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WHY THE CLARIFICATION PETITION FILED BY THE
UNION OF INDIA IN THE TRANSGENDER CASE IS
INCORRECT IN LAW AND IN BAD FAITH ON THE
QUESTION OF RESERVATION

SURABHI SHUKLA*

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ABSTRACT

In this Article, I make an argument that the state, including the Government of India, is empowered by the Constitution of India to decide which classes qualify as “backward classes” for affirmative action measures under the Constitution. The Supreme Court of India has directed the government to include the transgender population as a backward class and to extend to them affirmative action measures such as reservation in public appointments and university admissions. In response, the Union of India has filed a clarification petition stating that it is incompetent to *suo motu* include the transgender population as a backward class and that it can only do so upon the recommendation of the National Commission for Backward Classes (NCBC). This Article is a response to the Union’s clarification petition and it seeks to show that constitutionally, the competence to

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add a community to the backward class list lies with the State authorities such as the Government of India, and any suggestion to the contrary is an incorrect reading of the Constitution. As this clarification petition is still pending in court, this Article seeks to inform the view taken on this subject by both the legal system and scholars.

INTRODUCTION: THE CLARIFICATION PETITION

On April 15, 2014, the Supreme Court of India, in the case of *National Legal Services Authority v. Union of India and Others*, stated that transgender¹ persons have a right to be recognized in their self-identified gender (male, female, or third gender) and are entitled to the full protection of the right to equality, privacy, autonomy, and dignity as enumerated in the chapter on fundamental rights in the Constitution of India.² The Supreme Court also directed the Central

1. The remainder of this Article will use the broad definition of “transgender” adopted by the Supreme Court of India, which includes the Hijra population and other regional identities such as Aravanis, Jogti, Jogappa, etc. *Nat’l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438, 462. The Court explained:

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include [H]ijras/[E]unuchs who, in this writ petition, describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since [H]ijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender.”

Id. It must be noted that within the community itself, the word “transgender” and “Hijra” do not have the same meaning: a Hijra is a transgender person who is initiated into a socio-religious tradition with specific rules and regulations. *See, e.g., id.* at 480–81. If a person self-identifies as transgender but not Hijra, they are not a part of the Hijra socio-religious tradition. *See id.* The Supreme Court adopted the following definition of Hijras:

Hijras are biological males who reject their ‘masculine’ identity in due course of time to identify either as women, or “not-men,” or “in-between man and woman,” or “neither man nor woman.” Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but [H]ijras have a long tradition/culture and have strong social ties formalised through a ritual called “reet” (becoming a member of Hijra community). There are regional variations in the use of terms referred to [H]ijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: ‘badhai’ (clapping their hands and asking for alms), blessing newborn-babies, or dancing in ceremonies. Some proportion of Hijras engage in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations.

Id.

2. *Id.* at 447; *see also* INDIA CONST. arts. 12–35 (including the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, etc.). A

and State Governments to treat transgender persons as socially and educationally backward classes of citizens and to extend to them reservations in admissions to educational institutions and appointments to public posts.³

On July 30, 2014, the Union of India⁴ filed an application for clarification,⁵ (“Clarification Petition”) regarding the judgment of the Supreme Court in the above mentioned case. In the Clarification

complete list of all the directions issued by the Supreme Court to the Centre, and the state governments with respect to transgender and Hijra persons, is as follows:

[I]t is declared that: (1) Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

(2) Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) The Centre and State Governments are directed to operate separate HIV serosurveillance centres since [H]ijras/[T]ransgenders face several sexual health issues.

(5) The Centre and State Governments should seriously address the problems being faced by [H]ijras/[T]ransgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.

(6) The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

Nat’l Legal Servs. Auth., (2014) 5 SCC at 455–56.

3. *Id.* at 508.

4. When the Executive Branch of the State is sued in court, it is sued in the name of the “Union of India.” The Executive Branch of the State is called the Government of India. The words “Government of India” and “State” are used interchangeably only for the purposes of this Article. Generally, the word “State” carries a wider meaning in the Constitution of India. *See* INDIA CONST. art. 12 (“In this Part, unless the context otherwise requires, ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”).

5. Application for Clarification/Modification of Judgment and Order Dated 15.04.2014 Passed by This Hon’ble Court and to Pass Appropriate Directions on Behalf of Union of India, Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438, http://orinam.net/content/wp-content/uploads/2014/09/NALSA_UOI.pdf [<http://perma.cc/DWQ4-FNHT>] [hereinafter Clarification Petition].

Petition, the Union argues, among other things, that the State does not have the authority to *suo motu* include transgender persons as a socially and educationally backward class as required by the Supreme Court.⁶ To quote the Union of India, “[F]or inclusion of transgender as OBCs, the matter has to be first referred to the National Commission of Backward Classes.”⁷

Although the meaning of the term “backward classes” will be explained in detail for completeness in the latter portion of this Article,⁸ here it is important to lay down what it means to be included as a backward class. The backward class list is a list prepared by the State.⁹ Classes and communities present on this list are eligible for various State affirmative action measures such as job reservations and quotas in college admission.¹⁰

The Union of India argues that if transgender persons are to be included in the list of backward classes, the NCBC must direct the it to do so, and the Government of India cannot *suo motu* include the transgender communities as a backward class.¹¹ The aim of this Article is to demonstrate how the Union’s argument is based not only on an incorrect reading of the law, but is also *mala fide*.

I. INCORRECT READING OF THE LAW

The NCBC was constituted by the National Commission for Backward Classes Act of 1993 (“Act”) upon the direction of the Supreme Court in the case of *Sawhney v. Union of India*.¹² As per Section 9 of the Act:

*Function of the Commission: The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.*¹³

6. *Id.* at 13, 20.

7. *Id.* at 21 (emphasis added). “OBC” stands for “Other Backward Classes,” and is a category within the backward classes.

8. *See supra* Part IV.

9. National Commission for Backward Classes Act, No. 27 of 1993, INDIA CODE (1993), ch. I, § 2(a).

10. *See id.* § 2(c).

11. Clarification Petition, *supra* note 5, at 20–21.

12. *Sawhney v. Union of India*, (1992) Supp. 3 SCC 217. In *Sawhney*, the Court explained the law on the reservation system in India in the context of a government memorandum that provided for 27% reservation in public appointments for socially and educationally backward classes of citizens and 10% reservation in public appointments for the economically poor. *Id.* at 219.

13. National Commission for Backward Classes Act ch. III, § 9 (alteration in original) (emphasis added).

The NCBC is thus empowered to decide whether a particular community merits a place in the list of backward classes. *It is to be noted that Section 9(1) of the Act does not empower the NCBC to make the list*; as per the Act, it is the Government of India that is empowered to make this list.¹⁴ Indeed Section 2(c) of the Act clarifies this provision:

*“Lists” means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India . . .*¹⁵

The Union of India, therefore, misreads Section 9 of the Act when it argues, “[I]t will not be proper to classify all transgender persons and group them as ‘Other Backward Classes’ *suo motu*.”¹⁶

II. THE CONSTITUTIONAL COMPETENCE OF THE STATE (INCLUDING THE GOVERNMENT) TO ENACT AFFIRMATIVE ACTION MEASURES CANNOT BE STRIPPED BY THE JUDICIARY OR THE NATIONAL COMMISSION FOR BACKWARD CLASSES

The Constitution empowers the State to include a particular class within the backward class list: this constitutional competence is found, most directly, in Article 16(4) and Article 15(4) of the Constitution.¹⁷ Article 16(4) of the Constitution states that the State can, either by executive order (for example, a government notification) or law,¹⁸ make provisions for job reservations for backward classes of citizens.¹⁹

Similarly, Article 15(4) of the Constitution states that the State can, either by executive order (for example, a government notification) or law,²⁰ make provisions for the advancement of socially and

14. *Id.* at ch. I, § 2(c).

15. *Id.* (emphasis added).

16. Clarification Petition, *supra* note 5, at 20 (emphasis added).

17. INDIA CONST. arts. 16(4), 15(4).

18. *Sawhney*, (1992) Supp. 3 SCC at 688.

19. INDIA CONST. art. 16(4) (“*Nothing in this article shall prevent the State from making any 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.*”) (emphasis added).

20. In the case of *Sawhney*, the Court noted the use of the word “provision,” rather than “law,” in Article 16(4) of the Constitution is significant. *Sawhney*, (1992) Supp. 3

educationally backward classes of citizens and Scheduled Castes and Scheduled Tribes.²¹ To be sure, the Supreme Court has directed the State that, "[T]here ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of *Other Backward Classes* can be made."²² *The Court itself has acknowledged that, "Strictly speaking, appointment of a Commission under Article 340²³ is not necessary to identify the other backward classes. . . . The Government could have, even without appointing a Commission, specified the OBCs, on the basis of such material as it may have had before it"*²⁴

The appointment of a commission, therefore, does not strip the State of the power to identify socially and educationally backward classes under Article 15(4) or backward classes under Article 16(4). It is a body constituted for purely administrative efficiency because it is well versed in sociological research on the question of backwardness. True, "[t]he advice of the [NCBC] shall ordinarily be binding upon the Central Government,"²⁵ however, the government (and other state bodies) is free to depart from the recommendation of the NCBC. On this matter, the Supreme Court has held, "Where . . . the Government does not agree with [the NCBC's] recommendation, it must record its reasons therefor."²⁶ *This is because neither the judiciary nor the NCBC can take away a power of the State given to it by the Constitution.*²⁷

The judiciary can only interpret the power granting provisions of the Constitution so that State action is within constitutional

SCC at 688. The word "law" has been used in other parts of the Constitution. The Court noted that this deliberate departure from the word "law" in Article 16(4) meant that the Constitution makers wanted to empower the government of the day to regulate service conditions through orders and rules. *Id.* This was a well-known practice at the time of the framing of the Constitution. *Id.* In Article 15(4), the Constitution departs from the word "law" and states that the State can make "provisions" for socially and educationally backward classes of citizens. *Id.* Applying the reasoning of the *Sawhney* Court, the government can, even by a notification, make any provision (and not just reservation) for the socially and educationally backward classes of citizens.

21. INDIA CONST. art. 15(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.") (emphasis added).

22. *Sawhney*, (1992) Supp. 3 SCC at 756.

23. INDIA CONST. art. 340 (empowering the President to appoint a Commission to investigate the conditions of the backward classes).

24. *Sawhney*, (1992) Supp. 3 SCC at 763 (emphasis added).

25. National Commission for Backward Classes Act, No. 27 of 1993, INDIA CODE (1993), ch. III, § 9.

26. *Sawhney*, (1992) Supp. 3 SCC at 756.

27. *See* INDIA CONST. art. 15(4).

limits. It can also invalidate a State action if the State transgresses the limits of the Constitution. However, it would require nothing short of a constitutional amendment if the power to prescribe the list of backward classes is shifted from the State (including the government of the day) to a commission.²⁸

*Article 14 of the Constitution of India provides, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”*²⁹ It has always been an accepted tenet of constitutional interpretation that “equality” means “equality among equals.”³⁰ It is this principle that allows the State to classify people into different groups and treat them in a different manner if they are not equally placed in society.³¹ It is also this principle that allows the State to install affirmative action measures for one group so that the playing field can be leveled.³² Articles 15 and 16 are but an “incident of [the] guarantee of equality contained in Article 14,”³³ an “instance”³⁴ of the equality guarantee of the Constitution. It is from Article 14 itself that the constitutional competence to provide affirmative action measures arises. This position has also been clearly acknowledged by the Supreme Court in *National Legal Services Authority v. Union of India*: “Article 14 of the Constitution also ensures equal protection *and hence a positive obligation on the State* to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection.”³⁵

This is the principle of substantive equality also called the principle of “effective material equality” by Justice Mathew in *State of Kerala v. Thomas*.³⁶ As Ratna Kapur and Brenda Cossman explain, this “substantive approach to equality would interpret discrimination in terms of whether the treatment of a particular group of persons contributed to their historic and systemic subordination”³⁷ The Constitution places a duty on the State to keep in mind historical disadvantage at the time of preparing schemes and laws. In other words, the obligation of the State to ensure equality is not only an

28. See National Commission for Backward Classes Act, ch. III, § 11.

29. INDIA CONST. art. 14 (emphasis added).

30. See MAHENDRA PAL SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA 49–50 (12th ed. 2013).

31. See *id.* at 49.

32. See *id.* at 48.

33. *Kerala v. Thomas*, (1976) 2 SCC 310, 331.

34. *Sawhney*, (1992) Supp. 3 SCC at 691.

35. *Nat’l Legal Servs. Auth.*, (2014) 5 SCC at 487 (emphasis added).

36. *Thomas*, (1976) 2 SCC at 347.

37. RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* 178 (1996).

obligation to identify that two groups are positioned differently but also to ensure that the laws it enacts places these two groups on a level playing field to compete for opportunities.³⁸ The Constitution has empowered the State to do this under Articles 14–16 as also recognized by the Supreme Court in *National Legal Services Authority v. Union of India*.³⁹ The Union of India, therefore, misreads the Constitution when it argues in the clarification petition, “[F]or inclusion of transgender as OBCs, the matter has to be first referred to the National Commission for Backward Classes.”⁴⁰

The State is empowered by Article 14 and most certainly by Articles 15(4) and 16(4) to *suo motu* decide whether the transgender communities should be included within the backward classes. The State is only required to consult the NCBC at the time it is revising its list of backward classes. This is expressly stated in Section 11 of the Act:

Periodic revision of lists by the Central Government—

(1) The Central Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.

(2) The Central Government shall, while undertaking any revision referred to in subsection (1), consult the Commission.⁴¹

For the reasons explained above, the NCBC cannot compel the State to include or exclude a particular community from the list. Indeed, this was the very argument made by the government in the case of *Singh v. Union of India*.⁴²

III. *MALA FIDE* PETITION

On March 4, 2014, the Government of India published a notification in the Gazette of India that included the Jat⁴³ community on the Central List of Backward Classes for a number of States.⁴⁴ This

38. See SINGH, *supra* note 30, at 48.

39. INDIA CONST. arts. 14–16; Nat’l Legal Servs. Auth., (2014) 5 SCC at 508.

40. Clarification Petition, *supra* note 5, at 21.

41. National Commission for Backward Classes Act, No. 27 of 1993, INDIA CODE (1993), ch. III, § 11.

42. Singh v. Union of India, (2015) 4 SCC 697, 712.

43. A subsection of the Hindus.

44. Ministry of Social Justice and Empowerment Resolution, 2014, Gazette of India, sec. 1 (Mar. 4, 2014).

meant that for central services in these states, the Jat community was to be treated as a backward class, allowing for job reservations and other provisions enacted in their favor. By doing so, the Government of India acted contrary to the advice tendered by the NCBC.⁴⁵ On June 4, 2013, the Prime Minister constituted a Group of Ministers “[t]o interact with the representatives of the Jat community with regard to their demand for inclusion and to keep them apprised of the progress in the matter.”⁴⁶

This Group of Ministers requested the counsel of the NCBC and upon receiving advice that the Jat community is neither socially nor educationally backward and adequately represented in public employment and should not be included in the list of backward classes, rejected it.⁴⁷ It is important to note that when the gazette notification was published on March 9, 2014, the United Progressive Alliance government was in power at the center; the new government, the National Democratic Alliance headed by the Bharatiya Janta Party which took oath on May 26, 2014, has continued to defend this reservation and the gazette notification, which is evidenced from the fact that oral arguments in the present case took place on several dates in November and December 2014.⁴⁸

The petitioners, Ram Singh and others, challenged this inclusion of the Jat community in the list of backward classes.⁴⁹ They argued that the government decision was not based on any “relevant quantifiable data or material”⁵⁰ and was “wholly unsupported by any adequate, reasonable and relevant grounds or basis.”⁵¹

In response to this challenge, the Attorney General of India has, on behalf of the Union, argued that:

[T]he power to make provisions for reservation by inclusion of the eligible classes in the Central Lists flow from Article 16(4) of the Constitution. The advice of NCBC . . . would not be very material inasmuch as even *dehors* the provisions of the NCBC Act the Union Government would not be denuded of its powers to add or subtract from the Central Lists of Other Backward Classes.⁵²

45. Singh, (2015) 4 SCC at 705.

46. *Id.* at 706.

47. *Id.* at 708.

48. Oral arguments commenced on November 26, and continued on December 3, 4, 6, 11, 16, and 17, 2014. Detailed date-wise court orders are available at courtnic.nic.in/supremecourt/casestatus_new/caseno_new_alt.asp (Case No. Writ Petition (Civil) 274/2014).

49. Singh, (2015) 4 SCC at 705.

50. *Id.* at 712.

51. *Id.*

52. *Id.* (emphasis added).

After perusal of the State Commission reports, extant literature, the relevant report from the expert committee of the Indian Council for Social Science Research, and the NCBC recommendation, the Supreme Court decided that the NCBC had sufficient material to recommend the non-inclusion of Jats on the backward class list.⁵³ The Supreme Court found that the Jat community was a politically organized community and did not fit the criteria of backwardness contemplated by the Constitution.⁵⁴ Although the government did not win this case, it is important to note the ground on which the Supreme Court decision was based. The Court found the government's decision to include the Jat community in the list legally fragile and unreasonable.⁵⁵ The decision was not based on the fact that the Central Government did not have the power to create such a list; indeed, the Court acknowledged, "[u]ndoubtedly, Article 16(4) confers such a power on the Union"⁵⁶

The Union of India argues two contradictory principles: on the one hand, it claims that it is disempowered to include any community in the list of backward classes without the recommendation of the NCBC (the argument in the Clarification Petition).⁵⁷ On the other hand, eight months later, it includes a community in the list of backward classes disregarding the recommendation of the NCBC on the ground that Article 16(4) of the Constitution gives it the competence to do so and that the NCBC cannot denude it of these powers.⁵⁸ The Union has changed its legal stance in two different cases within the span of a few months. This demonstrates that it is not taking a position on law but through the backward class argument is betraying a political unwillingness to deny, or at least postpone, the inclusion of transgender communities in the backward class list.

IV. THE CLARIFICATION PETITION SHOULD NOT BE CONFUSED WITH THE RESERVATION DEBATE

At this juncture, it may be fitting to provide a brief overview of the law with respect to special provisions and affirmative action for backward classes, Scheduled Castes, and Scheduled Tribes in India. Article 15(4) empowers the State to make special provisions for

53. *Id.* at 728, 730.

54. *Id.* at 730.

55. *See Singh*, (2015) 4 SCC at 712.

56. *Id.* at 726.

57. Clarification Petition, *supra* note 5, at 13, 20.

58. *Singh*, (2015) 4 SCC at 708, 712.

socially and educationally backward classes of citizens,⁵⁹ and Article 16(4) empowers the State to make reservations for appointment to posts for the backward classes of India.⁶⁰

The terms “Scheduled Castes” and “Scheduled Tribes” are not defined anywhere in the Constitution. Articles 341⁶¹ and 342⁶² of the Constitution of India empower the President to appoint a commission to prepare a list of the Scheduled Castes and Scheduled Tribes. As this Article deals with the inclusion of transgender persons in the backward class list, I will not explore the terms “Scheduled Castes” and “Scheduled Tribes” in detail. I will, however, at the end of this section, bring out the differences between being classified as either “Scheduled Castes/Scheduled Tribe” or “Backward Class.”

The term “backward class,” although used in the Constitution, has not been defined anywhere. The question of the identification of a backward class has been a long and troubling one for the judiciary and the State but the position was settled by the Court in *Sawhney v. Union of India*.⁶³ This case conclusively laid down the law relating to reservation in India. The Scheduled Castes and the Scheduled Tribes are certainly a part of the backward classes within the Constitution.⁶⁴ The Court has left the procedure for the final identification of a backward class to state-appointed authorities but has given some broad guidelines for it.⁶⁵

The Court has stated that caste alone cannot be an identifier of a backward class.⁶⁶ Among Hindus, the court has noted that one is born into a caste and the caste, in most cases, at least in rural India, dictates the profession one follows: “Its social status and standing

59. INDIA CONST. art. 15(4).

60. INDIA CONST. art. 16(4).

61. INDIA CONST. art. 341(1):

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

62. INDIA CONST. art. 342(1):

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

63. *Sawhney*, (1992) Supp. 3 SCC at 766–67.

64. *Id.* at 716.

65. *See id.* at 717.

66. *Id.* at 446.

depends upon the nature of the occupation followed by it. Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy.”⁶⁷ Even if one ceases to follow the caste occupation, “the label remains.”⁶⁸ The backwardness contemplated by Article 16(4) is social backwardness, and the Court has held that caste, occupation, poverty, and social backwardness are closely entwined.⁶⁹

To be sure, the Constitution prohibits any discrimination based solely on caste.⁷⁰ The State, therefore, cannot provide job reservations or special provisions based on caste alone. However, once caste fulfills the criteria of backwardness devised by the State, it is no longer just a “caste” but a “backward class,” and the Constitution does allow special provisions and job reservations to be made in favor of “backward classes.”⁷¹ Moreover, caste can just be a starting point to determine social backwardness, and social backwardness can also be determined without reference to caste.⁷² This can be done by looking at occupational groups, denominations, and sects that have been historically disadvantaged and socially backward.⁷³ This broad categorization of backward classes is capable of encompassing persons from all religions, with or without a caste system, and groups such as transgender persons who have, because of a history of discrimination, remained socially backward.⁷⁴ Additionally, for the purposes of special provisions under Article 15(4), the backward class must not only be socially backward, but also educationally backward.⁷⁵ Once again, the criteria to determine educational backwardness are left to the State.⁷⁶

The Court has stated that the thrust of the test to determine backwardness is to determine if the class is considered socially backward.⁷⁷ Social backwardness can be alleviated by economic prosperity or educational advancement.⁷⁸ The Court has stated that once a person advances so much economically and educationally that the thread that connects them to their backwardness “snaps,” the person is no longer eligible for affirmative action measures.⁷⁹

67. *Id.* at 714.

68. *Id.*

69. *See* Sawhney, (1992) Supp. 3 SCC at 769.

70. INDIA CONST. art. 15(1).

71. Sawhney, (1992) Supp. 3 SCC at 718.

72. *Id.* at 250, 255–56.

73. *Id.* at 716.

74. *Id.* at 716–17.

75. *Id.* at 669.

76. *See* INDIA CONST. art. 15(4) (stating that nothing prevents the State “from making any special provision for” educationally backward classes).

77. *See* Sawhney, (1992) Supp. 3 SCC at 568.

78. *See id.* at 724.

79. *Id.*

Usually, income cannot be the sole determinant of this advancement because the amount of income necessary to overcome poverty and backwardness is a question that varies from state to state.⁸⁰ Moreover, there can be situations in which the income level of a person may not be exceedingly high but their social status has risen so much that they can no longer benefit from State affirmative action, such as the children of Indian Administrative Service Officers.⁸¹ These persons are called the “creamy layer” and they must be excluded to determine the “true” backward class.⁸² The Court has directed the Government of India to make the final determination of the criteria for identifying the creamy layer.⁸³ The criteria must be such that the creamy layer can be said to have emerged from social backwardness.⁸⁴ The Court stated, in a later case, that Scheduled Castes and Scheduled Tribes cannot be excluded by the creamy layer test.⁸⁵

There cannot be reservation of more than fifty percent of jobs and educational institutions except in the most exceptional cases.⁸⁶ The Court has also stated that reservation would not be advisable in the following sectors:

(1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors—and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in the Indian Airlines and Air India.⁸⁷

In addition, reservation may not be given in other posts where the Government of India may find that the job requires the “highest level of intelligence, skill and excellence,”⁸⁸ and it may be not in the interest of “efficiency of administration” to make a reservation in these posts.⁸⁹

80. *See id.* (noting that income is impacted by geographic location and the urban or rural nature of the place where individuals might live).

81. *Id.* at 724–25.

82. *Id.* at 725.

83. Sawhney, (1992) Supp. 3 SCC at 725.

84. *Id.*

85. Thakur v. Union of India, (2008) 6 SCC 1, 511–13.

86. Sawhney, (1992) Supp. 3 SCC at 735.

87. *Id.* at 752.

88. *Id.* at 753.

89. *Id.*

Subsequent constitutional amendments have empowered the State to make provisions for the Scheduled Castes and Scheduled Tribes and for the backward classes with respect to admission to educational institutions—even private and unaided education institutions—with the exclusion of minority educational institutions.⁹⁰ The Scheduled Castes and Scheduled Tribes have reservations in job promotions in State services as well.⁹¹ Unfulfilled seats reserved for one year can be carried forward to the next year and do not count toward the fifty percent reservation limit.⁹²

Every state or central government authority is free to devise guidelines to determine a backward class.⁹³ However, the broad set of guidelines adopted by the NCBC for determining whether a class has been rightly included or wrongly excluded from the list of backward classes were devised by the government-appointed Mandal Commission for Backward Classes.⁹⁴ The guidelines are as follows:

A. *Social* (i) Castes/Classes considered as socially backward by others. (ii) Castes/Classes which mainly depend on manual labour for their livelihood. (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas. (iv) Castes/Classes where participation of females is [sic] work in [sic] at least 25% above the State average.

B. *Educational* (v) Castes/Classes where the number of children in the age group of 5–15 years who never attended school is at least 25% above the State average. (vi) Castes/Classes where the rate of student drop-out in the age group of 5–15 years is at least 25% above the State average. (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. *Economic* (viii) Castes/Classes where the average value of family assets is at least 25% below the State average. (ix) Castes/Classes where the number of families living in Kutcha houses is at least 25% above the State average. (x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households. (xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.⁹⁵

90. INDIA CONST. art. 15(5).

91. INDIA CONST. art. 16(4A).

92. INDIA CONST. art. 16(4B).

93. Sawhney, (1992) Supp. 3 SCC at 639–40.

94. *Id.* at 640.

95. *Id.* at 645–46.

Each social indicator is given three points; each educational indicator is given two points; and each economic indicator is given one point.⁹⁶ All the indicators total up to twenty-two points.⁹⁷ Any community that scores less than eleven points on this scale is considered backward.⁹⁸

To be sure, the reservation debate is far from over. Should the Scheduled Castes and Scheduled Tribes be excluded from the “creamy layer”? Should seats be reserved for Scheduled Castes and Scheduled Tribes when it comes to job promotions? Should unfulfilled vacancies be carried forward to the next year so that more than fifty percent of the seats in a given year are reserved? Should reservations be allowed in post graduate medical courses as they now are? These and other questions are in the future of this debate. Neither the Clarification Petition nor this Article are about the reservation debate. The Union is not debating whether transgender persons qualify for reservation. The Union is only making an argument that it is not within their competence to include these communities in the backward class list without the NCBC recommending such action.

V. TRANSGENDER PERSONS CAN BE CATEGORIZED AS BACKWARD CLASSES UNDER THE CONSTITUTION

Transgender persons face “[s]ocial exclusion and discrimination”⁹⁹ in the Indian society. They are stigmatized for their gender identity and are also subjected to abuse both at their homes and in public places.¹⁰⁰ They face custodial violence and abuse at places such as the police station.¹⁰¹ They are not allowed to enter malls, restaurants, workplaces, schools, etcetera.¹⁰² They are collectively called by such derogatory epithets such as *chakka* (which in sentiment

96. *Id.* at 646.

97. *Id.*

98. *Id.*

99. Nat’l Legal Servs. Auth., (2014) 5 SCC at 483; see PEOPLE’S UNION FOR CIVIL LIBERTIES, *Human Rights Violations Against Sexual Minorities in India*, 32–33 (Feb. 2001), <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf> [<http://perma.cc/2EZH-TEYS>] (reporting that different sections of the sexual minority communities face varying degrees of rejection and discrimination); see also Siddharth Narrain, *Crystallising Queer Politics—The Naz Foundation Case and Its Implications for India’s Transgender Communities*, 2 NUJS L. REV. 445, 463–64 (2009) (stating that sexual minority communities are discriminated against by society and remain isolated).

100. Nat’l Legal Servs. Auth., (2014) 5 SCC at 442–43, 461–62, 487, 503 (citing, *inter alia*, affidavits of Laxmi Narayan Tripathy and Siddharth Narrain).

101. *Id.* at 446, 487; see also Jayalakshmi v. State of Tamil Nadu, 4 MLJ 849, W.A. No. 1130 of 2006 (Madras HC, Oct. 7, 2007).

102. See Nat’l Legal Servs. Auth., (2014) 5 SCC at 459.

means a eunuch).¹⁰³ Because of this treatment, education and livelihood are real challenges for them. To quote the observations of the Supreme Court on this point:

Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare, etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls, etc.¹⁰⁴

Such acts as well as Section 377 of the Indian Penal Code is the source of grave harassment for transgender and Hijra persons. Because of their visible gender non-conformity they are often arrested and harassed in police stations on the assumption that they are violating Section 377 (criminalizing carnal intercourse as against the order of nature).¹⁰⁵ Although even the Supreme Court has not been able to provide a list of acts which may be against the order of nature, sex with persons of the same sex is considered against the order of nature.¹⁰⁶ Under the British Rule such acts were criminalized under the Criminal Tribes Act 1871 as it was assumed that the individuals engaged in these acts were “addicted to the systematic commission of non-bailable offences”¹⁰⁷

After noting that these communities have been systematically stigmatized and excluded, the Supreme Court concluded that transgender persons qualify under the definition of socially and educationally backward classes as their backwardness is truly social in nature and rooted in the social stigma associated with them.¹⁰⁸ The Supreme Court stated that the State was under a positive obligation to make special provisions for them and to provide them

103. *Id.* at 461 (quoting affidavit of Laxmi Narayan Tripathy).

104. *Id.* at 487.

105. Section 377 states: “Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.” PEN. CODE § 377 (1860). *See also* Priyadarshini Thangarajah & Ponni Arasu, *Queer Women and the Law in India*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 325, 328–29, 333 (Arvind Narrain & Alok Gupta eds., 2011).

106. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 65–66 (India).

107. Criminal Tribes Act, INDIA CODE Part I, § 2 (1871) (repealed 1949).

108. *Nat’l Legal Servs. Auth.*, (2014) 5 SCC at 455–56.

with reservations in education and in job appointments under Article 15(4) and 16(4) respectively:

TGs have . . . not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBCs) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBCs. The State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. . . . TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. The State is bound to take affirmative action to give them due representation in public services.¹⁰⁹

In the case of *Singh v. Union of India*,¹¹⁰ the social backwardness of the transgender populations has once again been recognized. The Supreme Court cautioned the government against blind reliance on mathematical formulae to determine a backward class and urged the State to discover backwardness in the “historical injustice”¹¹¹ and “under protection”¹¹² of the transgender community which, in the opinion of the Court, certainly entitles them to State affirmative action under Articles 15(4) and 16(4) of the Constitution.

VI. VALID POINTS IN THE CLARIFICATION PETITION

There are some other concerns raised by the Clarification Petition. In this section, I will address those concerns, for completeness.

1. The first clarification sought by the petition is whether the term “third gender” is to be used for the purposes of identifying just Hijra persons or will it be used to identify all transgender persons?¹¹³ To answer this question, a careful consideration of the entire transgender judgment must be made. Upon reading the entire judgment as a whole, it is clear that the Court understands that Hijra persons (called variously Kinnar, Jogtas and Jogappas, Aravanis, etc.) neither consider themselves biologically or psychologically male nor do they

109. *Id.* at 446–47.

110. *Singh*, (2015) 4 SCC at 697.

111. *Id.* at 729.

112. *Id.*

113. Clarification Petition, *supra* note 5, at 7.

consider themselves women, as they cannot bear children and do not menstruate.¹¹⁴ It is for this reason, the court states, they call themselves third gender, whereas other transgender persons, who do not identify as Hijra (such as male-to-female transgenders [pre- or post-operation], female-to-male transgenders [pre- or post-operation], transsexuals, etc.) may not identify as third gender.¹¹⁵ To quote the Supreme Court on this point:

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include [H]ijras/[E]unuchs who, in this writ petition, describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since [H]ijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender.”¹¹⁶

The Court rightly understands the word transgender as an umbrella term, finding that Hijra persons are included within this term. It is to the Hijra persons that the term “third gender” applies and this understanding is in line with the current understanding of the term “transgender.”¹¹⁷

Not all transgender persons think of themselves as neither men nor women.¹¹⁸ Some transgender people *do* want to identify as either a man or woman, depending on their deeply felt gender identity.¹¹⁹ It would not be right—both in terms of their lived experience and also in terms of the judgment which finds a fundamental right to identify in self-defined gender—to compel such persons to identify as third gender. This understanding is reflected in the final directions of the Court to the Centre and the States:

(1) Hijras, [E]unuchs, apart from binary genders, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

114. Nat'l Legal Servs. Auth., (2014) 5 SCC at 442–43.

115. *Id.* at 443.

116. *Id.* at 462.

117. *Id.* at 443.

118. *Id.*

119. *Id.* at 442–44, 465.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.¹²⁰

A reading of these two directions means that whereas Hijra persons can be treated as third gender they can also identify, if they so wish, as male or female. This is because the definition of transgender includes Hijras. Similarly, for transgender persons who are not Hijras, the Court has recognized their right to identify as male, female, or third gender. The thrust of the judgment is on the fundamental right to self-defined gender identification¹²¹ and when understood in this way, the mandate of these directions is to freely allow transgender and Hijra persons to *choose* the gender with which they want to identify. Reading the directions in part and separate from its spirit offends the jurisprudence set forth therein. For the purposes of legal recognition (in identity cards and forms), the government should therefore, allow transgender and Hijra persons to decide whether they want to identify as male, female, or third gender.

2. The Clarification Petition states that the judgment uses the word “eunuch” to denote Hijra and transgender persons.¹²² It states that this term is derogatory and it must be done away with.¹²³ This, indeed, is a valid point raised by the petition. The term “eunuch” is used to denote a castrated male.¹²⁴ Not all Hijra or transgender persons are castrated.¹²⁵ In fact, castration has no necessary connection with being a transgender or Hijra person. Both the Supreme Court judgment and authoritative anthropological research has found that most of the male-to-female transgender persons and Hijra persons are born biologically male and have the full functioning of their sex organs.¹²⁶ Hijra are a distinct socio-religious cultural group with their own custom and initiation rituals.¹²⁷ Not all male to female transgender persons join this community. Quoted partially, the definition of the Hijra adopted by the Supreme Court states, “Hijras are biological males who reject their ‘masculine’ identity in

120. Nat'l Legal Servs. Auth., (2014) 5 SCC at 508.

121. *Id.* at 490.

122. Clarification Petition, *supra* note 5, at 2.

123. *Id.* at 7–9.

124. *Id.* at 7–8.

125. *Id.*

126. See SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA, at xx (2nd ed. 1999).

127. Nat'l Legal Servs. Auth., (2014) 5 SCC at 480–81.

due course of time to identify either as women, or 'not-men,' or 'in-between man and woman,' or 'neither man nor woman.'"¹²⁸

This definition is a well-accepted definition of the term "Hijra." Serena Nanda in her authoritative work *Neither Man Nor Woman* has also alluded to the fact that most Hijras are biologically male.¹²⁹

3. The third point that the Clarification Petition raises is that the Court has defined "transgender" to include even lesbians, gays, and bisexuals.¹³⁰ Such a broad definition confuses the scope of the directions issued to the government.¹³¹ This objection is indeed true. At various points, the Court has defined transgender to include lesbians, gays, and bisexuals. In paragraph twenty-two of the lead judgment, the judge states that "Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual, etc."¹³² Likewise, the concurring judgment states that, "At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even gay, lesbian, bisexual are included by the descriptor 'transgender.'"¹³³

To be sure, the Court has, fairly consistently, maintained a clear definition of the term transgender:

Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include [H]ijras/[E]unuchs who, in this writ petition, describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomical appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since [H]ijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional "third gender". Among [H]ijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo sex re-assignment surgery (*SRS*) or have undergone *SRS* to align their

128. *Id.* at 480.

129. *See* NANDA, *supra* note 126, at xx.

130. Clarification Petition, *supra* note 5, at 11.

131. *See id.* at 11–12, 19–20.

132. Nat'l Legal Servs. Auth., (2014) 5 SCC at 465.

133. *Id.* at 501.

biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender i.e. transvestites. Resultantly, the term “transgender,” in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex: male and female.¹³⁴

The above-mentioned deviation from the definition has the capacity to confuse the judgment and the scope of the applicability of the directions. In the wake of this judgment, the Rights of Transgender Persons Bill of 2014¹³⁵ has been introduced and passed in the Upper House of the Parliament in April 2015.¹³⁶ This Bill provides for both non-discrimination and welfare measures for transgender persons; the definition section of the Bill defines a transgender person with exclusive reference to their gender identity and does not include a mention of sexual orientation such as lesbian, gay, or bisexual.¹³⁷ This definition section also includes gender-queers within the definition of transgender.¹³⁸ The Supreme Court definition of the term does not include gender-queers. There is an urgent need for the Supreme Court to clarify this definition and the Clarification Petition is correct to consider it as a solution.

4. The next point that the Clarification Petition raises deals with the intersectionality of the Scheduled Castes and Scheduled Tribes and the other backward class category.¹³⁹ The government has argued that treating all transgender persons as a backward class may give rise to potential conflict.¹⁴⁰ Those persons who are not Scheduled Castes and Scheduled Tribes may not have a problem with being classified as other backward class but the Court *does* need to clarify, and the Clarification Petition indeed asks it to clarify, the status of the those transgender persons who are Scheduled Castes and Scheduled Tribes. Will they now be classified as an ‘other backward class’ or will they retain their Scheduled Caste and Scheduled Tribe status? This is an important determination to be

134. *Id.* at 443.

135. The Rights of Transgender Persons Bill, 2014, No. XLIX-C of 2014, RAJYA SABHA, 2014.

136. *Id.*

137. *Id.* at ch. I, § 2(t).

138. *Id.*

139. Clarification Petition, *supra* note 5, at 13–14.

140. *See id.* at 13–14, 20–22.

made. The purpose of this Article is not to discuss the creation of the constitutional category of Scheduled Castes and Scheduled Tribes. Suffice it to say that for the purpose of state affirmative action, the President can, under Articles 341 and 342 of the Constitution, cause a list of Scheduled Castes and Scheduled Tribes to be created.¹⁴¹ State affirmative action provisions such as Article 15(4) and Article 16(4) apply to those classes mentioned in this list.¹⁴²

Classification as Scheduled Castes and Scheduled Tribes or another backward class has telling repercussions on the eligibility of affirmative actions. All backward classes include Scheduled Castes and Scheduled Tribes but this is not true in the reverse. All affirmative action programmes for the backward classes automatically apply to Scheduled Castes and Scheduled Tribes but the reverse may not always be the case. For example, Scheduled Caste and Scheduled Tribe persons are not excluded from affirmative action programmes on the basis of a “creamy layer” determination,¹⁴³ unlike a person classified as a backward class who loses State affirmative action support once they attain the “creamy layer.” Additionally, no reservations can be made for backward classes in job promotions; however, owing to a new constitutional amendment inserting Article 16(4A), reservations can be made for Scheduled Castes and Scheduled Tribes in job promotions.¹⁴⁴ Moreover, Scheduled Castes and Scheduled Tribes have reserved seats in the legislature but backward classes do not have this provision.¹⁴⁵ Classification as Scheduled Castes and Scheduled Tribes or backward classes has a real impact on the nature of state affirmative action. It is indeed important for the Supreme Court to clarify what will happen to Scheduled Caste and Scheduled Tribe transgender persons—will they all now be classified as a backward class or will they retain their original classification—that of Scheduled Caste and Scheduled Tribe?

CONCLUSION

The Supreme Court has directed the Centre and the State Governments to include transgender persons in the backward class list with the objective of providing to them several affirmative action measures. The Union of India has, in response, stated that it does not have the competence to *suo motu* make this inclusion unless the

141. INDIA CONST. arts. 341(1), 342(1).

142. INDIA CONST. arts. 15(4), 16(4).

143. Thakur, (2008) 6 SCC at 249.

144. INDIA CONST. art. 16(4A).

145. See INDIA CONST. art. 330.

National Commission for Backward Classes makes a recommendation directing them to do so. I have tried to demonstrate through this Article that not only is this argument an incorrect reading of the constitutional guarantee to equality and the National Commission of Backward Classes Act, it is also a position that the Union has in the recent past argued against. Moreover, the NCBC can only decide claims of over inclusion and under inclusion in the backward class list for the purposes of providing reservations in job appointments as per Article 16(4). The scope of the Act does not extend to deciding the veracity of the socially and educationally backward class list prepared by the State for the purposes of providing other affirmative action measures under Article 15(4). Article 15(4) special provisions have a wider scope than job reservation in Article 16(4). The Supreme Court in the *Sawhney* case stated clearly that backward classes for the purpose of Article 15(4) and 16(4) are different.¹⁴⁶ The State, therefore, has the power to declare which classes of citizens will qualify as socially and educationally backward classes of citizens for the purpose of Article 15(4).

The Supreme Court has stated that transgender persons should be included in the backward class list owing to their social backwardness. The State, if it does not do so, opens itself up to challenge not only before the NCBC (under Section 9) but also before the Supreme Court.¹⁴⁷

146. *Sawhney*, (1992) Supp. 3 SCC at 719–20.

147. *Singh*, (2015) 4 SCC at 729–30.

