certain conditions before the benefit is passed on to eligible members of scheduled castes. It was made mandatory for the State to justify promotions in each case. This is a strange philosophy in which one has to give justification for the exercise of one's fundamental rights.

When the State provided reservation for SCs and STs either in appointments or in promotions exercising its Constitutional powers, scope for suo-moto judicial scrutiny is very limited because courts cannot put restriction on the exercise of such Constitutional powers of the State. It is for the aggrieved persons to challenge such action, and also to show that provision of reservation in appointments or in promotions, is adversely affecting the administrative efficiency by placing material evidence on record. As per the settled Constitutional principles, the presumption is always in favour of the validity of the legislation/statute.

### **anomaly.**

The founding father of our Constitution Dr. Ambedkar and many other legal and political stalwarts were acutely conscious of the unjust social order prevailing in our country and the centuries old customs and practices which imposed inhuman disabilities on a vast segment of our people. It is against this bleak background that a number of provisions were kept in the Constitution for affirmative action for the welfare of the weaker sections of society and for bringing about social and economic transformation in a peaceful and democratic manner. The perceived discrimination in Art. 16(4) and 16(4A), thus, is nothing but a protective discrimination in line with the vision of Mahatma Gandhi envisaged in the bilateral agreement called Poona Pact.

Caste discrimination continues to be deeply entrenched in the Indian Society. Scheduled Castes in many parts of the country are still subjected to the ugliest form of discrimination — 'Untouchability'. They are still subjected to endless humiliations and injustices in all spheres of life; being routinely attacked, raped, denied access to places of worship, common water sources, education, dignified jobs and other rights. Hon'ble Supreme Court has also made similar observations in the case of **Arumugam Servai Vs. State of Tamilnadu [2011 INSC 413 (19th April, 2011)]** which are given below: a Members of SC community are still called by their caste name with a view to insulting them even when it has been made an offence under the SC/ST POA Act.

- b. In some places in Tarnil Nadu there are separate tumblers in hotels for serving tea etc. to SCs and non-SC persons.
- c. The Judges observed that a large section of Indian Society still regards a section of its own countrymen as inferior which is one of the main causes holding up the country's progress and this mental attitude is unacceptable in the modern age.

Baba Saheb Dr. B.R. Ambedkar said in the Constituent Assembly: -

“On the 26th 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 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 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 else those who suffer from inequality will blow up the structure of democracy”.

The recent surveys undertaken by the Govt., NSS and other agencies have brought out clearly that majority of the poor or people below poverty line belong to Scheduled Castes. The economic reforms implemented by successive governments have widened the gap between the SCs and others not only in economic terms, but even in subtle forms of discrimination in modern sectors of employment. Therefore, the backwardness of the Scheduled Castes in India has remained not only in relative terms but is an absolute fact of life today as before.

“The survey was reported in Times of India on 12.04.2011 and stated as follows.”

- a) 50% of India's poor belongs to SCs/STs.
- b) 75% of SC population is under BPL.
- c) SCs/STs are not just poor but also score high on Kachcha Housing, Homelessness and Landlessness with agricultural wages as the main source of income.

### CHAPTER - III

#### Effect of Reservation on Administrative Efficiency

Hon'ble Supreme Court in M.Nagraj case has interpreted the following Article 335 and stipulated this as one of the condition before the benefit of reservation in promotion is available to the members of the Scheduled Caste in the Indian Constitution, could actually be passed on them :-

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

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

*\*Inserted by the Constitution (82<sup>nd</sup> Amendment) Act, 2000, Section 2 (w.e.f 08. 09.2000)”*

Title of Article 335 is “claims of SC/ST to services and posts” is the real essence of the matter and the phrase “consistently with the maintenance of efficiency and administration” is just supportive and explanatory provision.

Scheduled Caste Secretary in GOI Departments and only 3% vacancies are filled with these in Top Bureaucracy, it is a matter of grave concern and need to be pondered over immediately.

It is absolutely clear that the representation of SC and ST in States and central Govt./UTs has not reached the minimum required level. Keeping in view the inadequacy of the representation in services, direct recruitment through special recruitment and also filling up of posts through reservation in promotion is a must. Since the representation of SC and ST in services in the States is undoubtedly inadequate and has also not reached the minimum required level, it is of utmost necessity that the existing dispensation of providing reservation in promotions is continued. Further, as per extant practice, Roster points are followed before any promotion can be effected which ensures that posts going to the Share of SC/ST don't exceed the percentage fixed by the Govt. Hon'ble Supreme Court ought not to have any apprehensions on this count.

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- d) There is 10.69% literacy gap between the SCs and the others castes.
- e) The level of mal-nutrition amongst SCs is still very high.

Besides above, the percentage of enrolment of SC students in the schools is still very low. Further, various Acts aimed at the protection of the SCs such as Employment of manual scavengers and construction of dry latrines (Prohibition) Act. 1993, Protection of Civil Rights 1955 and Prevention of Atrocities Act. 1989 are not being implemented in letter and spirit. Bihar High Court has even suggested scrapping of all the cases under POA Act. as the Act is not implemented properly. It is a matter of concern that untouchability is still being practiced even by educated people and the caste system is still persisting towards suppression of SCs. Infact untouchability has multiplied several times as of now as per the records of National Crime Record Bureau and report of National Law School, Bangalore.

Episodes like Khairlangies, Mirchpur etc. are recurring even after 63 years of independence in every part of India and even in foreign land like Vienna. Because of the abject poverty and backwardness, sexual harassment and rapes are being committed largely on women and girls of these communities being always vulnerable due to their societal positioning. Naxalism in the tribal areas is the result of backwardness and caste discrimination only.

The mere fact that the SCs/STs are notified by the President of India under Article 341 and 342 of the Constitution implies "backwardness" as observed by the Hon'ble Supreme Court in the Indra Sawhney case. There should be no question of proving their social backwardness again and again. In this context one can rely upon the observation in Indra Sawhney case particularly para 796-797 at page 727 which is given below:

“The test of social educational backwardness cannot be applied to SCs and STs who indubitably fall within the expression of 'backward class of citizens.’”

It is particularly with the objective of dealing with the problems associated with abject poverty and backwardness that special courts have been set up in the States to deal with POA Act, dedicated hostels are being run, scholarships are being given to students, special training is being given for competitive examinations, reservation in higher education, reservation in the matter of allotment of shops/houses, keeping separate quota for bank loans. Earmarking of separate budgetary provisions for Special Component Plans for SCs/STs, reservation in Lok Sabha, State Assemblies and in Govt. Services have been continued.

Thus, it is absolutely clear that backwardness among SCs/STs is beyond doubt. It is stuck to these castes and the total Scheduled Caste Community as a whole. To ask these communities to separately prove their backwardness is to add insult to Injury.

-x- x- x- x

It is observed from the above table that no State/UT, except Goa, has adequate representation in all the group of posts i.e. A, B, C & D. Further, the aforementioned %ages of SC employees, who have been appointed, include the category of Sweepers which has inflated these figures. There is a huge backlog in all the categories of posts in these States/UTs Government services.

Similarly, representation of SCs in Group A, B, C and D posts of Central Government Services is also not adequate as evidenced by the following table. Figures about representation of SCs in the PSUs of Central and State Government are not available.

**Representation of SCs in Central Government Service as on 01.01.2008 as per Annual Report 2009-2010 of DoPT.**

Group	Total No. of Employees	SCs	%age of SCs
A	91881	11446	12.5
B	137272	20481	14.9
C	1810141	284925	15.7
D (Excluding Sweepers)	696891	134907	19.4

A latest report indicates that there is no candidate to represent in the top echelons of administration in Government of India. There is not a single Secretary belonging to Scheduled Castes against a total number of 88. There is only one Addl. Secretary as against in total number of 66, which is 1.52% only. There are only 13 Joint Secretaries belonging to Scheduled Castes against a total number of 249 which is 5.04% only. There are 471 Director level posts and the scheduled castes have a representation of only 31 which is 6.20% only. A new report published in the Hindustan Times of 22nd March, 2011 states that there is no

								employees in position (exclude 6 Department) i.e. Group A 15, Group B 42, Group C 266 and Group D-134 as on 01.01.2010
26.	D & Diu (UT)	0.05	3.10					Representation of SC in Gr B.-04 & Gr. C-25 Total 26 strength of 27 employees has not been given.
27.	Manipur	0.37	2.6	NA	NA	NA	NA	
28.	D & N Haveli (HT)	0.04	1.90	1.73	3.46	64.16	30.63	
29.	Goa	0.23	1.80	2.1	2.0	2.0	2.0	
30.	Arunachal Pradesh	0.06	0.60	NA	NA	NA	NA	
31.	Meghalaya	0.11	0.50	NA	NA	NA	NA	
32.	A & N Island (UT)	0.00	0.00	NA	NA	NA	NA	
33.	Lakshadweep	00	00	NA	NA	NA	NA	
34.	Mizoram	00	00	NA	NA	NA	NA	
35.	Nagaland	00	00	NA	NA	NA	NA	

## CHAPTER-II

### Inadequacy of representation:

Article 16(4) clearly states that in the services of the State, SCs are to be provided opportunity where they are not adequately represented. Constitution commands the State to make reservation for SCs. So far as education is concerned, reservation is provided to members of SC/ST/OBC under the Central Educational Institutions (Reservation in Admission) Act 2006 laying down 15% reservation for SCs. The same yardstick is applicable for the SCs in services under Article 16(4). Therefore, if the State makes reservation in the services upto 15% in the Central Govt. services, it is not open to the Court to say as to whether SCs are adequately represented or not. It is not out of place to mention here that 15% reservation is provided for SCs in the services since the advent of the Constitution in 1950 through various executive instructions issued by the Government of India and by different States, but still the minimum prescribed percentage of reservation has not been achieved. If 15% representation is achieved and this much percentage is continued, it shall never be as more than adequate. There are backlogs and vacancies meant for Scheduled Castes still remain vacant. The court should, therefore, not be unduly concerned about the adequacy or inadequacy of representation. There is a Constitutional authority like the UPSC with functions to implement Constitutional obligations. Further, the question whether it is open to the court to make observations or findings on its own without any pleadings, arguments on behalf of petitioners or Govt. of India, needs deliberation and also, whether such observations or findings are binding on those who were not even party to petition and were not afforded the opportunity to defend their Constitutional Rights. This has happened in this case. Therefore these observations in M. Nagaraj case as per in curium.

The different State Governments are mandated to make provision for reservation in services as per the percentage of SC population in that particular State.

Inadequacy of representation of SCs is evident from the information collected about the representation of scheduled caste in different State/UT Govt. Services which is reproduced below:

**State/UTs wise information about the representation of SCs in State/UTs Govt. Services:-**

(In lakh)

S. No.	Name of the State	Sched uled castes	*% Sc popul ation	Group A	Group B	Group C	Group D	Remarks
	INDIA	1665.76	16.20					
				% of SC appointed	% of SC appointed	% of SC appointed	% of SC appointed	
1.	Punjab	70.28	28.90	16	18.44	18.4	31.35	
2.	H.P.	15.02	24.70	10.83	18.94	18.14	26.89	
3.	W.B.	184.52	23.00	10.28	17.15	17.15	21.26	
4.	U.P.	351.48	21.2	12.17	15.03	17.77	37.95	As on 2004 (SC & ST combined).
5.	Haryana	40.91	19.40	3.77	10.93	17.19	3.75	
6.	Tamil Nadu	118.57	19.00	10	12	15	24	As on 1.1.2004
7.	Uttarakhand	15.17	17.90	23	16	14	15	As on 1.4.2009

8.	Chandigarh	1.57	17.50	9.06	7.29	12.97	14.18	
9.	Tripura	5.55	17.40	9.98	11.94	13.18	13.23	
10.	Rajasthan	96.64	17.20	12.53 (Gazetted)	-	16.40 (Non-Gazetted)	-	As on 31.3.2009
11.	Delhi NCT	23.43	16.90		22.99	16.88		
12.	Orissa	60.82	16.50	9.85	12.74	14.60	24.55	
13.	A.P.	123.39	16.20	14.83	-	15.87	32.77	Only gazetted, Non gazetted and group D posts as on 1.1.2007
14.	Karnataka	85.63	16.20	18.63	15.97	15.94	24.56	
15.	Puducherry	1.57	16.20	11.54	14.03	12.45	12.89	
16.	Bihar	130.48	15.70	14.58	14.13	8.86	11.51	
17.	M.P.	91.55	15.20	12.31	16.19	15.91	24.03	
18.	Jharkhand	31.89	11.80	9.36	10.13	9.58	9.97	
19.	Chhattisgarh	24.18	11.60	11.02	12.58	13.19	22.11	
20.	Maharashtra	98.82	10.20	9.88	11.55	11.98	16.85	
21.	Kerala	31.23	9.80	11.43	-	9.42	10.47	No group B posts. As on 1.1.2008
22.	J & K	7.70	7.60					
23.	Gujarat	35.93	7.10	7.79	3.50	9.99	8.88	
24.	Assam	18.25	6.90	5.56	5.83	11.40	-	
25.	Sikkim	0.27	5.00					The Sikkim Govt. has given only SCs