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**DIVIDING EQUALITY DESTROYING AFFIRMATIVE JUSTICE:
Assessing Economically Weaker Sections (EWS) Reservation
in India**

Mohammad Hussian, Showkat Ahmad Wani & Dhriti Bole

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Contents

Volume V	ISSN: 2582-1903	April 2022 - March 2023
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Excerpts from the V. R. Krishna Iyer Annual Law Lecture Series *Page*

1. HINDU PHILOSOPHY AND MODERN JURISPRUDENCE
Justice V. Ramasubramanian 1

Special Article

2. THE UNIFORM CIVIL CODE DEBATE IN INDIA: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism
Chanchal Kumar Singh & Mritunjay Kumar 12

Articles

3. THE UNDERSTANDING OF ANIMAL RIGHTS: Advancing a New Approach
Sanchit Sharma 63
4. GIG WORKERS AND EMPLOYMENT LAWS: An Indian Perspective
Anand Pawar & Ankit Srivastava 88
5. INSIDER TRADING: Contours of Liability and Judicial Approach
Girjesh Shukla & Adity Dehal 103
6. A TRYST WITH SUCCESSION RIGHTS: An Impact Assessment of the Hindu Succession Amendment Act 2005 on Women Landholders
Pranay Agarwal 123
7. CENSORSHIP: A Moral Dilemma or an Immoral Siege on Freedom of Speech?
Dhawal Shankar Srivastava & Zubair Ahmed Khan 144
8. THE LEGAL IMPLICATIONS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022: A Comprehensive Analysis of Constitutional, Criminal, and Forensic Dimensions
Shaifali Dixit & Chandrika 166

Notes and Comments

9. DISSENT IN THE AADHAAR JUDGEMENT: Exploring Dimensions of the future of Privacy Jurisprudence in India
Varin Sharma 190
10. HARMONIZING DIVERSITY: Challenges in Unifying Marriage and Divorce Laws in India
Alok Kumar & Namita Vashishtha 213
11. DIVIDING EQUALITY DESTROYING AFFIRMATIVE JUSTICE: Assessing Economically Weaker Sections (EWS) Reservation in India
Mohammad Hussian, Showkat Ahmad Wani & Dhriti Bole 236
12. HUMAN RIGHTS PROTECTION AT STATE LEVEL: A Critique of the Functioning of SHRCs in India
Nehru & Hitesh Manglani 253
13. *SUBHASH DESAI v. PRINCIPAL SECRETARY*: Interpreting the Issues of the Role of the Speaker Under the Tenth Schedule, and the Symbols Order
Abhinav Yadav 272
14. LEGAL CHALLENGES POSED BY ARTIFICIAL INTELLIGENCE IN CONSUMER ONLINE DISPUTE RESOLUTION
Vibhuti Jaswal & Shiekhar Panwar 289
15. DAM SAFETY ACT, 2021: A Critical Appraisal
Narayan Chandra Sarangi 300

DIVIDING EQUALITY DESTROYING AFFIRMATIVE JUSTICE: Assessing Economically Weaker Sections (EWS) Reservation in India

Mohammad Hussian, Showkat Ahmad Wani** & Dhriti Bole****

[Abstract: *The Indian constitution is considered a social document as defined by Granville Austin, but it has lost its essence due to the politicization of reservations. After the independence of India, the country faced multiple challenges, particularly with regard to the upliftment of the marginalized community and equal distribution of wealth. The framers of the constitution were well acquainted with the fact of growing poverty and injustice in the society. The introduction of reservation was the need of the hour to eradicate poverty and injustice. It applies to Scheduled Castes, Scheduled Tribes, and other backward classes, covering higher education, employment in the public sector, and legislative representation. Politicians and the judiciary formed these affirmative schemes, and they have been one of the most divisive issues in Indian politics. The constitution was amended from time to time to make reasonable accommodations for the underprivileged community. The legislative power to introduce constitutional amendment must be fair and reasonable within the ambit of the constitution to preserve the sanctity of the doctrine of basic structure. The 103rd amendment of the constitution, whereby 10% of economically weaker sections (EWS) were introduced by parliament, has been criticized by constitutional experts. It has been argued that the said amendment is a constitutional fraud. The EWS is seen as an instrument to protect the privileged rather than safeguarding the marginalised community.*

The paper is a metanarrative emphasising the need for rethinking the post-colonial democracy, essentially the implementation of so-called affirmative justice in the form of 'Economically Weaker Section Reservations'. It attempts to map the unhealthy growth of the said form of affirmative justice in the largest democratic nation. The main objective of the paper is to accentuate the deplorable conditions of the vulnerable communities and to study how the idea of EWS reservations has further upheld the divinity of the creamy layer, which is embedded in the system in a way that enables protected ignorance of the very ethos of our Grundnorm.]

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I

Introduction

Social justice is of paramount importance in any constitutional democracy, and the textual jurisprudence in the constitution does not mean to narrow down its inner philosophy. The egalitarian tenants of the Indian Constitution have lost their charm in caste politics. The promotion of hegemonic culture has produced innumerable instances of atrocities against vulnerable communities. The colonial ideologies of discrimination have gained uncritical adorations, leading to its political glorification. After the independence of India, the country faced multiple challenges, particularly with regard to the upliftment of the marginalised community and equal distribution of wealth. The framers of the Constitution were well acquainted with the fact of growing poverty and age-old injustice in society. Social justice is the bone of democracy, a nation cannot progress without reaching out to marginalized communities.

John Rawls, an American political philosopher, in his book, 'A Theory of Justice,' extensively discussed '*liberty and fairness*' and how to use political power in a legitimate democracy. He also emphasised justice as fairness is the basic principle in an egalitarian society that can be analysed in affirmative justice measures. John Rawls' liberalism in modern polity demands that citizens interact as equals within a social order defined by reciprocity instead of tolerating the unjust status hierarchies in our society.¹ Dr. B.R. Ambedkar experienced that social justice plays a significant role in shaping political and economic equality.² The inequalities have been viewed as inferior in marginalized communities, which led to a widespread sense of subservience and servility among them. The legislative intent of affirmative justice frustrates its objectives when it goes against the jurisprudence of social justice philosophy. The Economically Weaker Sections (EWS), termed by various legal luminaries as 'Constitutional Fraud', has no nexus with the doctrine of *intelligible differentia*.³ Justice as a fairness concept has been differently attributed to the economic upliftment of the weaker sections in the 103rd Constitutional amendment. The 103rd Constitutional Amendment 2019 was nowhere connected to social and economic justice because the procedural conditions in the Act are vague and defeat

¹ John Rawls, A THEORY OF JUSTICE 4, 73 (1971).

² Dr B.R. Ambedkar, ANNIHILATION OF CASTE 32 (Digital Fire; 1st edition 2022).

³ The Wire, 'If Rs 8 Lakh is EWS Cut-Off, How Come Those Earning Over Rs 2.5 Lakh to Pay Income Tax?': Petitioner, THE WIRE (Nov. 22, 2022) available at: <https://thewire.in/law/madras-high-court-ews-income-tax-cut-off-kunnur-seenivasan> (last visited Nov. 12, 2023).

the purpose of the definition of weaker sections in a society.⁴ However, the intricate connection of colonial ideology, caste politics and racial discrimination negates the affirmative justice that the Constitution has to offer to everyone, irrespective of their caste and or any other sort of discrimination. These unethical affirmative schemes were formed not just by politicians but, sadly, also by the judiciary, which upholds their validity without going into the merit of it and has been one of the most divisive issues in Indian politics.

Zoya Hassan, in the book titled 'India's Living Constitution' beautifully describes the state of affairs concerning the pursuit of social justice in India.⁵ It is explained that the constitution's principles of egalitarianism and justness conflict with India's historic norms and customs of origin disparity. It calls the constitution's social justice clauses a 'compromise between diverse and often conflicting viewpoints.' Positive discrimination, along with Part IV, dominated social justice measures. Beneficial prejudice for socially and educationally inferior sections was politically salient in certain regions of the nation before Independence. Political parties' attempts were furthered by the constitution's specific provisions for legislating Scheduled Caste and Tribe reservations in elected legislative bodies and public jobs and education. General reservations in public employment were allowed for those backward classes that the state believed were underrepresented in the services. Employment reservations ought to be coordinated with productivity in administration and considered provisional. The fact that their remit and longevity are now broader and cemented shows how political power has transformed.

Including such provisions in the non-justiciable Directive Principles of State Policies part of the Constitution in itself speaks volumes. The paradigm of a free, democratic nation, as debated and aimed to be enforced by the fighters for freedom and framers of the constitution, has been a far-fetched dream even today due to the complexities of social strata embedded in Indian society. These ideals remain political yen. The author believes that this caste system is a form of deeply sown colonialism, which India is unable to recover from. The inclusion of the Right to Property in Part III of the constitution underscored the ideological divide in the robin-hood theory.⁶ The

⁴ Krishnadas Rajagopal, *EWS quota | 103rd amendment was a fraud on Constitution, petitioners tell Supreme Court*, THE HINDU (Sep. 14, 2022) available at: <https://www.thehindu.com/news/national/ews-quota-reservation-cannot-be-implemented-as-a-poverty-alleviation-programme-say-petitioners/article65886561.ece> (last visited Dec. 11, 2023).

⁵ Zoya Hasan, et al. (eds.), *INDIA'S LIVING CONSTITUTION - IDEAS, PRACTICES, CONTROVERSIES* (2002).

⁶ ET Online, *Wealth redistribution: The economics behind Rahul Gandhi's 'Robin Hood' idea*, THE ECONOMIC TIMES (Apr. 23, 2024) available at: <https://economictimes.indiatimes.com/news/elections/lok-sabha/india/wealth-redistribution-the-economics-behind-rahul-gandhis-robin-hood-idea/articleshow/109528342.cms?from=mdr> (last visited May 20, 2024).

chapter 'Pursuit of Social Justice' also considers certain positive factors, such as the conduct of free and fair elections with high voter turnout and low violence rates and the existence of a free press. However, the contemporary conditions abound in the nation speak for the real state of affairs. The voter turnout in the ongoing 'unfair' elections has reached the floor'.⁷ The authors find it noteworthy to mention the next chapter of the aforementioned book as it records a vital paradox. It links the uncertainty of the name of affirmative action in the Constitution to the precariousness of its enforcement.

In his book, Andrew Beteille retains his stance on reservations. However, fails to produce any evidence in support of his stance. It is true to assert that society fails to proceed unless an ideal of achievement superior to the present is brought to life.⁸ However, in Indian society, it is also true that such superiority will take time to mature. It is his case that life chances are not related to caste, but it is factually incorrect when we talk about 'perpetual backwardness'. In the Indra Sawhney case, the Court held that Scheduled Castes (SCs) suffer perpetual backwardness, unlike Other Backward Classes (OBCs), even if they make substantial economic gains. However, the case is that the Indian society encounters intersectionality in matters of Economic weakness and caste-based discrimination. Ghanshyam Shah, in his study, rightly clarified a crucial distinction and elaborated upon the repercussions that intersectionality has over the Other Backward Classes and the so-called Economically Weaker Sections of Indian Society. The prejudices that come along with an economically weaker individual are much worse for those belonging to lower strata than otherwise.⁹ N. Palkhivala, much ahead of time, had realized the necessity to put up a ceiling to reservations at 30%. In fact, N. Palkhivala had already warned more than three decades ago that the trend would lead to 100% reservations, making it a mockery of Social Justice as promised by the Constitution. The Hon'ble Apex Court, rejecting the submission in Mandal-I, decided to cap it at 50 percent.¹⁰ This has essentially led to the ceiling being stretched even forth for political gains. Hence, the current abuse of powers by the Central Government via the

⁷ Shoumojit Banerjee, *Low voter turnout, missing names in electoral rolls mar phase 4 of polling in Maharashtra*, THE HINDU (May 14, 2024) available at:

<https://www.thehindu.com/elections/lok-sabha/low-voter-turnout-missing-names-in-electoral-rolls-mar-phase-4-of-polling-in-maharashtra/article68172002.ece> (last visited May 21, 2024);

Anurag Kundu, *Why the 2024 general election is unfair*, THE INDIAN EXPRESS (May 10, 2024) available at: <https://indianexpress.com/article/opinion/columns/why-the-2024-general-election-is-unfair-9320107/> (last visited 21 May, 2024).

⁸ Andre Beteille, *THE BACKWARD CLASSES IN CONTEMPORARY INDIA* 117 (1993).

⁹ Ghanshyam Shah, *Of Reservation, Merit and Distributive Justice*, 38(15) EPW 633-635 (1993).

¹⁰ Hari Desai, *Palkhivala for only 30% Reservation*, ASIAN VOICE (dec. 10, 2018) available at: <https://www.asian-voice.com/Opinion/Columnists/Hari-Desai/Palkhivala-for-only-30-Reservation> (last visited Jul. 20, 2024).

Economically Weaker Section scheme is an apt example of how socially educationally backward (SEB) and caste have been equated in one barrel, which is, in fact, not true when we see the true intent of the reservations. The upper cast politics in many states led to including the upper caste in reservations that destroyed the fundamental structure doctrine.

The constitution was amended from time to time to make reasonable accommodations for the underprivileged community. The legislative power to introduce constitutional amendment must be exercised fairly, reasonably and within the ambit of the constitution so as to preserve the sanctity of the doctrine of basic structure. The 103rd amendment of the constitution, whereby a 10% reservation has been granted to the Economically Weaker Sections (EWS) as introduced by the parliament, has been criticised by constitutional experts. It has been argued that the said amendment is a constitutional fraud. The EWS is being seen as an instrument to protect the privileged, rather than safeguarding the marginalised community. This being the case, it is imperative and high time that constitutional democracy, as promised by the forefathers, is revived. The democratic legitimacy handed over to civilised political slaves has proven to be homicidal because fear and hate are a rich business that cannot be eliminated deftly as it is engulfed with ideological barriers. The introduction of reservations to facilitate the destitute has been an enormous defeat, and it now serves more as a gimmick for the downtrodden. Negating the basic ideals of constitutionalism in a civilised society, the present-day issues do not reflect a promising future of this largest democratic nation if not addressed in a shifted manner.

The Indian Supreme Court has maintained that the concept of equal treatment is an element of the Constitution's '*basic structure*.' The Indian Legislature created '*reservations*' for marginalised individuals in public institutions as one of its measures to support the rights of the impoverished. The primary socio-legal issue that has split Indian society apart is the reservation of 'other backward classes,' among other reasons, on the grounds of caste.

II

Social Justice & Backward Classes

Social justice provides equitable socioeconomic opportunity for each community member to nurture their personalities, free from prejudice based on their ethnic background, sexual orientation, or religion. In light of these disparities, no individual deserves to be denied access to the social circumstances necessary for societal advancement. Social equality, social rights, and social equality are all related to the subject of social justice, and they all hinge on financial rights and fairness.

Justice for all can be achieved in a society without the exploitation of people and without the advantages of the few being based on everyone else's suffering. The Indian Constitution's Preamble guarantees all of its inhabitants social, economic, and political fairness; equality of status and access; advancement for all; and fraternity, which upholds the inherent worth and cohesion of the country. This section on Fundamental Rights and Directive Principles of State Policy, which aims to advance the well-being of society by safeguarding and defending the framework of society whereby justice—social, economic, and political—must inform all national institutions, additionally embodies the values indicated in the Preamble. The 42nd Amendment Act has reinforced its fundamental social and economic justice spirit by adding the term 'Socialist' to the preamble.

Democracy, as is widely acknowledged, is not merely a system of governance; it also emphasises dignity and rights for all people, which calls for the rule of law, equality, liberty, and freedom against tyranny, abuse, and capricious intervention.

Article 15 (4) constitutes an exemption to clauses (1) and (2). The provision gives the government the authority to create specific arrangements for the growth of every citizen section that is socially or educationally stranded, as well as for the Scheduled Castes and Scheduled Tribes. Following the modification, the government could establish Harijan Colony to further the interests of the Underprivileged.

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Article 15, (4) presents a significant challenge in identifying the individuals classified as 'socially and educationally backward classes'. This is not a straightforward issue because sociological and economic factors must be considered when developing appropriate standards to identify 'Backward Classes.' The government is responsible for defining the backward class. However, the Court may examine how the set of standards the State has chosen is appropriate. The Supreme Court has addressed the issue of designating backward divisions in various decisions. Since it is implied in the concept of reservation that a meritorious individual is given preference to a more deserving individual, the Court has generally taken the position that the State's instruments have limitations and that protecting a particular category influences various citizens' constitutional rights to seek equal treatment. Additionally, the Court has held that effectiveness and the public interest must be preserved in providing public services. The Court also aims

to prevent the financially prosperous communities from being included in the sphere of the Backward Classes and to prevent the caste system in India from continuing. Several claims arise from the various rulings made by judges about the meaning of 'backward classes.' Primarily, a group must be simultaneously socially and educationally backward to be classified as 'backward' under Article 15(4), which defines backwardness as both social and educational. Further, since the majority of Indians live in impoverishment, a sizable portion of the citizenry could be considered backward, defeating the purpose of reservations altogether. As a result, impoverishment cannot serve as a yardstick for determining backwardness in India. Additionally, backwardness should be compared to Scheduled Castes and Scheduled Tribes, which are not precisely comparable. Furthermore, while 'caste' may be an essential component in defining backwardness, it shouldn't be the only or the most predominant requirement.

If the only factor used to determine social backwardness were caste, this would mean that the caste system would continue to exist in Indian society. Finally, it is impossible to overlook the variables that undoubtedly trigger backwardness, including impoverishment, work, place of residence, etc. Lastly, caste need not be included in the definition of backwardness. As the Supreme Court has emphasised, Article 15 (4) 'does not speak of castes, but only speaks of classes', and that 'caste' and 'class' are not synonyms.

Equality of opportunity regarding appointment in State services is guaranteed by Article 16. It does not, however, stop the State from establishing the prerequisites and vetting procedures for hiring people for public service positions. Prescribed qualifications may include, in addition to mental excellence, physical fitness, discipline, moral integrity, loyalty to the country, etc., if the appointment requires technical knowledge, technical qualifications may be prescribed. In official positions, the nature and background of the candidates may be considered. Of course, a selective test cannot be arbitrary. It must be reasonable, and there must be a link between the qualifications and the nature and duties of the job.

III

Reasonable Classification

A reservation denotes a distinct allotment set aside for a specific set of people. Reservation was instituted in India to promote and provide requisite inclusion for Scheduled Castes, Scheduled Tribes, and other individuals from disadvantaged backgrounds, as well as those from socially and educationally underprivileged

backgrounds. The Indian Constitution's Articles 15,¹¹ 16,¹² 17,¹³ and 46¹⁴ calls for creating an egalitarian community where everyone is treated equally, and there is no disparity in status or oppression. When the principle of reservation was first suggested in 1948, it was met with great support. It was meant to be implemented for a maximum of a decade, with extensions possible only under special circumstances. After over 75 years, Elected Officials of the nation continue to use the 'reservation' as an agenda to gain electoral leverage, and there continues to be fierce competition among Indians for employment and academic allowances.¹⁵

State of Madras v. Champakam Dorairajan,¹⁶ is a well-known case on the quota system in which the court invalidated an administrative directive establishing caste-based reservations in universities of sciences and engineering. In *M.R. Balaji v. State of Mysore*,¹⁷ the judiciary overturned the municipality of Mysore's 1962 quota of 68% of admissions to different disadvantaged divisions, ruling that the quota must have been less than 50%. Furthermore, it was decided in *T. Devadasan v. Union of India*,¹⁸ those with reserved positions that remain empty in a particular year cannot be rolled over to the subsequent. In 1975, two judges of the five-judge bench in *State of Kerala v. N.M. Thomas*,¹⁹ addressed the reservation issue in promotions, stating that the fifty per cent ceiling is a guideline rather than an absolute. A full Bench was tasked with reviewing the case extensively. Following that, the Court affirmed the fundamental legality of 'Kerala State and Subordinate Services Rules, 1958' Rule 13AA²⁰, which gives the authorities the discretion to exclude SC and ST members currently employed to undertake the assessment for a predetermined amount of time.

The Mandal Commission officially known as the SEBC i.e., the 'Socially and Educationally Backward Classes Commission' was established by the Janta Party in 1979 with an objective of identifying the nation's socially and educationally disadvantaged groups and recommending a quota scheme for them whenever

¹¹ Constitution of India, 1950, art. 15.

¹² Constitution of India, 1950, art. 16.

¹³ Constitution of India, 1950, art. 17.

¹⁴ Constitution of India, 1950, art. 46.

¹⁵ Shubhashni Kumari, *Conundrum on Economically Weaker Section—Having Reservations about Reservation*, SCC ONLINE (Apr. 20, 2022) available

at: <https://www.sconline.com/blog/post/2022/04/20/conundrum-on-economically-weaker-section-having-reservations-about-reservation/#:~:text=By%20employing%20only%20income%2Fwealth,and%20both%20income%20and%20caste> (last visited Oct. 11, 2023).

¹⁶ *State of Madras v. Champakam Dorairajan*, 1951 SCC 351.

¹⁷ *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439.

¹⁸ *T. Devadasan v. Union of India*, (1964) 4 SCR 680.

¹⁹ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

²⁰ Kerala State and Subordinate Services Rules, 1958, R.13AA.

necessary. In the *Indra Sawhney v. Union of India*²¹ case, a nine-judge Supreme Court panel supported the 50% cap, rejected reservation for elevation, and established metrics to determine disadvantages in response to challenges to the Mandal Commission's reservations.

A five-judge bench annulled the Maratha Reservation in *Dr. Jaishri Laxmanrao Patil v. The Chief Minister*,²² relating to Maharashtra State Reservation for admission to educational institutions in the state and for appointments in public services under the Socially and Educationally Backward Classes ('SEBC Act') as revised in 2019. The court maintained that the Maratha Community's 12% and 13% quota and 50% communal reservations are not included under 'exceptional circumstances', as considered by the Constitution Bench in the *Indra Sawhney* case. The Constitution (One Hundred and Third Amendment) Act,²³ which was approved by Parliament in 2019, allows a 10% additional quota for economically disadvantaged communities on top of the already-existing reservations. In *Janhit Abhiyan v. Union of India*,²⁴ the five-judge Constitution bench of 'UU Lalit, CJ and Dinesh Maheshwari, S. Ravindra Bhat, Bela M Trivedi, JB Pardiwala, JJ,' affirmed the constitutional legitimacy of the 'Constitution (One Hundred and Third Amendment) Act, 2019' which was primarily challenged based on breaking the ceiling of 50%.

IV

Objections on the EWS Reservation System

The Supreme Court has raised concerns to the Central Government about the criteria used to define the Economically Weaker Sections (EWS) category, questioning the Union Government's thorough examination and the apparent overlap in establishing an identical income criterion for both categories without considering regional income variations or other related issues. The Central Government defines EWS as 'individuals who do not fall under the quota schemes for Scheduled Castes (SCs), Scheduled Tribes (STs), or Other Backward Classes (OBCs) and have a family gross annual income of less than Rs 8 lakhs.' This revenue includes revenues from many sources such as salary, agriculture, business, and professions from the preceding fiscal year. Individuals possessing specific assets, such as 5 acres of agricultural land or more, a residential flat of 1000 sq. ft. or more,

²¹ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

²² *Dr. Jaishri Laxmanrao Patil v. The Chief Minister*, 2021 SCC OnLine SC 362.

²³ Constitution of India, 1950, arts. 15(6) and 16(6), amended by The Constitution (One hundred and third Amendment) Act, 2019.

²⁴ *Janhit Abhiyan v. Union of India*, 2022 SCC OnLine SC 1540.

or a residential plot of 100 sq. yd. or more in selected municipalities, are also excluded from the EWS group, regardless of family income.

The definition may appear basic and all-inclusive at first, but as the text goes on, it becomes clear that it raises serious questions about possible constitutional violations of Articles 14,²⁵ 15,²⁶ and 16.²⁷ The OBC reservation system is designed around the principle of exclusion, which tries to deny reservation benefits to socially advanced OBC categories, frequently referred to as the 'creamy layer.' The Official Memorandum on Issuing Instructions for Reservation for Scheduled Castes, Scheduled Tribes, and Other Backward Classes in Government Services includes Annexure-II, which lists the requirements for defining this creamy layer.²⁸ An income or wealth test is one of the six categories used to establish the creamy layer among OBCs.

Historically, the 'creamy layer' within the Other Backward Classes (OBC) was determined by an individual's parents' gross yearly income of Rs 1 lakh or more for three consecutive years. Such people are not eligible for the benefits of OBC reservations. Following that, the income criteria for defining the creamy layer were revised to Rs 2.5 lakhs, Rs 4.5 lakhs, and Rs 6 lakhs through various notifications. However, the government's current strategy, which depends only on income or wealth criteria to determine eligibility for reservation inside the Economically Weaker Sections (EWS), violates a number of Supreme Court decisions. These decisions indicate that neither income nor caste alone should be used to determine social backwardness. Instead, income and caste should be examined simultaneously when judging citizens' backwardness. In a country as diverse as India, with considerable inter-state discrepancies and regional income inequalities, the government has created a consistent income criterion of Rs 8 lakhs for EWS reservations across the country. It's worth noting that the per capita net State domestic product (NSDP) for 2020-2021 differs substantially between states. For example, Goa, Sikkim, and Delhi have much higher per capita NSDP levels than Bihar, Uttar Pradesh, and Jharkhand. This disparity suggests that the economic production attributable to each citizen in states such as Goa, Sikkim, and Delhi is significantly higher than in states such as Bihar, Uttar Pradesh, and Jharkhand. Given this context, it is clear that a significant section of the population in less economically successful states like Bihar, Uttar Pradesh, and Jharkhand would fall under the 10% EWS reservation category. As a result, the Rs 8 lakh income requirement is far too broad. It is clear from the discussion above that the EWS reservation scheme lacks a deliberate and organized strategy. The administration

²⁵ Constitution of India, 1950, art. 14.

²⁶ *Supra* note 1.

²⁷ *Supra* note 2.

²⁸ Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel & Training Official Memorandum No. 36011/6/2010-Estt. (Res), (Notified on 25-6-2010).

apparently mechanically adopted the Rs 8 lakh income cut-off without carefully considering the parameters for EWS quotas. The government's arbitrary action here clearly contravenes Article 14's mandate under the constitution.

It is believed that it is essential for legislators first to prove the inequality within the upper caste and grant them a reservation, be it of any nature, including the EWS scheme. As the Mandal Commission recommended, the reservation system for Other Backward Classes in India involved a comprehensive survey conducted across 405 districts. This survey encompassed two villages in each district, and each block was meticulously assessed in urban areas. Subsequently, the Commission identified and established 11 distinct parameters, which were then translated into a scale of 22 points. Meeting or exceeding 50% of these points, equivalent to 11 points, designated an individual as belonging to the 'backward' category while falling short of this score categorised them as 'forward.' These parameters were categorised into social (3 points), educational (2 points), and economic (1 point), reflecting a ratio of 3:2:1.

Conversely, when it comes to the reservation for Economically Weaker Sections (EWS), none of the points related to social or educational backwardness are considered. Further, the scheme of EWS reservation has not been formulated based on any report but seems to be a vote bank strategy of the Modi government. Instead, this reservation is solely determined by an individual's economic circumstances. To assess whether these policies contravene the fundamental structure of the Constitution, the Supreme Court has devised two tests. The first, known as the 'width test,' examines both the quantitative aspect (whether the reservation quota of 50% is exceeded) and the qualitative aspect (whether the creamy layer, or the relatively affluent among the reserved categories, has been properly excluded or included in the benefits of the reservation). The second test is the 'identity test,' which evaluates whether an amendment significantly alters or transforms the fundamental character of the Constitution. It's worth noting that reservations, while intended to address historical social disparities, should be applied thoughtfully to avoid undermining the principle of equality in society.

V

Surprising Selection

It was further unexpected that JB Pardiwala, a Gujarat High Court judge, had been part of the constitutional bench that the Chief Justice appointed to deliberate on the case. Pardiwala's order, which had nothing to do with reservation, sparked discord after he put pen to paper, 'If anyone asks me for a list of two factors that have essentially demolished this nation, or more importantly, have prevented the nation's advance in the correct route, then the answer is (i) Reservation and (ii) Corruption.

Post 75 years of liberty; it is utterly disgraceful for any citizen of this nation to want a reservation.²⁹ He deleted the sentence as soon as certain lawmakers gathered signatories to file an indictment petition over him; however, he still voiced his opinions. While Pardiwala was appointed to the Supreme Court despite being a junior justice, prominent Gujarati jurist Akil Kureshi was not. The outcomes are evident. We see split decisions dictating national law like the US Supreme Court. The EWS case's 3-2 majority demonstrated that the appointment of Pardiwala, the court's youngest judge, produced the intended effects. The discussions in the Constituent Assembly about Articles 15 and 16 as constructive measures to improve the state of SEBC have since been buried.

VI

Constitutional Assembly Debates

A thorough examination of the deliberations held during the Constituent Assembly shows that the ultimate objective of the parliament's reservation policy was to guarantee the inclusion of marginalised groups in politics. Therefore, the purpose of the Reservation system of affirmative justice, which is akin to the idea of the West, has constantly been to elevate this class of historically downtrodden people. Thus, it is ludicrous to think that the EWS seat reservation in the legislature was implemented to reduce impoverished conditions. In a comparable vein, the constitution secured occupational reservations while taking into account the delegation of authority throughout the State's departments. Ambedkar was accurate when he surmised that there are other barriers for the downtrodden classes than those caused by conservative Hindu blockage.³⁰ Ambedkar claimed that numerous elite Hindu customs were significantly more detrimental than actual bloodshed. Social boycotting was one of these tactics. In their struggle against the Hindu superior ethnicity, the downtrodden sections struggled with an absence of equal social power and financial autonomy. The impoverished strata faced exclusion and estate evictions anytime they tried to make use of their civil liberties. This was accompanied by the suspension of work along with every essential community assistance, as well as the ban on using public areas including the common area and pathways. However, the assurance of non-discrimination alone proved insufficient. Thus, Ambedkar imposed yet another crucial need: the

²⁹ Justice K. Chandru, *10% EWS quota SC ruling: 'Caste' has finally overtaken 'class'*, THE FEDERAL (Nov. 7, 2022) available at: <https://thefederal.com/analysis/sc-ruling-on-10-ews-quota-caste-has-finally-overtaken-class/> (last visited Oct. 11, 2023).

³⁰ B.R. Ambedkar, DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES (Pt. 1) 80 (2003).

inclusion of lower-class members in the governmental sector.³¹ He noted that through the abuse of the legal system or the misuse of the autonomy bestowed upon them in its administration, Hindus of the upper caste have essentially monopolised the administration of public services. It was his view that the poor sections ought to be granted adequate representation in public services and the legal resources to challenge the Constitution's inability to carry out this commitment. Moreover, even though social and economic hardship is sometimes linked, Ambedkar strongly advised against drawing distinctions between the downtrodden groups solely on the basis of their financial status. He maintained that the main distinction between regular class labour and distressed class labour is societal bias, which is primarily to blame for the impoverished conditions of the depressed castes.³²

Since members of higher castes traditionally held public service jobs, management was composed of individuals representing very particular castes. Consequently, reservation sought to end this exclusive position and guarantee that authority to decide was distributed amongst all populations, especially the weaker and downtrodden sections. It was not intended to improve an individual's financial situation. The economic criteria by itself do not satisfy the requirements of Article 14³³ and Article 16(1)³⁴ of the Constitution for both the test of reasonable nexus and the test of comprehensible differentia.³⁵ The court has previously ruled in a number of cases that Articles 15(4)³⁶ and 16(4)³⁷ do not provide concrete instances of programmes intended to reduce poverty. The idea of personal rights and social affiliation through the prism of economics runs counter to the intentions of the Indian Constitution's framers.

VII

Missed Objective

The Constituent Assembly recognised that certain groups of individuals might be illiterate, socially and educationally backward, and would need assistance from the state. A committee to 'investigate the conditions of socially and educationally

³¹ Jyoti Rao Phule, GULAMGIRI (1873); Nandini Gooptu, *Caste and Labour: Untouchable Social Movement in Upper Uttar Pradesh in the Early Twentieth Century*, in CASTE IN MODERN INDIA 110 (Sumit Sarkar and Tanika Sarkar eds., 2015).

³² Arpita Sarkar, *Reservation on an Economic Basis: Some Issues and Challenges*, 15 NSLR 131(2021).

³³ *Supra* note 14.

³⁴ Constitution of India, 1950, art. 16(1).

³⁵ Madhu Limaye, CONTEMPORARY INDIAN POLITICS 208 (1987).

³⁶ Constitution of India, 1950, art. 15(4).

³⁷ Constitution of India, 1950, art. 16(4).

backward classes...and to make recommendations as to the steps that should be taken...to improve their condition and as to the grants that should be made for the purpose' was to be appointed, as per Article 340(1) of the Assembly's resolution.

The greatly controversial article since 1950 led to the creation of 2 committees (the Mandal Commission in 1979 and the Kaka Kalelkar Commission in 1953) and a long-term legislative organ, NCBC, in 1993. The NCBC was granted constitutional legitimacy in 2018 under Article 338B, distinct from Article 340. While there exist communities that have experienced caste prejudice and untouchability that do not belong to the SC/ST category, they nonetheless lag behind in terms of social and scholastic advancement. On November 30, 1948, T.T. Krishnamachari said, 'May I ask, who are the backward class of citizens?' in the Constituent Assembly. Additionally, he said, 'It does not apply to a backward caste.' The Assembly's belief that the 'backward classes' would never refer to castes but rather to any ambiguous category of non-SC/ST individuals was echoed by Krishnamachari. They might be victims of the whims of nature, or they might be upper castes living in isolated, hostile, or desolate places. The Article specified that the Commission would examine 'the difficulties under which they labour' and recommend 'the steps that should be taken...to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose.' The Assembly firmly believed that Article 340 might lead to initiatives and plans to enhance the social and educational well-being of the OBCs, and no interpretation of the Article could be interpreted to imply that job quotas were in any way intended. Certain Assembly members, including H.V. Kamath, believed that Article 340 would not take effect more than ten years after the Constitution went into effect. The 1955 Report of the Kalelkar Commission (also known as the First Backward Classes Commission), which suggested employment reservations for the OBCs even though its provisions of inquiry (or 'ToR') included no requirement of employment allocations, marked the beginning of the departure beyond 'the letter and spirit' of the Article. It is true that national commissions, as constitutional and advanced institutions, are free to deviate from their Terms of Reference, and this—or its successors—is not to blame. However, this kind of deviance necessitates the creation of imaginary types of marginalisation and prejudice. That is precisely what occurred when Article 340 was in effect. Supporters of OBC job quotas were compelled to assert that OBCs experience the same levels of marginalisation and prejudice as SC/STs. As a sibling of the two National Commissions—one for the SCs and the other for the STs—the tendency resulted in establishing an additional NCBC in 2018 with the addition of Article 338(B). Rather than proposing a new Article, the legislature replicated Article 338 and renamed it Article 338(B), substituting 'the socially and educationally backward classes' for the original phrase 'the Scheduled Castes.' The OBCs should be the same as the SC/STs if the NCBC is the same as the NCSC or the NCST. As a result, the authorities have thrown off the system of castes by reclassifying OBCs as SC/STs by this parliamentary gimmick.

In carrying out its duties, the NCBC will have all the authority of a civil court, including the ability to call people, request evidence, and accept testimony through affidavits. This includes the NCSC and NCST. It can also 'inquire into specific complaints with respect to the deprivation of rights and safeguards of' the OBCs, as well as 'monitor and investigate all matters relating to the safeguards provided for' them, according to Article 338B. Since any legal 'safeguards do not protect the OBCs,' it may eventually be necessary to enact legislation like to the Atrocities Act in order to operationalize this feature. There are two ways in which the current NCBC differs from its predecessors. For starters, it is no longer expected to define backwardness; the Parliament will handle that task for the central list. Secondly, it has no say in what constitutes a backward class. Political discourse shall apparently decide who qualifies as an OBC. The purpose of Article 340 was to establish the new NCBC in 2018. However, the authorities have hardly bothered to give the Article the respect it deserves by repealing it. The Article is still somewhat desiccated.

VIII

Affirmative Action in the United States

Affirmative action is a policy intended to increase diversity or mitigate the impact of unjustified prejudice. The inequalities caused by prejudice on the grounds of racial or ethnic background and other characteristics—like gender identity or language—can be addressed by affirmative action. 'Affirmative action' is a term used to describe racialised, goal-oriented initiatives by both governmental and private entities to address the disparities in the distribution of financial possibilities and educational opportunities that are linked to racism, poverty, segregation, and enslavement.

In contrast to the 1950 Indian Constitution, which established India's reservation framework, the 'Kennedy administration's Executive Order' in the US mandated federal contractors to implement 'affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, colour, or national origin.' It should be mentioned that the 1950s civil rights movement campaigned for affirmative action, significantly enhancing possibilities for Black Americans who endured generations of prejudice because of their race. The government of President Lyndon Johnson provided additional support for the presidential order. As a result, an executive order introducing the initial formal affirmative action programme was created in 1965, drawing inspiration from the landmark Civil Rights Act of 1964. After President Richard Nixon signed the executive order in 1969, AA programmes were supported by both parties. Subsequently, the Equal Opportunity Act and various national measures

were enacted, encouraging businesses and vendors to grant minority employees opportunities for advancement in employment, educational institutions, and business licences.

Supreme Court on Affirmative Action

In a landmark decision, the US Supreme Court ruled that ethnicity could not be considered further when admitting students to universities. This ruling has sparked much discussion and represents a change concerning decades of US regulations on 'affirmative action,' commonly called constructive bias. Chief Justice John Roberts, who wrote the majority ruling, stated that he believed colleges had incorrectly placed too much focus on a person's race, claiming that a candidate's skin colour shouldn't be the deciding factor when assessing them. Justice Clarence Thomas, a traditionalist supporter of eliminating affirmative action, agreed, calling the programmes in question discriminatory. Sonia Sotomayor and Ketanji Brown Jackson, the first black woman nominated to the court, were among the liberal justices who dissented from the decision. They contended that the ruling solidified the shallow idea of colour blindness in a culture that is nonetheless fundamentally divided. Although the verdict affects affirmative action practises in college admissions, it is essential to remember that nine US states already have laws prohibiting college admittance depending only on colour.

IX

Conclusion

The Chief Justice of India has acknowledged that the legal system has frequently played a significant role in perpetuating historical injustices against marginalised social groups. The harm caused by such injustices can endure for generations. He also made a comparison with the United States, where he stated that the legal system has often been utilised to subjugate and eliminate specific groups systematically. This practice began with the formalisation of regulations that condoned slavery and extended to the Jim Crow laws that enforced segregation in the Southern United States. It further continued with regulations mandating the integration of Native Americans.³⁸ He systematically omitted that the United States has not implemented or legalized any arbitrary reservation policies to secure votes for the ruling party. Additionally, the U.S. is willing to abandon race-based admissions reservations,

³⁸ Press Trust of India, *Legal system often played key role in perpetuating historical wrongs: CJI*, BUSINESS STANDARD (Oct. 23, 2023) available at: https://www.business-standard.com/india-news/legal-system-often-played-key-role-in-perpetuating-historical-wrongs-cji-123102300182_1.html (last visited Oct. 25, 2023).

contrasting India's stance. In India, the threshold of 50% for reservations is already being exceeded in the form of reservations for the Economically Weaker Sections.

The principles outlined in the excerpt from the *Indra Sawhney v. Union of India*³⁹ case, which emphasises that economic criteria cannot solely determine a backward class and must consider social backwardness, reflects a longstanding and respected view. It is inconceivable to overestimate the significance of this viewpoint, especially in a country where social fairness is the cornerstone of the Constitution. Nevertheless, questions are raised concerning how the 103rd Amendment would affect the principles of social justice. There has been contention that this amendment jeopardises the fundamental tenets of the Constitution by attempting to invalidate advantages granted to historically marginalised people. The Constitution's purpose is changed by this modification, which turns it from being a guide for social revolution to a defence of caste privilege.

Some perceive the implementation of reservations for economically weaker sections (EWS) as a direct affront to the social justice ideal outlined in the constitution. A genuinely representative and democratic administration is opposed by the potential of oligarchic classes becoming even more dominant if quotas are reserved for classes already overrepresented in many facets of society. Examining and debating the 103rd Amendment's consequences for the ideals of social justice and affirmative action is crucial in light of these worries. It is essential to ensure that any modifications to the Constitution are consistent with its fundamental principles and do not jeopardise efforts to create a more just and equal society. The *Indra Sawhney*⁴⁰ the case serves as a reminder of the importance of upholding these principles and maintaining a balanced approach when crafting policies that impact the nation's social fabric.

³⁹ *Supra* note 11.

⁴⁰ *Supra* note 11.