IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5542 of 2023

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1. Youth For Equality, P-21, South Extension Part -II, New Delhi 110049, through its Secretary Shri Subham Kumar aged about 33 years, Male, Son of Amrendra Kumar Singh, Rajeev Nagar, P.O, Keshri Nagar, Patna.
2. Dr. Bhurelal, Son of Shri. Rajaram, Resident of Sector 128, Noida, Augusta Gold Apartments-005, PIN-201304.
3. Prof. Makkhan Lal, Son of Shri. Durga Prasad Srivastava, A-9, NSG Society, P 6 Builders Area, Gautal Budh Nagar, Uttar Pradesh, PIN-201308
4. Prof. Kapil Kumar Son of Shri. Bishan Narain Saxena, Resident of 819, Level Pinto Block, Asian Games Village, Delhi - 110049.
5. Prof. Sangit Kumar Ragi Son of Shri Dinesh Sharma Resident of 310, Patrakar Parisar, Section 5, Vasundhara, Ghaziabad - 2010102.
6. Ms. Ahna Kumari Daughter of Mr. Amol Kumar Singh, Resident of Village- Vaishali, Abhay Singh House Near Vaishali Block Chowk, P.S.- Vaishali, District- Vaishali, Bihar - PIN - 844128

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, New Secretariat, Patna, Bihar.
2. The Principal Secretary, Department of General Administration, Govt. of Bihar, Patna
3. The Deputy Secretary, General Administration Department, Government of Bihar, Patna.
4. The Additional Chief Secretary, Government of Bihar, Patna.
5. The Principal Secretary to the Governors Secretariat, Government of Bihar, Patna.
6. The Principal Secretary to the Chief Minister, Government of Bihar, Patna.
7. The Additional Director, Evaluation Directorate, Economic and Statistics Directorate, Bihar, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 4624 of 2023

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Sh. Akhilesh Kumar Son of Sh. Mithilesh Kumar R/o Village- Begampur Mari, District- Nalanda, Bihar 803111.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.

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2. The Additional Chief Secretary, General Administration Department, Government of Bihar, Patna.
3. The Principal Secretary to the Chief Minister, Govt. of Bihar, Patna.
4. The Principal Secretary, Department of General Administration, Government of Bihar, Patna.
5. The Deputy Secretary of the government General Administration Department, Government of Bihar, Patna.
6. The Union Govt. of India, through Secretary Ministry of Home Affairs, New Delhi.
7. Registrar General and Census Commissioner, Union of India, New Delhi.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 4650 of 2023

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EK SOCH EK PRAYAS through its Settlor Trustee,Upendra Kumar, S/o Shri B.Ram, Office-B240, Krishan Kunj Gali No. 2, North Ghonda, Delhi 110053.

... ... Petitioner/s

Versus

1. Union of India through its Home Secretary, Ministry of Home Affairs, Govt. of India, North Block, New Delhi 110001 through its General Secretary, hshso@nic.in.
2. Govt. of Bihar through its Deputy Secretary, General Administration Department, Main Secretariat, Patna 800015. cs-bihar@nic.in
3. The Registrar General and Census Commissioner of India NDCC-II Building, Jan Singh Road, New Delhi-110001. Rgi.rgi@gov.in

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 5749 of 2023

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1. Shri. Suresh Kumar Bharadwaj, IPS, Retired Director General of Police Son of Shri Chander Parkash Bharadwaj, resident of Arpana Bank Colony, Phase 2 Ram Jaipal Path, South of Bailey Road, Danapur, Patna, Bihar - 801503.
2. Shri Amod Kumar Kanth, IPS Retired Director General of Police, S/o Late Sri RSP Kanth, resident of A1/52 FF Safdarjung Enclave New Delhi 110029.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, New Secretariat, Patna,

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Bihar.

2. The Principal Secretary, Department of General Administration, Govt. of Bihar, Patna.
3. The Deputy Secretary, General Administration Department, Government of Bihar, Patna.
4. The Additional Chief Secretary, Government of Bihar, Patna.
5. The Principal Secretary to the Governor's Secretariat, Government of Bihar, Patna.
6. The Principal Secretary to the Chief Minister, Government of Bihar, Patna.
7. The Additional Director, Evaluation Directorate, Economic and Statistics Directorate, Bihar, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 6506 of 2023

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Ms. Muskan Kumari D/O Shri Brijnandan Singh, Gate No-92, Bajitpur, Opp-Puja Flour Mill, Patna, Dinapur - Cum-Khagaul, Patna, Bihar - 800011

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, New Secretariat, Patna, Bihar.
2. The Principal Secretary Department of General Administration, Govt. of Bihar, Patna.
3. The Deputy Secretary, General Administration Department, Government of Bihar, Patna.
4. The Additional Chief Secretary General Administration Department, Government of Bihar, Patna.
5. The Principal Secretary to the Governors Secretariat Government of Bihar, Patna.
6. The Principal Secretary to the Chief Minister Government of Bihar, Patna
7. The Additional Director, Evaluation Directorate, Economic and Statistics Directorate, Bihar, Patna.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 7297 of 2023

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Ankit Roushan S/o Mahavir Chandra Das 15, Near Durga Asthan, Ghosh Tola Dumarama, Amarpur, Banka, Bihar- 813101.

... ... Petitioner/s

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Versus

1. The State of Bihar through the Chief Secretary, New Secretariat, Patna, Bihar.
2. The Principal Secretary, Department of General Administration, Govt. of Bihar, Patna.
3. The Deputy Secretary, General Administration Department, Government of Bihar, Patna.
4. The Additional Chief Secretary, General Administration Department, Government of Bihar, Patna.
5. The Principal Secretary to the Governor's Secretariat, Government of Bihar, Patna.
6. The Principal Secretary to the Chief Minister, Government of Bihar, Patna.
7. The Additional Director, Evaluation Directorate, Economic and Statistics Directorate, Bihar, Patna.

... ... Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 5542 of 2023)

For the Petitioner/s : Ms. Aprajita Singh, Sr. Advocate
Mr. Abhinav Shrivastava, Advocate
Mr.Dhananjay Kumar Tiwary, Advocate
Mr. Rahul Pratap, Advocate
Mr. Raushan, Advocate
Mr. Krishna Murari, Advocate
Mr. Arpit Anand, Advocate
Mr. Pushkar Bharadwaj Advocate

For the Respondent-State : Mr. P.K. Shahi, Advocate General
Mr. Anjani Kumar, AAG-4
Mr. Sanjiv Kumar, AC to AG
Mr. Alok Kr. Rahi, AC to AAG 4
Mr. Manish Kumar, Advocate
Mr. Shailendra Kumar Singh, Advocate
Mr. Utkarsh Bhushan, Advocate

(I.A. No. 3 of 2023 in CWJC No. 5542 of 2023)

For the Intervenor : Mr. Basant Kumar Choudhary, Sr. Advocate
(In person)
Mr.Shashi Bhushan Kumar, Advocates

(In Civil Writ Jurisdiction Case No. 4624 of 2023)

For the Petitioner/s : Mr. Dinu Kumar, Advocate
Ms.Ritika Rani, Advocate
Mr.Vardaan Mangalam, Advocate
Mr.Rituraj, Advocate

For the Respondent/s : Mr. P.K. Shahi, Advocate General
Ms. Kalpana, Advocate

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(In Civil Writ Jurisdiction Case No. 4650 of 2023)
For the Petitioner/s : Mr. Yadunandan Bansal, Advocate
Mr. Avinash Kumar Pandey, Advocate
Mr. Upender Kumar, Advocate
For the Respondent/s : Dr. K.N.Singh, Additional Solicitor General
(In Civil Writ Jurisdiction Case No. 5749 of 2023)
For the Petitioner/s : Mr. Abhinav Shrivastava, Advocate
Mr. Karandeep Kumar, Advocate
For the Respondent/s : Mr. P.K. Shahi, Advocate General
(In Civil Writ Jurisdiction Case No. 6506 of 2023)
For the Petitioner/s : Mr. M.P.Dixit, Advocate
Mr. S.K.Dixit, Advocate
Mr. Swastika, Advocate
Mr. Sanjay Kumar Chaubey, Advocate
For the Respondent/s : Mr. P.K. Shahi, Advocate General
Mr. Naresh Dikshit, Advocate
Ms. Kalpana, Advocate
(In Civil Writ Jurisdiction Case No. 7297 of 2023)
For the Petitioner/s : Mr. M.P.Dixit, Advocate
Mr. S.K.Dixit, Advocate
Mr. Swastika, Advocate
Mr. Sanjay Kumar Chaubey, Advocate
For the Respondent/s : Mr. P.K. Shahi, Advocate General
Mr. Naresh Dikshit, Advocate
Ms. Kalpana, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 01-08-2023

1. The action of the State in carrying out a caste survey, impugned in the present batch of writ petitions and the vigorous challenge raised to it on multiple grounds, *inter alia* of infringement of fundamental rights, by reason of infringement of privacy, reveal that despite attempts to efface it from the social fabric, caste remains a reality and refuses to be swept

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aside, wished away or brushed aside nor does it wither away and disperse into thin air.

THE ARGUMENTS AGAINST THE SURVEY :-

2. Learned Senior Counsel Ms. Aparajita Singh, instructed to appear in CWJC No. 5542 of 2023, led the arguments on behalf of the petitioners. Referring to Annexure-P/1 notification dated 06.06.2022, which initiated the caste survey and the instructions issued from the Principal Secretary to the District Collectors, followed up with directions from the District Collectors to the Block Development Officers (Annexure- P/2 and P/3 respectively) and the guidelines issued through Annexue-P/4 notification, the learned Senior Counsel raised objections specifically regarding the queries raised under the three heads of religion, caste and monthly income. Reliance was placed on ***K.S. Puttaswamy II (Aadhaar) v. Union of India; (2019) 1 SCC 1*** to point out that these three aspects are very sensitive personal information which defines the identity, autonomy, dignity and privacy of every individual. The Hon'ble Supreme Court in ***Justice K.S.Puttaswamy I v. Union of India; (2017) 10 SCC 1*** specifically dealt with these aspects and held it to be sacrosanct; the infringement of which would also fall foul of the constitutional guarantees to preserve fundamental rights

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and never to be impinged; other than by way of reasonable restrictions, conforming to strict standards of scrutiny. The State by the above survey conducted amongst the residents of Bihar is imposing a caste status on every citizen, whether he desires it or chooses to distance himself/herself from it. The guidelines at Annexure-P/5 are specifically read out which depict the manner in which the details are to be obtained from the individuals through the Government Officers, called the Enumerators. In collecting the details of religion, there is a specific option, to be counted as not falling under the enumerated six religions; who will be classified under the heading ‘other religion’ and even those who express no religious beliefs to be classified under the head ‘no religion’. Such an option is not available insofar as the caste status and it is specified that under no instance the mother’s caste will be recorded. This brings in a situation where, even a person who does not nurture any religious belief would be classified as a person belonging to one or other caste; which can only be that of the father. As far as monthly income is concerned, there is an estimation possible of the total income received by the members of the family in the whole year divided by 12 months; which, it is argued, is quite artificial and not the real income derived by an individual. It is argued that the

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survey, as it is intended, would be completely out of focus and there would be no possibility of verification of any of the details supplied by the individual citizen, especially in matters of religion, caste and monthly income.

3. It is specifically argued that the power to carry out a census is exclusively on the Union Parliament as provided under Article 246 of the Constitution of India read with Entry 69 of List-1, Seventh Schedule. In the year 2011, though not under the Census Act, 1948; as brought out by the Union Parliament under Entry 69 of the 1st List, a socio-economic caste census (SECC) was carried out by the Central Government by invoking its power under Article 73 of the Constitution. The methodology and the fall out of the same has been emphasized by the learned Senior Counsel with reference to Annexure-P/9, a reply affidavit filed on behalf of the Central Government in a writ petition before the Hon'ble Supreme Court. The counter affidavit has emphasized that the Central Government has given up a caste wise enumeration, as a matter of policy from 1951 onwards and decided to carry out only an enumeration of the Scheduled Castes (S.C) and Scheduled Tribes (S.T), notified under the Constitution. Except that of S.C and S.T, it is asserted that no census was carried out in 1951 or in the succeeding six census,

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of any information about the caste of the citizen. The counter affidavit further indicates that enumeration of the Other Backward Class Communities has posed extremely complex impediments. When such data was collected in the pre-independence period, the data suffered from lack of completeness and accuracy and a census of the Backward Classes has been found to be administratively difficult and cumbersome. When such a conscious policy decision was taken by the Central Government, it is very difficult to perceive and accept the decision of the State Government to proceed with such an enumeration; when the resources of the State is not as large as that of the Centre.

4. Specific reference is made to the general guidelines issued which enable the enumerators and supervisors to get information regarding the caste from the head of the family, which again would not be authentic and would also impinge upon the personal choices of an individual regarding disclosure of his caste status. It is emphasized that there is no law brought out by the State to collect such sensitive data and that, in any event, there is no competence in the State to carry out a caste census in the guise of a survey. It is further emphasized that the objective of enabling affirmative action, to those marginalized

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communities, is not specifically stated in the notifications issued. ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi; 1978 (3) SCR 272*** is relied on to rubbish the contention of the object now declared of aiding affirmative action, which object is only an afterthought at the time of preparation of the counter affidavit. There is total absence of statement of such objective in the notification itself and what had not been thought of or stated at the time the decision was taken to initiate a caste-based survey cannot now be supplanted as an objective by way of a counter-affidavit.

5. It is vehemently argued that any individual has the right to choose or renounce his caste and there is no justification or legitimate aim, as disclosed from the notifications, to profile an individual on the basis of his caste, religion or income. ***Shafin Jahan v. Asokan K.M.; (2018) 16 SCC 368*** is relied on to argue that the Constitution recognizes the liberty and autonomy which inheres in each individual and this includes decision on aspects defining one’s person. There can be no enumeration of the required details, as is permitted under the guidelines, either from the head of the family or from neighbours and persons of a locality, which would not be accurate and would also violate the right to define oneself,

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which inheres in the right to privacy.

6. The power to carry out a Census, especially of caste, religion and monthly income can only be traced to Entries 19, 69, 81 and 94 of the Union List under Schedule-VII of the Constitution. Entries 20, 23, 24, 30 and 45 under the Concurrent List, as relied on by the State, can be resorted to only insofar as it does not impinge into the field exclusively reserved for the Union Parliament. The distinction of Census and Survey is specifically urged to further impress upon us that the exercise attempted, is in measure and effect a census; thus, impinging upon the exclusive power of the Union Parliament. It is also urged that the restrictions and protection available to a citizen insofar as ensuring the integrity of the data collected and providing for its security, are not available in the present exercise. The State, which is the protector of fundamental rights under the Constitution, has turned its might against the citizen to collect data forcibly and surreptitiously, thus, infringing upon the citizens' valuable right to privacy, identity, autonomy and dignity. It is summed up that, to uphold the exercise as legal, there should be competence in the State and if competent, then a valid law should be in existence, under which the exercise can be carried out, motivated by a legitimate goal or aim; which has

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to be judged under the highest standards of scrutiny. If such a legitimate aim or goal is available, even then there should be narrow tailoring to ensure that nothing beyond what is necessary is done by the State. Again, if there is an alternative method available; which in this case the State has by way of appointing Commissions, to aid the affirmative action, such alternatives have to be resorted to rather than involve in an exercise leading to infringement of fundamental rights. Further, the test of proportionality necessarily has to be satisfied and in the present case, there can be no balance found to sustain the arbitrary action, clearly leading to infringement of fundamental rights, without any declared purpose or goal. The lack of security also assumes importance insofar as the State having not placed anything on record to indicate any audit having been conducted for ensuring the protection of the data collected. Reference is also made to a notification issued by the State Government, which the State Government itself relied on before the Hon'ble Supreme Court, wherein prescribed action was threatened in case of deliberate wrong information being supplied by any person. This assumes relevance especially in the context of the State having not directed the enumerator to collect the information required at the survey, from the individuals

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themselves and goes against the assertion of the disclosure in the survey being voluntary.

7. Sri Abhinav Srivastava, learned counsel appearing for some of the petitioners adopted the arguments already addressed and assailed the impugned survey primarily on lack of legislative competence, disregard of the right to privacy which is also enshrined in Article 21 of the Constitution and alternatively the absence of a legislation sanctioning such survey. It is specifically argued that Article 162 only extends to the legislative power conferred on the State and insofar as caste census is concerned, there is absolute lack of it. The object of the exercise asserted by the State; to further the development of the downtrodden communities is a mirage brought in at the second phase of the exercise. For identification of other backward communities (OBC) or the extremely weaker backward communities (EWBC), there is sufficient power available with the States under Articles 15 (4) & 16 (4) of the Constitution of India. In Bihar, there is also a legislation identifying the OBCs and EWBCs, which is the Bihar Reservation of Vacancies in Posts And Services (SC/ST, OBC) Act, 1991. Schedules 1 and 2 of that Act enumerates the various castes which are entitled to such benefits. There is also power

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on the State to identify those castes which are marginalized and are downtrodden by appointment of Commissions which is sanctioned by ***Indra Sawhney v. Union of India; (1992) Supp. (3) SCC 217.*** In achieving a constitutional goal, the learned counsel asserts, the State has to adopt constitutional means and cannot otherwise proceed. Annexure-1, the initial notification and Annexures 2 and 3, insists upon collection of the data specified, from each and every individual belonging to all religions and communities and there is nothing stated as to an option regarding disclosure of caste, to be voluntary. The said option now asserted by the State is an afterthought which has been stated in the counter affidavit filed by the State and not in any of the notifications issued or the guidelines brought out. Reliance is placed on the Constitution Bench decision of the Hon'ble Supreme Court in ***K.S. Puttaswamy I*** *&* ***Aadhaar*** to urge the significance and importance of the right to privacy as highlighted by the Hon'ble Supreme Court reversing two earlier decisions of the Hon'ble Apex Court itself. While ***K.S Puttaswamy I*** upheld the right to privacy as a right protected by the Constitution, being an intrinsic part of the right to personal liberty and right to life under Article 21, the ***Aadhaar*** judgment defined the contours within which such right could be infringed.

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The ***Aadhaar*** judgment stressed upon the need for existence of a law which had a legitimate aim, the least infringement being occasioned & the test of proportionality being satisfied. The exercise carried out by the State fails on all three counts. If for arguments sake, it can be sustained under Article 162, the action is bad for the complete lack of guidelines on how the exercise is to be carried out. It is reiterated that be it the exercise of legislative power or an executive fiat; necessarily it should be preceded by a legitimate object which is not discernible from any of the notifications issued. The exercise of a caste survey is being initiated without any definite objective and carried out without a proper direction and the result of the culmination of such collection of data, even now, is elusive. It is specifically pointed out that even in the interim order passed, this Court had expressed concern about protection of data; the details of which are not disclosed.

8. Pointing out the specific details to be collected under the 17 identified heads as per Annexure-4 notification; it is pertinently pointed out that the survey itself has been named with one of such details; as ‘the caste survey’. The intention is very clear from the nomenclature given to the survey and it is the objective of the State to find out the number of persons

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belonging to a caste, presumably for forging alliances and carving out areas for narrow political ends; least of all is the development or upliftment of the down trodden. It is further pointed out from the guidelines regarding collection of data that many of the guidelines are autocratic and arbitrary. It is specifically pointed out that as per the guidelines in no event the mother's caste is to be recorded. It is also directed that an individual's caste or other personal details can be ascertained from the head of the family. A woman who refuses to disclose the father of her child would be forced in the presence of a male member to disclose it.

9. The very attempt of the State to record the caste of each and every individual smacks of arbitrariness and displays scant respect for the dignity of an individual. It is specifically pointed out that while the Constitutional goal is to efface the caste identity, it also promotes affirmative action for upliftment of the downtrodden and marginalized. A declaration of caste or a demand to disclose it arises only when a benefit flows from it to an individual. All the members of an identified downtrodden community would not be availing the benefits of the affirmative action of the State, sanctioned by the Constitution, that flow only because of the caste identity. Even a member of the S.C or

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S.T, if not intending to seek the benefits of reservation, cannot be forced to declare his caste status. It is in this context that the test of proportionality has to be applied on the attempt of the State to make every individual disclose his caste in the survey conducted by government officials. The learned counsel would emphasize that the mere presence of a government official is an indirect coercion on the individual who is questioned, to disclose the details under the seventeen heads, including the identification of that individual in a particular caste. The enumerators have been directed to ascertain the caste of an individual from the head of the family or from the neighbours or the people of the locality which, in effect, is a measure employed to ferret out the caste identity even of an individual who refuses to disclose it.

10. The learned counsel relying on paragraph 148 to 157 of the decision in ***Aadhaar*** emphasized the need to ensure the proposed survey to be one for a designated legitimate purpose, the measures adopted having a rational connection to the fulfillment of the purpose, there being no alternative measures available to achieve the very same purpose with a lesser degree of invasion/intrusion into individual rights and there existing a balance between the need to achieve the purpose

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and preventing any infringement of a constitutional right. It is also pointed out from ***Aadhaar*** that, what stood permitted by the Hon'ble Supreme Court, was after specifically taking into account the precautionary measures to ensure the security of the data; which have been detailed in the leading judgment.

11. Shri Dinu Kumar, learned counsel appearing in CWJC No. 8796 of 2023, while adopting the arguments already addressed before this Court, commenced with a reference to the counter affidavit of the State, speaking of a similar exercise having been carried out by a number of States; which, however, is stated to be only through a proper legislative exercise of having a Commission for making recommendations for the upliftment of the Backward Class communities. The learned counsel would specifically refer to the series of documents produced along with the reply affidavit to specifically point out the provisions in the States of Karnataka, Kerala, Maharashtra and Orissa. The functions of the Commissions are specifically referred to from the legislations produced. It is also pointed out that on similar lines there exists a legislation in the State of Bihar and that makes the present exercise a futile one and an unnecessary waste of public money. It is specifically pointed out that an individual centric identification of the backward class

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communities has been only carried out by Karnataka and Orissa. A Division Bench judgment of the Kerala High Court in WP(C) No. 35220 of 2017, ***Manava Aikyavedhi v. Union of India***, was relied on, in which directions were issued to the Union and the State Governments to finalize a report of socio-economic study taking into account all parameters required for identification of socially and educationally backward classes within the State of Kerala and submit a report to the statutorily constituted Commission; thus, coming within the contours of the decision of the Hon'ble Supreme Court in ***Indra Sawhney*****,** which did not sanction an individual enumeration of caste status as distinguished from an identification of social classes or groupings for the purpose of ameliorating social and economic backwardness. But for the assertion in the counter affidavit of the State, that the disclosure of the 17 aspects identified for enumeration from individuals is voluntary, there is nothing discernible from the various notifications and the communications addressed in furtherance of the exercise of a caste survey, which substantiate such an assertion. Ext. P-23 produced is specifically referred to as the socio-economic caste census carried out by the Central Government in the year 2011, the details of which have not yet been disclosed and as argued

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by the other learned counsel, the Central Government had encountered many problems in proceeding with such an exercise.

12. It is also urged that there is no reason, purpose or necessity for the exercise carried out in the name of a caste survey and it is on the mere *ipse dixit* of the State Government. There had to be a legitimate purpose for initiating such an exercise and there should also be a legitimate method followed, informed with reason. ***M.P. Oil Extraction and Another v. State of M.P.; (1997) 7 SCC 592, East Coast Railway v. Mahadev Appa Rao; (2010) 7 SCC 678*** *and* ***Census Commissioner v. R.Krishnamurthy; (2015) 2 SCC 796,*** were relied on to argue that the executive authority of the State must be held to be within its competence to frame a policy for the administration of the State; which policy should also be absolutely free of caprice and informed by reason, failing which it could be held to be arbitrary and on the mere *ipse dixit* of the executive functionaries. If there was a purpose for the survey adopted and disclosure was to be voluntary then it should have come out from the scheme of things formulated by the executive authority and it cannot later be supplanted by a counter affidavit before this Court. The Census Act is specifically pointed out and Ext.

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P-12, produced along with IA No. 1 of 2023, is referred to where the reference to a 'JANGANANA' meaning census; for which there is no competence on the Executive Government of the State. It is also urged that there was unnecessary expenditure and there is no clarity as to how the funds were sourced from.

13. Shri. Yadunandan Bansal, learned counsel appearing in CWJC No. 4650 of 2023, went one step ahead to allege that the survey intends only to rebuild a society on the principle of divide and rule, with an eye on vote bank politics. It is pointed out that the data collected cannot be verified, is not conclusive and there is absolutely no authenticity attached to the same. It is specifically pointed out that the measure of enumeration from the head of the family and the people of the locality gives credibility to hearsay information. The preamble of the Constitution is read out to contend that it condemns the caste system and the State intends to perpetuate what the constitution framers intended to efface.

THE STATE IN SUPPORT OF THE SURVEY :-

14. Learned Advocate General commenced his arguments with the statement that everyone should realize that we have not yet attained the ideal goal of equality for all and an egalitarian society is still a mirage. It is to achieve that, the State

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strives, for which the exercise of a caste survey was initiated; challenged on personal predilections and vested interests. It is asserted that the purpose is very clear and it is the upliftment of the downtrodden and the marginalized for which the State has ample powers to conduct a survey of the nature now proposed; that too with the sanction of the entire legislature. The arguments raised by the learned counsel for the petitioners, of the State having no competence to proceed on the exercise of a survey and the violation of their right to privacy have no legal framework and are mere assumptions, presumptions and hypothesis. It is submitted that the law has to be applied on facts and there is no material produced by the petitioners to demonstrate a compulsion or coercion to disclose details, in the survey carried out. It is pointed out that 80% of the survey is over and there is not even one instance of an objection from the subjects of survey, regarding the disclosure of the details, including that of caste. The notifications and the communications are misread and the argument of a compulsion having been exercised by the State is misleading, especially when there is no consequence for non-disclosure. It is emphatically urged that the writ petition is not based on any empirical data; especially in a public interest litigation where

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there is an onerous duty on the petitioners to disclose materials to substantiate the arbitrariness or illegality alleged and the consequential public interest involved, so as to invoke the extra-ordinary remedy under Article 226.

15. Dwelling upon the argument of the petitioners that there is no legislative power in the State, which is denuded by Entry 69 and Entry 94 of List I of the Seventh Schedule; it is contended that the source of power to legislate does not flow from the Entries in the three lists, which are mere fields of legislation, and it is sourced from Article 246 of the Constitution of India. Even according to the petitioners, the census carried out by the Central Government in 2011 was neither under Entry 69 nor under the Census Act and it was by an executive fiat under Article 73 of the Constitution of India. If that be so, it is pointed out that Entry 45 in List III, akin to Entry 94 of List-I, confers power on the State to collect statistics for the purpose of verification of details, to achieve the goal under Entry 20 of List III. The exercise cannot at all be construed as a Census under Entry 69 of List I and the State has the power to proceed under the aforesaid Entries in List III.

16. It is argued that while broad submissions are made about infringement of privacy, it is not stated as to disclosure of

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which information leads to such infringement of a right protected under Part-III of the Constitution. It is also argued that the information sought for by the State is already in the public domain by way of declarations made by the very same citizens and when there is no provision for mandatory disclosure or a consequence on failure so to do; it can only be implied as a voluntary disclosure. It is argued that both the decisions cited, ***K.S. Puttaswamy I*** and ***Aadhaar*** are cited out of context and the challenge upheld in the latter, was only with respect to very personal details sought for, of biometrics and iris identification.

17. It is submitted that caste is by birth and is not by way of choice of an individual. There is neither infringement of privacy nor lack of competence on the State to carry out an enumeration of the details as attempted under the caste survey, for which heavy reliance is placed on ***Indra Sawhney***. It is pointed out that the State had been waiting for the disclosure of the information collected by the Central Government under the 2011 Census which, unfortunately, has not materialized. It was in this circumstance that the State Legislature unanimously decided on the caste survey to further the goal as declared by the Hon'ble Supreme Court in ***Indra Sawhney***. The dictionary meaning of 'census' and 'survey' are not relevant in the context

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of the specific power conferred on the State under Article 246 and the Entries in the concurrent list. The State sources its power also from Articles 14, 15 and 16 and the learned Advocate General points out that now there is a further category added by way of extremely weaker sections, identification of which section can only happen by collection of data. The exercise is intended at fulfilling the constitutional ideals and is not merely intended for an affirmative action. The State by the aforesaid exercise does not intend to, nor has the power to include or exclude castes from the Schedules under the Constitution. Other than affirmative action, there are many welfare schemes which are formulated by the State for the upliftment of those backward class communities identified in the survey. The aim and objective is the collection of data for the purpose of future use by the Welfare State; by inviting recommendations from the various Commissions constituted or an informed analysis made by the State Government itself.

18. The learned Advocate General pointed out that affirmative action is a dynamic concept and since upliftment of the backward communities is what the Constitution ordains, necessarily, there should be empirical data before the State, to include those communities which require a helping hand as also

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affirmative action. Even certain communities which have been enjoying reservation for long could be considered for exclusion, if the general social, educational & fiscal conditions with respect to such communities have improved over the years. It is pointed out that in Bihar, prior to the judgment in ***Indra Sawhney***, Mungerilal Commission was appointed. Later to the decision in ***Indra Sawhney***, the Backward Commission Act came into force and the Bihar Reservation Act, 1991 was promulgated. For better dissemination of welfare measures, the State has to collect data and it is not the Commission's duty to collect such data. The Backward Commissions Act and the provisions thereof, especially, the functions of the Commission are pointed out to urge that a Commission appointed could only make recommendations based on the data produced before it; for which purpose the State machinery has to be employed. This is the exercise now attempted by the State which is only to attain the constitutional goal of removing inequality and bringing in equality and thus pave the path to an egalitarian society.

19. It is pointed out that the details sought for by the State in its survey especially the three aspects of religion, caste and income on which specific objection has been raised by the

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petitioners cannot be construed to be an integral personal aspect of an independent nature, the disclosure of which will be an infringement of his or her privacy. It is reiterated that there is no compulsion on the individual to disclose any details and it can be demonstrated that it is only a voluntary disclosure that is attempted by the State. The learned Advocate General takes us through the material supplied to the enumerators to impress upon us the voluntary nature of disclosures by individuals. It is pointed out that there is a four-stage hierarchy created for the purpose of the survey with the enumerator at the grass root level and the Supervisor, the Charge Officer and the Nodal Officer in the ascending positions of hierarchy. There is absolutely no substance in the contention that the aspects disclosed by the head of the family would not be at the option of the various individuals comprising the family. It is pointed out that the head of the family, as the survey defines, is not the eldest one or the one who brings income to the family and is the person who is given the position of respect in the family and handles the day-to-day affairs of the family. It is also pointed out that there is no gender specification and either a male member or female member of the family can give the details to the enumerator. The hierarchical officers ensure that any clarification can be

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obtained by the enumerator immediately and rectified. The details supplied by the head of the family or those not within the knowledge of an individual; if collected from other sources, are put to the individual before it is recorded. It is also pointed out that despite the petitioners having pointed out a provision which speaks of prescribed action in case of failure to disclose the details; there is no such prescription made. The ground of coercion and mandatory disclosure, is only on a truncated reading of the various documents. Even the income disclosure is not the exact income received by an individual and the details collected is only of the range in which an individual has income from various sources. In the event of there being no definite income, it is also stipulated that an estimated income based on the professional activity carried on, can be recorded. It is pointed out that what is intended is only the collection of approximate estimations, which though not absolutely verifiable, however, would provide the State with a platform and enable it to decide upon the socio-economic status of families and thereby the communities/castes to which they belong.

20. As to the competence, the learned Advocate General specifically refers to the distinction as discernible from the words employed in Clauses (3) and (4) of Article 16 and the

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authoritative pronouncement in ***Indra Sawhney***. It is pointed out that ***Indra Sawhney*** had asserted the power of the State to make laws which, looking at the definition of 'State' and 'laws' as available in the Constitution was held to be including even orders, rules, regulations and notifications. The 72nd and 73rd amendment giving a Constitutional status to the local self-government institutions and providing for reservation to such local bodies were specifically pointed out. To satisfy the Constitutional goal of providing equal opportunities to the backward and unrepresented communities to be represented in the local self government, the contemporaneous empirical data about such communities assume relevance. ***K. Krishna Murthy (Dr.) v. Union of India; (2010) 7 SCC 202*** is relied on to contend that the collection of data is not the duty of the Commission and it is for the State to collect such data and provide it to the Commission for the purpose of making recommendations. ***Vikas Kishanrao Gawali v. State of Maharashtra; (2021) 6 SCC 73*** was also relied upon to urge that collecting adequate materials and documents to identify Backward Classes for the purpose of reservation by conducting a contemporaneous rigorous empirical inquiry into the nature and implications of backwardness in the local areas concerned is

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the foremost requirement. Reliance was also placed on ***M. Nagaraj v. Union of India;*** **(2006) 8 SCC 212**.

21. The Collection of Statistics Act, 2008 was specifically referred to and the provisions therein to contend that the caste survey initiated by the State of Bihar is perfectly within the scope and ambit of that Act. The prohibition in Section 3 (a) is only with respect to any matter falling under any of the entries specified in List-I in the Seventh Schedule to the Constitution. Section 3(c) on the other hand, restricts the Central Government from issuing any directions for collection of such statistics which are being collected by the State Government or Union Territories on the basis of prior directions issued by such Governments. Section 32 of the Act of 2008 is also emphatically pointed out to assert the power of the State to conduct a census or survey as defined under the definition clause of Statistical Survey [Section 2(g)], despite it being inconsistent with any other law for the time being in force.

22. The supplementary affidavit which was filed on 28.05.2023, with the consent of the petitioners, was also referred to. The averments there were copiously read over to impress upon us that there was absolutely no coercion and that the disclosure, if at all, made by the citizens were fully

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voluntary. From the counter affidavit, the tedious task of preparation of caste list prior to the decision made by the Cabinet, the purpose for which it was initiated and the data security ensured were specifically referred to. It is pointed out that a scientific module has been put in place for enumeration of the seventeen heads under the survey and it is ensured that the data collected is as accurate and precise as possible in the given circumstance of the massive exercise carried out through the officers of the Government. The learned Advocate General, with an amount of consternation, pointed out the delay in approaching Court; after more than 80% of the work was completed. In fact, earlier itself one of the petitioners had approached the Hon'ble Supreme Court and the said petition was not entertained specifically directing the High Court to be approached. It was after considerable time that the petitioners had approached the High Court and that too after the exercise had proceeded to a considerable extent. The two stages as contemplated was specifically pointed out which ensured the collection of data extensively, precisely and without any coercion exercised on the subjects of the survey.

23. On the insistence for the caste of father being recorded, reference is made to prevalent practices in the State

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which stood altered with ***Rameshbhai Dabhai Naika v. State of Gujarat; (2012) 3 SCC 400***. On the aspect of the sharing of data argued by the learned counsel for the petitioners, from the notification, it is pertinently pointed out that what is indicated is only apprising the various leaders of the political parties in the assembly about the stages of the caste survey and not necessarily disclosing the details. The National Health Mission Survey is pointed out wherein religion and caste are also recorded of the individuals, subjects of survey. Insofar as the Census specified in Entry 69 of List-1 of the Seventh Schedule and the various entries upon which the State relies to carry on the instant survey, the decisions in ***ITC Ltd. Vs. Agricultural Produce Market Committee; (2002) 9 SCC 232 and Vinodchandra Sakarlal Kapadia v. State of Gujarat; (2020) 18 SCC 144*** are relied on. The words in an entry cannot be given a narrow construction and has to be given the widest amplitude so as to enable the State and the Union to have an enlarged scope and coverage to carry out welfare schemes, affirmative action and so on and so forth which are the primary obligations of a Welfare State.

24. To sum up, it is pointed out that there are inadequate materials to support the contentions raised by the

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petitioners, purportedly in public interest, but however, projecting a very personal perspective, not taking into account the ramifications in furthering the constitutional goal of bringing the marginalized and the downtrodden to the mainstream. The caste survey as planned and implemented by the Bihar State looks at the larger public good and is an endeavor to further public interest and cannot at all be termed as a political gimmick furthering vested interests. It is prayed that the actions of the State may not be invalidated merely on individual perceptions, especially when the exercise is sanctioned by the Constitution; precisely Articles-14, 15, 16, 243-D, 243-T and Article-246 read with entries 20, 23, 24 and 45 of List-III. The exercise does not make any inroads into the provisions of the Census Act nor does it impinge upon legislative or executive power of the Union Parliament. It is only natural that in an exercise of this magnitude there could crop up minor defects which the State has tried to rectify in the course of the implementation, as pointed out during the hearing. The reliance on ***Mohinder Singh Gill*** is specifically objected to, especially since the sequitur insofar as the reasons required to be disclosed in the order itself, is with respect to routine administrative matters and not the legislative and executive actions of the State, the reasons

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and objectives of which would be available in the contemporaneous documents.

25. Learned Senior Counsel Shri Basant Kumar Chaudhary appears for an intervenor and points out that there are two perspectives to the issue: one, the constitutionality and the other, the social aspects. The learned Senior Counsel would specifically point out that eye-brows are raised only because of there being a caste enumeration; which, the objectors fail to realize, is a reality and reflected in every fabric of the society. The learned Senior Counsel would also specifically point out that there is no concern of privacy since the citizens have come forward voluntarily to disclose the details under the seventeen enumerated heads. When there is abject poverty, as is indicated from the lowest per capita income in the State of Bihar, there is a requirement for enumeration of the backward communities and castes to further the reservation process and bring development within the State and also to its citizens, especially when the statistics now available upon which the 1991 Reservation Act came into force are outlandish and obsolete. It is pointed out that of the 215 castes enumerated in the survey, only ten are now represented in the local bodies and the objections against the enumeration reveals the undercurrent of

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paranoia displayed by the communities holding hegemony over every aspect of political and social life within the State. Reference is made to ***S.R. Bommai v. Union of India; AIR 1994 SC 1918*** to assert that there is no interference caused to the decennial census and to further the federal system under which our country works there should be full play of the entries in the three lists which also should suit the needs of the time. The doctrine of seeming conflict does not allow the Courts to interfere with valid actions, as has been held in ***Jorubha Juzer Singh v. State of Gujarat; AIR 1980 SC 358 and K.C. Gajapati Narayan Deo v. State of Orissa; AIR 1953 SC 375.***

IN REPLY :-

26. In reply, it is argued that ***Indra Sawhney*** has absolutely no application to the facts of the present case since the decision deals with affirmative action of reservation which is not a disclosed object of the present exercise. The Collection of Statistics Act does not rescue the State from the quandary it is placed in, regarding competence and in any event the exercise does not comply with the provisions of that Act. It is pointed out that Article 243-D and 243-T have to be furthered through dedicated Commissions which are independent of political interests. Further challenging the application of ***Indra Sawhney***,

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it is emphasized that a precedent has to be applied on the facts of each case, as has been held in ***Suresh Mahajan v. State of Madhya Pradesh; 2022 SCC OnLine SC 589*** and ***Government of Karnataka v. Gowramma; AIR 2008 SC 863.*** It is also pointed out from the Collection of Statistics Rules, 2011 that Rule 5(5) makes it mandatory *inter alia* to disclose subject and purpose of collection of statistics which is not evident in the present exercise, at least in the initial stage of the notification; bringing forth to the public the intention of the Cabinet to carry out a caste survey. Rule-6(i) specifically fetters the power of the State in impinging upon the powers of the Union; i.e. a census. Rule 6(iv) ensures the narrow stitching causing minimum intrusion into the privacy of an individual; as brought in by the Statute, even before the declaration made in ***Aadhaar*** case by the Hon'ble Supreme Court. From the decision of the Hon'ble Supreme Court, it is pointed out that privacy has been held to be not an elitist construct, not applicable to the teeming masses who are bogged down by poverty and lack of literacy. They too deserve a dignified existence and even if they are not aware of it, the Court should be cautious in ensuring their basic dignity and not allowing the State to embark upon unnecessary intrusions into their privacy. Reliance is also placed on ***Forum***

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for People's Collective Efforts (FPCE) v. State of West Bengal; (2021) 8 SCC 599 and ***National Confederation of Officers Association of Central Public Sector Enterprises v. Union of India; (2022) 4 SCC 764***.

THE GROUNDS IN SHORT :-

27. The main grounds of challenge to the exercise of a caste survey carried out by the State Government are, (i) that there is no competence on the State legislature to carry out such a survey, which is in essence a census, (ii) that even if there is competence, there is no object or a legitimate aim declared for collecting such data from the citizens, (iii) that there is an element of coercion in disclosing personal details such as religion, income and caste, (iii) that this coercion leads to the invasion of privacy of an individual; declared to be a valuable right encompassed within Article 21 of the Constitution of India and (iv) that the measures now attempted goes against the principles laid down in the ***Aadhaar*** decision and fails the three pronged test laid down therein. There is also a contention raised in one of the writ petitions that the expenditure for the massive exercise is without due sanction of law.

THE EXPENDITURE :-

28. The allegation of Rs. 500 crores having been taken

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from the contingency fund without due appropriation as provided under the Constitution of India and in violation of the law on this point as also the rules of business framed by the State, was raised at the interim stage itself. It was found that two earlier writ petitions filed on similar lines were closed on the submission of the learned Advocate General that the supplementary budget stands presented and passed by the Legislative Assembly of Bihar. It was observed that one of the earlier writ petitions was filed by the very same Advocate who has filed CWJC No. 4624 of 2023, which is one of the writ petitions considered herein, in which there was no specific contention challenging or doubting the veracity of the submission made by the then Advocate General. The interim order was passed on 04.05.2023 and then and there, the matter was posted to 03.07.2023 for final hearing. The State had moved an appeal from the interim order before the Hon'ble Supreme Court in which no interference was caused, since the matter was posted to the 3rd of July, for final hearing. The Hon'ble Supreme Court permitted the State to further move the petition if hearing was not commenced on that date. Hence, it was very evident that the matter would have to be taken up for final hearing on 03.07.2023. An application was filed by the petitioner in CWJC

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No. 4624 of 2023 on 28.06.2023. The Courts were closed after that, till the date on which the hearing was scheduled i.e. 3rd of July, 2023.

29. It had been noticed in the interim order that there was no contention raised in the writ petition doubting the veracity of the submission made by the Advocate General as to a valid appropriation having been made and the absence of such a contention prevented the State from answering it completely with substantiating records. The present application is filed making a bland prayer in Paragraph 23 that on the basis of the facts stated in the I.A. the State Government has to produce the records containing the decision of the State Government for expenditure of Rs. 500 crores for the Caste Based Survey in the State of Bihar. This has to be juxtaposed with the submission of the petitioner himself that he was aware of the decision taken by the Government of Bihar to make appropriation from the contingency fund to carry on the Caste Based Survey, after the supplementary budget was presented and passed by the State Legislative Assembly. The contentions are not properly couched and the prayer has been made belatedly, thus preventing the State from answering it completely with substantiating records. We refuse to consider the said prayer, when the State has not

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been given an appropriate opportunity to answer the contention raised.

THE COMPETENCE OF THE STATE LEGISLATURE :-

30. As for competence or rather lack of it, the petitioners rely on Entry 69 of List-I of the Seventh Schedule read with Entry 94 to assert total absence of competence in the State Legislature to carry out the present exercise which is akin to 'Census'. Carrying out a census is argued to be the exclusive premise of the Union Parliament based on which the Union Parliament has framed the Census Act. Any survey and collection of statistics for the purpose of any of the matters in List-I also is within the exclusive domain of the Union as per Entry 94, is the compelling argument. On the other hand, the State relies on Articles 15(4), 16(4), 38 and 39, Parts IX and IXA, and the 102nd Amendment to the Constitution of India bringing in Article 342A. As for the fields of legislation, the State banks on Entries 20, 23, 24 and 45 under List-III of the Seventh Schedule. The State also relies on the Collection of Statistics Act, 2008 and asserts the notification to be one issued under the said enactment though there is no specific reference to the said enactment in the notification by which the caste survey was initiated. The State also placed heavy reliance on the

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judgment in ***Indra Sawhney***.

31. Article 15 speaks of prohibition of discrimination on grounds of religion, race, caste, sex or place of birth with clause (4) enabling the State to make specific provisions for the advancement of any socially and educationally backward class of citizens or for the Scheduled Castes and Scheduled Tribes; notwithstanding Article 15 & clause (2) of Article 29. Clause (5) of Article 15 enables State to also make similar provisions relating to admissions to educational institutions. Similarly, Article 16 speaks of equality of opportunities in matters of public employment and clause (4) enables the State to make provision for 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. ***Indra Sawhney*** was concerned with Article 16 and specifically sub-clause (4) and the ramifications it entails. Answering the question framed as to whether clause (4) of Article 16 is an exception to the provision, the learned Judges referred to ***M.R. Balaji v. State of Mysore; AIR 1963 SC 649; State of Kerala v. N.M. Thomas; (1976) 2 SCC 310 and T. Devadasan v. Union of India ; AIR 1964 SC 179.***

32. ***M.R. Balaji*** found that Article 15(4) has to be read

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as a proviso or an exception to Articles 15(1) and 29(2); Article 15(4) being inserted by the first amendment in the light of the decision in ***State of Madras v. Champakam Dorairajan; AIR 1951 SC 226. M.R. Balaji*** also held that this principle is applicable equally to clause (4) of Article 16, following which another Constitution Bench by majority in ***T. Devadasan*** held that clause (4) of Article 16 has already been held to be a proviso or an exception to Clause (2). The dissenting opinion in the said decision that Article 16(4) is not an exception to Article 16(1), but is only an emphatic way of stating the principle inherent in the main provision was accepted by the majority in ***N.M. Thomas*** and also in ***Indra Sawhney;*** larger Benches. It was held that Article 16 does permit reasonable classification for ensuring attainment of equality of opportunity; the assurance of which is possible, only if unequally situated persons are treated unequally and not equally, in certain situations. Not doing so, according to the majority judgment in ***Indra Sawhney,*** *'would perpetuate and accentuate inequality'*. Article 16(1) being a facet of Article 14; implicitly permits classification and the minute that is recognized, clause (4) becomes an instance of classification inherent in clause (1) and the theory of it being an exception becomes untenable. In

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dealing with the question whether Article 16(4) is exhaustive of the very concept of reservations, it was held that the clause is exhaustive of reservations only in favour of backward classes and there could be exceptional situations where further reservations of whatever kind could be provided in public interest, to redress a specific situation.

33. The leading judgment in ***Indra Sawhney***, approved by the majority, also considered the question as to whether a 'provision' contemplated by Article 16(4), must necessarily be made by the Parliament or Legislature of a State. It was held that the definition of State in Article 12 is not restricted to the Government, the Parliament of India or the Government and the Legislature of each of the States, but includes all local authorities and other authorities within the territory of India under the control of the respective Governments. The term, local authorities in Article 12 was also found to take within its ambit all municipalities, panchayats and other similar bodies. Viewed in that perspective of the wider definition of State in Article 12, it was held that it is not reasonable, possible and practical to say that the Parliament or Legislature of the State itself, should provide for reservation of post/appointments in the services of all such bodies, besides

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providing for reservation in services under the Central/State Government. Reading the definition of State along with Article 13(3)(a); the definition of 'law', it was held that a 'provision' as contemplated under Article 16(4) can be provided not only by the Parliament or Legislature but also by the Executive in respect of Central/State services and by the local bodies and other authorities coming within the ambit of Article 12; in respect of their respective services. We are conscious of the fact that the said declarations on the ambit and scope of Article 16 was specifically on the power conferred with respect to affirmative actions by every entity coming under the definition of State.

34. If such affirmative action is permitted by all such entities coming within the definition of State, then as a corollary it has to be held that the decision-making process, in so far as bringing forth such affirmative actions, would include the identification of socially and educationally backward classes under Article 15 and backward classes under Article 16. It was so held in ***Indra Sawhney,*** **Paragraph 736-**

> *"... Any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held herein; as also by earlier judgments; the exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group or*

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> *class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power."*

35. The above extract answers the question raised in Paragraph 736, in so far as the possibility of abuse of power by the political executive; the adequate safeguard against which misuse was found in Article 16(4) itself. Hence, before an affirmative action is taken by the State, there should be satisfaction of the relevant criteria by which the backwardness can be defined and for that purpose the social standing of the groups or communities which take in various factors; like the social capital as also the financial & educational capacity of the members of such communities, has to be ascertained. The ascertainment of social capital would include representation in the various administrative services, legislative & governing bodies, enrollment in educational institutions and the general living standards and so on, as prevalent among the members of the various communities within a local area. Hence, when affirmative action can be provided by the various entities coming under the definition of State, the executive branch of the Government who also has been conferred with the power to bring in such affirmative actions; can adopt such measures for

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better understanding the living conditions, social, economic and educational status of the various communities, existing within its boundaries. For the State Governments to take up the cause of backward communities, as a welfare state is wont to do, there should be collection of empirical data, on which would be based the affirmative actions and the various schemes and projects to uplift the marginalized masses and bring them to the mainstream.

36. The State Governments cannot wait on their haunches for the Central Government to carry out the census and provide it with the details so as to ensure affirmative action within the State, in its services under Article 16(1) & (4) and for its downtrodden under Article 15(1) & (4). What has been stated about Article 16 and the power of the executive branch of the State, applies equally to Article 15(1) and (4) of the Constitution of India. Therein also, the State is empowered to make special provisions for the advancement of any socially and educationally backward class of citizens or for the Scheduled Castes and the Scheduled Tribes; which necessarily is not confined to an affirmative action but essentially is an upliftment of such socially and educationally backward communities so as to ensure due recognition and representation in society.

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37. Articles 15 & 16, while prohibiting any discrimination on grounds of religion, race, caste, sex or place of birth and providing for equality of opportunities in matters of public employment, inherently provides for beneficial schemes for the advancement of socially and educationally backward classes and reservation in favour of citizens, not adequately represented in, the services under the State, its instrumentalities and the various representative bodies of governance. Article 246, which is the source of all legislation has to be read with Articles 15 & 16, along with the fields of legislation as relied on by the State coming under List-III of the Seventh Schedule to the Constitution of India. Entry-20 of List-III refers to economic and social planning and Entry 23 deals with social security and social insurance; along with employment and unemployment. The power of the State legislature to make laws under the above fields of legislation, without repugnancy to any legislation brought out by the Union, cannot at all be disputed. In this context, Entry 45 of List-III also assumes significance in so far as it deals with inquiries and statistics for the purpose of any of the matters specified in List II or III. Article 38 also obliges the State to secure a social order for promotion of the welfare of the people with every institution of national life permeated with

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justice, social, economic and political; striving to minimise and eliminate in-equalities amongst individuals and groups of people. Article 39 again exhorts the State to follow the principles of policy which would further equality in every aspect of human life. Though the provisions in Part IV are not enforceable, they are fundamental to the governance of the country and enjoins the State to apply it in making laws. It has been held in ***Atam Prakash v. State of Haryana; AIR 1986 SC 859*** that while the Preamble to the Constitution is the guiding light; embodying the hopes and aspirations of the people, the Directive Principles set out the proximate goals. The collection of statistics to further, economic and social planning and ensure social security and insurance is definitely within the premise of the State and when such action is taken by way of a legislation or even by executive fiat, permissible under Article 162 of the Constitution of India, conferring privileges or favours on any particular community found to be backward or attempting to bringing in such schemes or welfare measures; that cannot be faulted.

38. The State has a duty to ensure and satisfy itself that benefits or privileges are provided to further the cause of a community or group which has been identified as backward, as

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has been argued by the learned Advocate General. For such satisfaction to be entered by the State, which should also be an objective satisfaction; either by its legislative body or the Government, which is the executive body, necessarily, there should be empirical data available as to the conditions of a community or group which is earmarked for the purpose of conferring such preferential benefits, as has been held in ***Indra Sawhney***. While the State has the power to bring in affirmative action, it also has a corresponding duty to satisfy itself that the benefit conferred by such affirmative action satisfies the relevant criteria; which satisfaction as has been declared, should be objective and not subjective. The instant survey is said to be under seventeen heads, as seen from the notification issued by the State Government, a brief perusal of which itself would satisfy any reasonable man that these heads would bring out the social, educational and economic condition under which a community or group exist within the larger society. We also have to specifically notice that the objection taken is only with respect to the collection of details of religion, caste and income; which we will deal with, a bit later. We cannot but; after the aforesaid discussions, at this point, emphatically say that the survey which is now initiated by the Government is within its

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competence since any affirmative action under Article 16 or beneficial legislation or scheme under Article 15 can be designed and implemented only after collection of the relevant data regarding the social, economic and educational situation in which the various groups or communities in the State live in and exist. We also have to notice the provisions under Article 243D & 243T which further enjoins reservation to local bodies, of not only S.C and S.T, but also backward class of citizens.

39. The constitutionality of Articles 243D and 243T providing for reservation in Local Government Institutions and Bodies was examined in ***K. Krishna Murthy*** in juxtaposition with the reservation policies under Articles 15(4) and 16(4). Reservation in local self-government was held to be not a chance provided to play leadership roles but a measure of protective discrimination to weaker sections at the local level, so as to afford them adequate representation in local self-governance. The provisions under challenge were held to be analogous and was based on the proportion between the population belonging to the downtrodden or backward categories and the total population of the area in question. Upholding the provision to reserve seats and the post of Chairperson in favour of backward classes, a distinction was

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drawn from the nature and purpose of reservation policies under Articles 15(4) and 16(4). It was held that backwardness in the social and economic sense is not the only criterion for conferring reservation benefits and hence the exclusion of creamy layer in the context of political representation would not be proper. The State Government's power to determine the extent of such reservation on the basis of empirical data such as population surveys was clearly emphasized; the guiding principle being the principle of *'proportionate representation'*. The rotational policy envisaged under the two provisions was also held to be a safeguard against the possibility of a particular office being reserved in perpetuity.

40. Reservations in local bodies as well as in the position of Chairpersons, in favour of backward class citizens, does not explicitly provide any guidance regarding the quantum of reservation and in the absence of such explicit quantum the only presumption is that such reservation should be guided by the standard of proportionate representation for which necessarily there should be collection of empirical data as to the quantum of population and the percentage of the backward classes within such population. It was held that economic backwardness should not be conflicted with political

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backwardness and even a person from a declared backward community having financial autonomy, if enabled to be represented in the local body, the same could inure to the benefit of and result in the upliftment, of the category/class to which he/she belongs. The Court categorically held that the reservation benefits contemplated by Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Articles 243D and 243T. Restriction of access to education and employment cannot be readily equated with the disadvantage in the realm of political representation. In conclusion, while upholding the Constitutional validity of both the Articles, it was held so in Paragraph 82 (iii):-

> *"(iii) We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of "backward classes" under Article 243-D(6) and Article 243-T(6) should be distinct from the*

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identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16(4).”

41. The above proposition of law was followed in ***Vikas Kishanrao Gawali*** wherein the three-pronged test as propounded in ***K. Krishna Murthy*** was specifically adverted to. The three pronged test was succinctly stated as (i) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness *qua* local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body wise in the light of recommendations of the Commission, so as to not fall foul of overbreadth and (3) in any case, such reservation not exceeding 50 per cent of the total seats reserved in favour of SC, ST and OBC. The need for contemporaneous empirical inquiry to identify the quantum of reservation *qua* local bodies was emphasized and this is the task which the State is embarking upon.

42. While the three-pronged test as stated herein above speaks of a dedicated Commission to conduct an empirical inquiry into the nature and implications of backwardness, it has to be pertinently observed that ***Indra***

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Sawhney emphasized that the appointment of Commissions is not the only procedure, method or approach to be adopted in identification of backwardness and there is no such thing as a standard or model procedure/approach. It was declared that *'It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the Court has no say in the matter'* (*sic* para 783). It is also emphatically stated that '…*if a Commission or Authority begins the process of identification, with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad'* (sic para 783). Hence, not only qua local bodies, for identifying backwardness; for the purpose of affirmative action or schemes or projects to ensure their upliftment as also providing adequate representation in governance there can be a method adopted, a reasonable method and procedure, for the purpose of identifying the backwardness in society, which could also be on the basis of caste.

43. We have also looked at the various statutes produced in C.W.J.C. No.4624 of 2023 for the constitution of Commissions for Backward Classes. The functions of the Commissions as seen from the statutes are more or less the

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same. We specifically look at the Bihar State Commission for Backward Classes Act, 1993, wherein the function of the Commission is to examine requests for inclusion of any class of citizens as a backward class in the list and hear complaints of over inclusion or under inclusion of any Backward Class in this list and tender such advice to the State Government as it seems appropriate. The advice of the Commission is also declared to be ordinarily binding on the State Government. It would be futile to expect the Commission to carry out the collection of empirical data and it cannot be said that the request of inclusion or exclusion of any class can only come from individuals or representatives of such backward classes or groups. The Welfare State having appointed the Commission should also further the object of upliftment of such backward communities and the State cannot be a mute spectator, waiting to put its imprimatur on the recommendations of the Commission.

44. If the State machinery is put to use for collecting empirical data, which we have found is possible and constitutionally permissible, the appointment of a Commission or the power to such appointment of Commissions cannot deprive the State from carrying out a survey, for collecting empirical data, aimed at identifying backwardness to further the

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cause of backward communities including the Scheduled Castes and Scheduled Tribes. We specifically notice that the Karnataka State had brought in an amendment by way of Section 9 to conduct survey of social and educational status of the citizens of India and to identify the socially and educationally backward classes for the purpose of recommendation to the State Government, of necessary measures. If the State had the legislative power to carry out such an exercise, then necessarily, the Executive Government could also bring out notifications under Article 162 of the Constitution, when there is no legislation existing on that count, either of the Parliament or the State Legislature; when the matter is one which comes within List III of the Seventh Schedule under the Constitution. The appointment of a Commission is one of the modes for identifying backward communities and the collection of empirical data by the Government is only furthering the process of upliftment of the backward communities; which data collected could also be placed before the Commission for an independent recommendation as to inclusion and exclusion of various communities.

45. We have to specifically notice that the State in its counter affidavit has spoken about the involvement of the

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various Commissions statutorily constituted for the purpose of identifying the various castes that exist in the State; which were also later put through the Administration at the District Level for proper identification of the various castes within the State of Bihar. It is for the State to decide whether the details collected would be placed before the Commissions, for the purpose of recommendations or a policy framed by itself from the details collected. At the risk of repetition, it has to be noticed that the mere possibility of an abuse for political ends cannot result in the Court interfering in a valid procedure adopted.

46. The objection raised, which another Division Bench (authored by myself) upheld on a *prima facie* consideration at the interim stage, was also of the generic meanings assigned to census and survey. It was the petitioners' contention that what the State attempts is a census under the garb of a survey, which is a legislative power clearly conferred on the Union Parliament as per Entry 69 of List-I of the Seventh Schedule. Much was also argued of the nomenclature under which the survey was published; being Caste Survey, having disclosed the surreptitious, nefarious political game of the Executive Government to identify the caste equations in the State so as to hatch political alliances and even carry out

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delimitation of constituencies. We have to immediately notice the caution expressed in ***Indra Sawhney*** so far as the power conceded to even the executive arm of the State Government as also the various entities coming under the definition of State to carry out an affirmative action within its services. The mere possibility of an abuse of power cannot lead to restriction of a provision in the Constitution, curtailing its full effect and reducing its fullest amplitude. As has been held, the action of the State should be informed with reason and an objective satisfaction of the relevant criteria; which stage we have not yet reached. The attempt of the petitioners is to say that the State cannot collect such data in which case the power conceded to the State Legislature and its executive arm, to give the fullest effect to the provisions of Articles 15 and 16 would be curtailed and frustrated. We are unable to accept the contention of the petitioners that the State Legislature is devoid of the power to attempt a survey in the manner in which it has now been attempted for reason of only of lack of competence. When the power of the Legislature and the Executive Government is clear from the Constitution, there is no purpose in looking at the generic definitions of the term and solely on that ground, set aside an action of the Government which is otherwise valid

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under the Constitution.

47. It has been noticed in the interim order that census, as the term is generically defined, gives forth the connotation of accurate facts and verifiable details while a survey brings forth only abstract opinions and perceptions of the subjects of the survey. We have to notice that the State Government in collecting the data, especially in finding out the social, educational and financial situation of the various communities within the State is not looking at exactitude nor can mathematical precision be the norm in such data collection from the entire citizenry within a State. In fact, no affirmative action or a beneficial legislation or schemes and measures to uplift the backward community can be made if there has to be collection of exact data. As has been rightly pointed out by the learned Advocate General, what is intended by the survey is collection of broad estimates based on which the State can initiate legislative action and implement beneficial schemes even by an executive fiat so as to ensure the development of the backward communities within its State.

48. It is also to be noticed that while the Constitution includes ‘Census’ under Entry 69 of List-I there is no definition of the term in the Constitution. The Union Parliament has

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brought out the Census Act, 1948 which also does not have a definition of that term and there is no enumeration of the details which would fall under the word ‘Census’. It is, however, clear that a census under the Census Act, 1948 can only be carried out by the Central Government wherein even the staff of the local authorities have to be made available to carry on the nitty gritty of interphase with the citizens and collection of data. The mandate of an active cooperation of the State Government is also very clear from Section 7, wherein the District Magistrate or such authority as the State Government appoints in this behalf, being empowered to call upon any person within the State to give such assistance as has been specified in the order, towards the taking of a census of the persons, who are at the time of such census, occupying their lands or working in their premises or residing within the areas in which local authorities are established.

49. The question is as to whether Entry 69 prohibits any survey to be conducted which could also result in enumeration of details that could be collected under the Census Act, 1948. In this context, we have to specifically notice the Collection of Statistics Act, 2008 brought in by the Union Parliament which specifically defines statistical survey as a

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‘census’ or a ‘survey’, whereby information is collected from all the informants in the field of inquiry or from a sample thereof, by an appropriate authority under the Act. The word ‘census’ and ‘survey’ have been used interchangeably with reference to appropriate governments of the Union, State or Union Territories, making it very clear that the inclusion of ‘census’ under Entry 69, does not prohibit any State Government from collecting live data, as collected in a census, for the purpose of implementing welfare schemes within the State and also carrying out affirmative action.

50. We need not dwell upon the source of power from the Collection of Statistics Act, since we have otherwise found competence on the State. Though there is a gazette notification, it does not speak of sourcing the power from that Act. The learned Advocate General pointed out that even if the source of power is not specified in the notification, if the State is conceded such power under an enactment, the Court cannot set it aside only for reason of the source having not been referred to in the notification. We are quite conscious of the said principle, but we notice that a notification under the Collection of Statistics Act requires certain details to be provided, as is mandated under Rule 5 of the Collection of Statistics Rules,

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2011. Rule 5(5) of the Rules of 2011 specify that a notification under Section 3 of the Act shall contain *inter-alia* the subject and purpose for collection of statistics and the obligation of the informant which definitely is not available in the notification. We hasten to add that we are not dealing with the contention of there being no legitimate aim for the attempted survey, at this stage, and we only notice the absence of the purpose for collection of statistics, in the notification, which is a mandate under the Rules of 2011. The State could have proceeded under the Collection of Statistics Act; under the proviso (c) to Section 3 or based on the authority we found earlier from the various constitutional provisions, to carry out a survey of the instant nature; both of which could be treated as valid. Proviso (a) to Section 3 prohibits a State Government or Union Territory Administration from issuing any direction with respect to collection of statistics relating to any matter falling under any of the entries specified in List 1 of the Seventh Schedule of the Constitution. Proviso (b) also prohibits any State Government or Union Territory Administration from issuing any direction similar to that issued by the Central Government, till the collection of statistics by the Central Government is completed. Proviso (c) likewise restrains the Central Government from

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issuing any similar direction, when a State Government or Union Territory Administration has issued a direction under Section 3 for the collection of statistics relating to any matter. Collection of statistics is hence a power conferred on the Union, States and the Union Territories. The blanket prohibition is only insofar as the States and U.Ts being disabled to carry out a survey with respect to matters in List I and even otherwise, when the Central Government is in the process of collecting any statistics. With respect to matters not included under List I, the prohibition applies equally, depending on who; whether the Centre or the State having first initiated the process. We notice the Collection of Statistics Act only to emphasize that the inclusion of Census under Entry 69 of List I does not restrict a survey of the very same details that could be collected under the Census Act, unless it is with reference to any matter under List I or of such statistics which the Centre is in the process of collecting.

51. An overlap of power leading to repugnancy occurs only in such circumstances or when the State attempts to collect statistics from outside its boundaries either under the Collection of Statistics Act or under the various Entries in List II or III read with Article 246, Article 15(5) and 16(4) of the Constitution of

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India. We once again reiterate to emphasize, the use of the words ‘census’ and ‘survey’ interchangeably in the Collection of Statistics Act, which is an enactment brought out by the Union Parliament quite aware of the inclusion of Census under Entry 69 of List I of the Seventh Schedule. A PAN- (Presence Across the Nation)-India census can only be carried out by the Central Government, is the reason for Entry 69 in List I of the Seventh Schedule.

THE LEGITIMATE OBJECT OR GOAL :-

52. Having found competence on the State Government to initiate a measure of survey, in the nature of that challenged, we have to look at whether there is any declared objective in the survey being carried out. We cannot accept the ground raised by the petitioners that the object for which the survey is carried out should have been explicit in the notification itself, and that, it cannot be declared in the counter affidavit, which would be only an afterthought to save the situation and would be in the teeth of the authoritative declaration in ***Mohinder Singh Gill.*** In ***Mohinder Singh Gill***, it was held that when a statutory order is made, it’s validity must be adjudged by the reasons mentioned therein and cannot be supplemented by fresh reasons in the shape of an affidavit or

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otherwise (sic. Paragraph 8). The reliance placed was on ***Commissioner of Police, Bombay v. Gordhandas Dhanji; AIR 1952 SC 16,*** which held as follows: "*The public orders publicly made in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the Officer making the order of what he meant or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself" (sic).* We have to accept the reservation made by the learned Advocate General that this applies to administrative orders and not necessarily to notifications made under Article 162 implementing policies of the government, which has to be tested on the background of how the decision-making process came to be.

53. Policy decisions shall not be interfered with by Courts unless patently arbitrary, as has been held in ***M.P. Oil Extraction.*** If there is an objective and rational foundation for the Government's decision, the Courts will not embark upon an exercise to ferret out a better measure in substitution of what the Government proposes. It is trite that in matters of economic

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rights and policy decision the scope of judicial review is limited and circumscribed. If the executive authority is found to be within its competence to frame a policy for better administration of the State; unless the policy framed is absolutely capricious, not being informed by any reason and can be clearly held to be arbitrary, founded on mere *ipse dixit* of the executive functionary thereby offending constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not overstep the limits and tinker with the policy, the framing of which is in the exclusive domain of the State. It has been declared that-

> *"Policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India." (sic Para-41)."*

54. ***East Coast Railway*** distinguished the requirement of sufficiency of materials to base a decision; from the duty to record reasons, both of which could lead to the decision being sustained. It was held that every order passed by a public authority should disclose due and proper application of mind of the person making the order; which may be evident from the

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order itself or the record contemporaneously maintained. Disclosure of the mind of the authority is best done by recording reasons; while absence of reasons in the order passed or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary and legally unsustainable. There can be no hard and fast rule formulated in this regard was the finding. In the cited case the administrative decision taken for cancellation of the typing test was found to be bad for reason of the order having not stated any reasons whatsoever and no reasons having been set out in any contemporaneous record or file. ***Census Commissioner*** reiterated that the wisdom of a policy decision does not lie within the domain of Courts and there can be interference caused only if it is absolutely capricious, not informed by reasons, totally arbitrary and founded on the *ipse dixit* of the administrative body.

55. The counter affidavit dated 01.05.2023 of the State, not only asserts the object behind the survey but also speaks of the decision-making process. It is stated in the counter affidavit that the 2021 census having not commenced, the beneficial schemes and allocations are blocked at the level of the population, as has come out in the census of 2011. Almost 80% of the population, in the State of Bihar is said to be rural

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and the literacy and per capita income is at a lower side compared with the other States in the Union. Within the State, Mungeri Lal Commission was constituted by the Government of Bihar to identify the socially and educationally backward castes within the State. The initial list of backward classes was prepared on the basis of that report and based on its recommendation, the reservation for backward classes was first introduced in 1978 by resolution dated 10.11.1978, which resolution contained the list of backward classes and extremely backward classes. It was later that the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1991 came into force. The State also has constituted State Commissions for Backward Classes, which has to be supplied with sufficient material, for the purpose of making recommendations. As of now, finding the list of existing castes within the backward classes and extremely backward classes to be insufficient, prior to the caste-based survey, a meeting of all the Commissions related to the castes in the State is said to have been convened. It is further stated that on 09.06.2022, the State Commission for Backward Classes, Commission for Extremely Backward Classes, the State Commission for Scheduled Castes, State

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Commission for Scheduled Tribe and also the Commission for Upper Classes met on 09.06.2022, as is seen from the document produced as Annexure-K in the counter affidavit dated 29.04.23 filed in CWJC No. 5542/23. The various Commissions were requested to submit a caste list related to the respective commissions, which lists were directed to be examined by the District Magistrates of the State as per the communication dated 13.07.2022. The District Magistrates held meetings at the district level, block level and with urban bodies for preparation of the caste list which could be used in the caste survey. Again, on the basis of the reports received from the District Magistrates, a meeting was organised of the Commissions, the Department of Backward Classes and Extremely Backward Classes Welfare Department, as seen from Annexure-C. It was in by this exercise that the different heads under which the details are to be collected and the list of castes were finalised after due process, as referred to earlier, and brought out by notification dated 28.07.22.

56. It is also pertinent that the Governor declared the policy of the Government in both Houses of the legislature, which is seen from Annexure-A, produced in the counter affidavit dated 01.05.2023 filed in CWJC No.5542/23. The

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policy decision as stated by the Governor; though on 27.02.2023, later to the notification, discloses the object and the intention behind the notification which was brought out on 06.06.2022 which speaks of a Cabinet Decision on 02.06.22. We extract hereunder the introductory paragraph and the last but one paragraph of the speech, relating to the Caste Survey :-

> *"On the occasion of the first session of the new year, I convey my best wishes to all of you in the joint session of both the houses of the Bihar Legislature and wish for the prosperity and multi-dimensional development of the State. Financial, legislative and other important works are to be completed in this session. I expect all the members of Bihar Legislative Assembly to play a constructive role for the development of Bihar. Your valuable suggestions and discussions will strengthen the progress of Bihar.*
> *xxx xxx xxx*
>
> *The State Government is continuously working on the principle of Development with Justice and under the next dimension of this principle, caste-based census is being done with the aim of ensuring all round development of all sections of the State. Keeping in view the resolutions unanimously passed by all the Hon'ble MLAs, on June 2nd 2022, the State Government decided to conduct caste-based enumeration from its financial sources and is also moving fast on this. It is a pleasure to inform you that the State Government has completed the first phase of this programme on January 21, 2023 and the second phase is also targeted to be completed in due time as per the schedule. For this, caste-based enumeration portal and caste-based enumeration app have been created. Under this enumeration, a complete survey will be done on the caste, economic, educational, and migrant status of all*

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> *Biharis living inside and outside the boundaries of the State, on the basis of which the plans will be prepared for Biharis of all regions, castes and classes which will open new dimensions of their development. The State Government expresses its thanks for the co-operation of you, the Hon'ble members and the people of Bihar in the first phase of caste-based enumeration. It is hoped that full co-operation of all of you will continue to be received in the second phase as well."*

57. The Object is very explicit which was the basis of the decision taken by the legislators followed up by the Executive Government.

58. We notice the judgment of the Hon'ble Supreme Court in ***CAG v. K.S. Jagannathan;*** **(1986) 2 SCC 679** from which we extract paragraph numbers 30 and 31 which dealt with the condition of the Schedule Castes and Schedule Tribes and the endeavor made in the Constitution to atone for the sins of the depredation visited on the said communities :-

> *"30. What relevance the above decision has to the facts of the present case is also beyond us. It is not possible to equate the members of the Scheduled Castes with goods imported from abroad. They are human beings like all other human beings, the only difference being that for centuries a large number of their countrymen have not treated them as human beings but as sub-human creatures beyond the pale of society and even of humanity. William Blake in this poem*

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"Auguries of Innocence" said:
"Every Night and every Morn

Some to Misery are Born.

Every Morn and every Night

Some are Born to sweet delight.

Some are Born to sweet delight,

Some are Born to Endless Night."

The members of the Scheduled Castes were the children of the "Endless Night". Their birthright was the badge of shame; their inheritance, the overflowing cup of humiliation; their constant and closest companion, degradation; the bride of their marriage, lifelong poverty; and their only fault, to be born to their parents. They were denied education. They were denied jobs except the lowest menial tasks. They were denied contact with persons not belonging to their castes for their touch polluted and even their shadow defiled, though the touch and the shadow of the animals did not, for men rode on horses and elephants and on mules and camels and milked cows, goats and buffaloes. They were denied worship and the doors of the temples were shut on their faces for their very presence was supposed to offend the gods. All these wrongs were done to them by those who fancied themselves their superiors. As the anonymous satirist said:

"We are the precious chosen few:

Let all the rest be damned.

There's only room for one or two:

We can't have Heaven crammed."

The treatment meted out to the members of

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the Scheduled Castes throughout the ages was an affront to Human Rights. It was in a spirit of atonement for the wrongs done to them and to make restitution for the injury and injustice inflicted upon them that the framers of the Constitution enacted Article 16(4) placing them in a separate class in matters relating to employment or appointment to any office under the State, formulated the Directive Principle embodied in Article 46, and proclaimed the great constitutional mandate set out in Article 335.

31. It is equally not possible to equate the members of the Scheduled Tribes with goods imported from abroad. They too are human beings like other human beings with this difference that for centuries they have preferred to follow the primitive ways of their forefathers. Remote and almost inaccessible in their hilly vastness and secluded forests, civilization has passed them by. The benefits of high sophisticated technology is as unknown to them as its hazards of noxious fumes and poisonous gases. Simple and naive, they have become a rich mine for exploitation by the human products of civilization. Their lands have been stolen from them by skullduggery and they have been tricked into selling the products of their craft and skill for a song. It was to protect them from such exploitation and to enable them to participate in the mainstream of the nation's life that they have been given special treatment by Articles 16(4), 46 and 335 of the Constitution."

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59. The situation of the backward communities was not much different and, in this context, we specifically notice the debates in the Constituent Assembly on the framing of Article 16, extracted in ***Indra Sawhney.*** Article 16(4) as it was originally proposed did not qualify the words 'class of citizens' with the word 'backward'. The debates in the original Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar inserted the word 'backward' in between the words 'in favour of any' and 'class of citizens' appearing in Article 16. There was stiff opposition to the said expression on the ground that it was quite vague and is likely to lead to complications in the future. However, the Vice President of the Constituent Assembly Dr. H.C. Mookerjee was of the opinion that the clause, *'affects certain sections of our population - sections which have been in the past treated very cruelly - and although we are today prepared to make reparations for the evil deeds of our ancestors, still the old stories continue, at least here and there and capital is made out of it outside India…'(sic).*

60. After elaborate discussion, some of which were noticed, the speech of Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, which put to rest the entire objections were quoted *in extenso*. We only extract the last portion quoted,

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which puts the matter in the correct perspective:

> *"Somebody asked me: 'What is a backward community? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government".*
> *(Emphasis supplied by us)*

61. It is in this background that we have to look at paragraph Nos. 782 and 783 of ***Indra Sawhney*** which are extracted hereunder:

> *"782. Coming back to the question of identification, the fact remains that one has to begin somewhere — with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a*

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particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions,

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each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.

783. We do not mean to suggest — we may reiterate — that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real

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> *object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward."*

62. It is thus crystal clear that identification of the backward communities has to be made after a survey of the entire populace and the majority judgment did not find any fault with identification of caste, which would represent explicit identifiable social classes/groupings, especially when the very intention of Article 16(4) was to ameliorate social backwardness. It is worthwhile to also notice that the majority judgment was in favour of the approach and methodology adopted by Justice O. Chinnappa Reddy Commission in Karnataka. Without a detailed discussion of the report itself, it has to be noticed that Justice O. Chinnappa Reddy Commission considered *"economic and cultural impoverishment and social deprivations"* as the singular cause of perpetual backwardness. While poverty is an indicator of economic impoverishment, lack of educational attainments reflected cultural impoverishment amongst the communities. The Commission opined, social deprivation as stemming from a structure based on hierarchical caste and community status. The Commission evolved four

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quantifiable indicators to reflect on all these factors :-

> *1) Caste and community-based poverty level in comparison with the corresponding state averages;*
> *2) Caste and community averages of students appearing in matriculation; termed the first and biggest elimination stage on the education ladder, in comparison with the state average;*
> *3) The representation of the castes and communities in the higher education in comparison with the state average; and*
> *4) The representation of the castes and the communities in the state services, including government departments, state undertakings and universities.*

63. The majority judgment approved or rather *'broadly commend (ed) the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.' (sic)*. The majority judgment in ***Indira Sawhney*** while observing that there is no such thing as the standard or model procedure or approach and it is for the authority appointed to identify & adopt such approach and procedure as it thinks appropriate, held that, so long as the approach adopted by it is fair and adequate, the Court has no say in the matter.

64. In the present case, the 17 heads of details which are to be collected would definitely indicate the social and educational backwardness of the communities, which is also an indicator of the financial conditions on which the community

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exists. Caste has been found to be an important indicator to understand backwardness since historically the deprivations visited on communities were based on their caste names. The constitutional goal we see from the aforesaid discussions is not intended at effacing caste but aimed at erasing once and for all, discrimination based on caste. The mere unfortunate circumstance of birth within one caste cannot lead to a man or woman being excluded from the privileges and benefits enjoyed by the other members of society and when it becomes the accepted normal & the general norm, then there can be no claim of equality within the society. It is hence, the Constitution framers felt that Article 15 and 16 which ensures prohibition of discrimination on grounds *inter alia* of caste and assures equality of opportunity in matters of public employment, should be impelled with a condition to uplift the marginalized sections of society and bring them at par with the privileged class, who have equal representation in administration, governance, educational institutions and every facet of quality social existence.

65. The caution in ***Indra Sawhney*** not to carry out an individual survey is also pertinently relevant in so far as the protection provided under Articles 15 & 16, existing not as one

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for individual protection, but aims only at class protection. The impecunious circumstances or the educational backwardness of an individual cannot be rectified by the protections under Articles 15 & 16. It is hence, the emphasis on un-equals not being treated equally and those suffering deprivations, as a group or class, having been conferred with special privileges and benefits to uplift them and to provide them with a quality of life at par with any other, opening up the opportunities equally to them and thus, bringing in dignity of life to every member of the community, at par with others in the larger society. This is not to be dismissed as a futile search for the pot of gold, at the end of a rainbow or a useless pursuit of a mirage; but it is the path to attainment of an egalitarian society, which is the Constitutional goal, which every State and its instrumentalities should endeavor to achieve and realize and so is a duty cast on the citizens at large.

***VOLUNTARY DISCLOSURE & PRIVACY* : -**

66. It is true that there is nothing stated in the notification as to the disclosure being voluntary, however, it has to be noticed that, admittedly, 80% of the survey is over and not even one instance has come forth where a complaint was raised of coercion to divulge the details sought for in the survey. The

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State has also specifically argued that what is attempted is the collection of details which may not have mathematical precision but would necessarily provide broad estimates for the State to formulate schemes. As has been argued, there is no element of coercion discernible from the various notifications issued or the guidelines brought out to guide the process of enumeration. Looking at the 17 heads under which the collection of data is attempted, it cannot be disputed, that they bring forth the social, economic and educational situation in which the individual families exist and the identification of the caste of such families enable identification of the classes or groups based on caste identity, which are backward. We again emphasize the caution expressed by ***Indra Sawhney*** that the protection offered under Article 15 and 16 is to a class/group and not individual oriented. In collecting the data as provided under the 17 heads, it is also evident that the occupational groups also could be identified as per the details collected in the survey.

67. We cannot fault the contention of the State that one can very well start the process with caste, wherever they are found, to evolve the criteria for determining backwardness; which has been accepted by the Constitution Bench decision in ***Indra Sawhney***. It is very relevant that apart from the State List

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of Backward Classes and Extremely Backward Classes, there are 33 castes identified as Scheduled Tribes and 23 as Scheduled Castes, which are notified by the Government of India for the State of Bihar. The State List of Backward Classes and Extremely Backward Classes also includes the various castes; backwardness being identified on the basis of such castes. The additions or deletions in these lists have been done on the recommendation of dedicated Commissions with due process at different spans of time. The State in its counter affidavit also speaks of having had discussions with the various Commissions appointed by the State for the different classes and groups and the identification of castes or groups were done based on the recommendations of the respective Commissions; which were also put through the district administration.

68. It is very evident that the Central Government, as a matter of policy, decided not to carry out any caste-based enumeration and as we found, the mere inclusion of Census under Entry 69 of List I does not preclude the States from carrying out such exercise, as is presently carried out by the State of Bihar. We reiterate that the State of Karnataka had also carried out such a survey, however, through a Commission and by a legislation which only reinforces the power of the State to

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carry out such survey for collection of data, to achieve the constitutional goal of uplifting the downtrodden and the marginalized. The State has emphasized that there is no detail sought for from the citizens, the subjects of the survey, akin to any, found in the **Aadhaar** decision to be an infringement of privacy. The various heads under which details are collected are normally declared by each individual at the time of admission in a school or for opening of a bank account or also for other purposes. Regularly, the Backward Classes and Extremely Backward Classes as also the Scheduled Caste and Scheduled Tribes declare their caste and economic condition to the authorities for the purpose of claiming the benefits of welfare schemes and also taking recourse to the privileges of an affirmative action.

69. The population of Bihar in 2011 was approximately 10.40 crores comprised in 1.89 crores households, while the total number of caste and income certificates issued from 15.08.2012 till date is 7,29,48,500 and 6,19,69,592 coming to a total of 13,49,18,092. These are the statistics provided in the counter affidavit of the State. The total number of certificates issued for the economically weaker sections from June 2019, under the general category is

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approximately 10.54 lakhs. The data collected in the SECC, 2011 are also available with the MNRGA Scheme Portal; in relation to job cards issued in Bihar which alone comes to 16.62 crores. Similarly individual data is recorded in labor registration portals and collected for the issuance of ration cards as also enabling implementation of the provisions of the Food Security Act. The data collected, hence, can always be verified with the data already available with the Government, which could further aid the policy determination insofar as the inclusion and exclusion of caste and communities for welfare schemes, which is intended at uplifting the downtrodden and marginalized.

70. While looking at the two decisions on privacy, especially with reference to the specific arguments raised, we think it appropriate to extract the following paragraphs from ***Puttaswamy (1)***, which have also been extracted in the ***Aadhaar*** decision.

> *"46. Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.*
>
> *318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the*

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Indian Constitution.

(Hon'ble Justice Dr D.Y.Chandrachud)

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

(i) Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

(ii) Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

(iii) The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

(Hon'ble Mr. Justice R.F.Nariman,J.)

620. I had earlier adverted to an aspect of privacy — the right to control dissemination of personal information. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of

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boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business". On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candor in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation.

(Hon'ble Mr. Justice S.K.Kaul, J)"

71. The ***Aadhaar*** decision also succinctly stated the following features from ***Puttaswamy (1)***:

"108. It stands established, with conclusive determination of the nine-Judge Bench judgment of this Court in K.S. Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] that right to privacy is a fundamental right. The majority judgment authored by Dr D.Y. Chandrachud, J. (on behalf of three other Judges) and five concurring judgments of other five Judges have declared, in no uncertain terms and

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most authoritatively, right to privacy to be a fundamental right. This judgment also discusses in detail the scope and ambit of right to privacy. The relevant passages in this behalf have been reproduced above while taking note of the submissions of the learned counsel for the petitioners as well as respondents. One interesting phenomenon that is discerned from the respective submissions on either side is that both sides have placed strong reliance on different passages from this very judgment to support their respective stances.

109. A close reading of the judgment in K.S. Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] brings about the following features:

109.1. Privacy has always been a natural right : The correct position in this behalf has been established by a number of judgments starting from Gobind v. State of M.P. [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] Various opinions conclude that:

109.1.1. Privacy is a concomitant of the right of the individual to exercise control over his or her personality.

109.1.2. Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.

109.1.3. The fundamental right to privacy would cover at least three aspects — (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.

109.1.4. One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise

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over his/her own life and image as portrayed in the world and to control commercial use of his/her identity."

72. Informational privacy is the aspect on which there was an emphasis by the learned counsel for the petitioners. As is discernible from the above extracts, there are certain aspects of personal information, which fall under the phrase *'none of your business'*, meaning none other can seek such an information mandatorily from the citizens; especially not the State which has the might of its authority, which permeates to every Government officer. In the present case, we have already found that there is absolutely no coercion applied, neither is it discernible from any of the guidelines put forth nor is there a single complaint made regarding coercion to disclose the details. The data sought from the subjects of the survey, the citizens within the State of Bihar, are also details which are available in the public domain, but still difficult to be extracted. It is for the purpose of identifying the Backward Classes, Scheduled Castes and Scheduled Tribes with the aim of uplifting them and ensuring equal opportunities to them, not only by an affirmative action, but also in providing employment, ensuring admission to educational institutions as also representation in local bodies, and formulating schemes and projects targeted at specific classes or groups, that the instant

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survey is carried out, is the contention of the State; which cannot be brushed aside.

73. It has been argued that wherever there is a declaration sought of personal details like religion, caste and income, there is a benefit conferred on the citizen. In the caste survey also, there is a definite privilege sought to be conferred on the individuals, who are eventually identified to be belonging to the backward communities, by way of preferential action of the State targeted at the specified class/group. Though the caste survey and collection of data would not by itself confer any benefit on the citizen, the statistics which are collated could be placed before the various statutory Commissions, which would result in recommendations, definitely inuring to the benefit of the individuals in the identified classes/groups when schemes and projects are formulated for their upliftment. We cannot, but reiterate with emphasis that there can be no coercion found and there is no complaint of such a coercion having been applied by the Government officers in getting the details from the citizens; especially when 80% of the work of collecting data is said to be over. We have also seen the survey of the National Health Mission which also seek the specific details as sought for in the instant survey.

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74. Learned counsel for the petitioners had emphasized on the option insofar as the details of Aadhaar is concerned, which is specified in the format of survey to be optional. We cannot find such a mandatory pressure applied on the subjects of survey merely for reason of the Aadhaar details being made optional and specified so in the format of survey; which definitely is to ensure that there is no violation of the principles of right to privacy, as laid down by the Hon'ble Supreme Court. In this context, we also have to notice the following paragraphs from ***Puttaswamy(1)***:

> *"310.While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14,*

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which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients.

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Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology—legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

(Hon'ble Justice Dr D.Y.Chandrachud,J)

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some

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of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry [A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165, is very simply the lack of any reasoning.] ; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of "compelling State interest". The last of these four options is the highest standard of scrutiny [A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn 4 in United States v. Carolene Products Co., 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly

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rigorous standard of scrutiny.] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

(Hon'ble Mr. Justice Chelameswar,J.)"

75. The three requirements, as noticed in paragraph 310, extracted hereinabove, are fully satisfied in the present case. The Executive Government had decided to initiate a survey to collect personal details of the natives of the State of Bihar for the purpose of initiating and implementing developmental activities to uplift the backward classes, as is seen from the Governor's speech to the two Houses. The State Government has also brought out a notification which is published in the official gazette, which is a law, being an exercise under Article 162 of the Constitution of India, especially when there is no law on the subject made by the Parliament to which the present exercise can be said to be repugnant. As far as the third requirement, to satisfy the test of proportionality, we have to only refer to paragraph 311, as extracted hereinabove. We cannot, but reiterate with utmost respect, the aspect of allocation of resources for human development, coupled with a legitimate concern for utilization of resources, ensuring that it is not siphoned away for extraneous purpose; which requires data mining, is the attempt

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of the State by the instant survey.

76. The test as has been laid down in paragraph 378 extracted hereinabove, of the compelling State interest or rather the interest of the citizens/subjects; especially those who are downtrodden and marginalized; termed the highest standard of scrutiny, according to us, stands satisfied. As has been held in paragraph-380 of ***Puttaswamy(1)***, it varies from case to case as to when and in what types of privacy claims, this standard should be applied. The standard of compelling State interest, as has been held in paragraph 380, depends upon the context of concrete cases.

77. We reiterate at the risk of repetition, that the test stands fully satisfied in the present case. In the ***Aadhaar*** decision it was held that going by the majority in ***Puttaswamy(1),*** *'legitimate State interest'* can be taken as a permissible restriction on a claim to privacy of an individual instead of applying the test of *'compelling State interest'*. We also extract paragraph 157 of ***Aadhaar***:-

> *"**157.** In Modern Dental College & Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1] , four sub-components of proportionality which need to be satisfied were taken note of. These are:*
>
> *(a) A measure restricting a right must have a legitimate goal (legitimate*

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goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rational connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right-holder (balancing stage).”

78. We have already held these tests to be satisfied to the hilt.

79. We have to notice that there are concerns raised by the petitioners insofar as the head of the family being asked to disclose the details of others, the caste of the mother not being recorded in any context and there being no option to refuse to declare the caste status; though the same is available insofar the religion is concerned. We have to emphasize the contention raised by the State that a mathematical precision is not warranted in identification of backward status or occupational classes or groups and caste is the best denominator available as of now; which is recognized also in ***Indra Sawhney***, a Constitution Bench. It cannot, but be observed that caste is a matter of descent while religion is a matter of belief. India has many instances of persons belonging to the same caste practicing different religions and despite the religions other than

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the Hindu religion, not practicing caste system as such; those converted groups, in the other communities also are conferred with backward status and enabled privileges and benefits by the State. The details sought for in the survey are not individual centric and is not aimed at targeting an individual, which in the context of the details collected from the head of the family; is virtually impossible, as the law exists today.

80. As we discern, the disclosures are voluntary and it has a definite aim of bringing forth development schemes for the identified backward classes/groups. The caste status sought to be collated is not intended at taxing, branding, labeling or ostracizing individuals or groups; but it is to identify the economic, educational and other social aspects of different communities/classes/groups, which require further action by the State for its upliftment.

***SECURITY CONCERNS* :-**

81. The counter affidavit of the State goes on to demonstrate that the Caste Based Survey has a full proof mechanism and there are no chances of any kind of leakage of the data. The survey operation has taken into account the following measures:

a. *Provision and arrangement has been made to ensure the confidentiality and security of the*

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data.

b. *Enumerators and supervisors have been instructed and trained not to share or show the data with any unrelated individual/third party.*
c. *Provision has also been made in the software so that no one can take the screenshot of the mobile app.*
d. *Device binding has been done so that each enumerator or supervisor can work with only one mobile during the whole process.*
e. *Data cannot be downloaded from the mobile device.*
f. *Data of any person cannot be downloaded from the system. It is encrypted data and can be read only on the data base made for it.*
g. *Data are being stored in servers of the State Data Census of the Government of Bihar and not on any other server or on the cloud so therefore, no unauthorized person except, the Data Based Administrator can access the data.*
h. *The Role Based Access Control (RBAC) System is working with OTP verification to ensure the entry of only authorized users.*
i. *Encrypted password storage and secure coding practices are in use of security of the data.*

82. In addition to these is the letter produced as Annexure-B from the Officer on Special Duty to the Secretary of the General Administration Department, the translation of which reads as under:

"Subject:- With regard to making available facilities of Web Portal Hosting, SMS and E-Mail at the State Center under Bihar Caste Based Census – 2022.

Ref. – Your letter no. 272/23 dated 12.01.2023

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and letter no. 2016/2023 dated 26.04.2023 of Beltron.

Sir,

In the light of your letter on the aforesaid subject under reference regarding declaration of secured I.T Infrastructure to those basic infrastructure under the I.T. Act where the data of caste based census have been stored at the data center of Beltron and the relevant storage, it has been declared vide letter no. 2016/2023 dated 26.04.2023 of Beltron that application and data hosting related with caste based census for State Data Center is a secured I.T. Infrastructure in accordance with the provisions of Information Technology Act 2000 (as amended) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011."

83. The security aspect argued by the petitioners are hence taken care of and that does not invalidate the survey.

84. On the above reasoning we find the action of the State to be perfectly valid, initiated with due competence, with the legitimate aim of providing 'Development with Justice'; as proclaimed in the address to both Houses and the actual survey to have neither exercised nor contemplated any coercion to divulge the details and having passed the test of proportionality, thus not having violated the rights of privacy of the individual especially since it is in furtherance of a *'compelling public interest'* which in effect is the *'legitimate State interest'*.

85. We dismiss the writ petitions, leaving the parties

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to suffer their respective costs.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree.

(Partha Sarthy, J)

Sujit/PKP

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