

RESERVATION ON AN ECONOMIC BASIS: SOME ISSUES AND CHALLENGES

Arpita Sarkar*

*An increasing number of judicial decisions have emphasized the absence of 'really backward' people among the notified backward classes in reservation schemes. Economic backwardness is an important aspect of the determination of backward classes for reservation. However, unnecessary emphasis on this dimension may result in the delegitimization of other indicators for identifying backward classes. The constitutional amendment of 2019 which introduced reservation for economically weaker sections ('EWS') of the society further reduces the importance of social backwardness as an indicator for backward classes. This paper revisits the legal history of reservation to highlight that economic backwardness as a ground for reservation was deliberated upon and rejected by the Constituent Assembly. The paper further argues that the 'creamy layer' is a judicially developed test introduced through judicial surmises. Also, it is argued, based on historical and legal grounds, that reservation for EWS is likely to be declared unconstitutional because of its incompatibility and contradictory nature vis-a-vis the rest of the equality clauses. It may fail the width and identity tests as laid down in *M. Nagaraj v. Union of India* (2006) (hereinafter 'M. Nagaraj') to assess the violation of the basic structure through constitutional amendments.*

* Assistant Professor, Jindal Global Law School. I wish to thank Professor (Dr.) Mahendra P. Singh for his guidance. I also wish to thank Akhilendra Pratap Singh and Kanad Bagchi and the reviewers of the journal for their suggestions on several versions of this paper.

CONTENTS

INTRODUCTION	147
I. HISTORY OF RESERVATION IN THE INDIAN CONSTITUTION.....	150
A. <i>Conditions of Support Placed on Behalf of Dalits to be Governed by Majority Rule During the Drafting of Government of India Act, 1919</i>	151
B. <i>Backwardness – Not Economic, but Social and Educational as per the Constituent Assembly Debates</i>	153
C. <i>Interpretation of ‘Backward Classes’ by the Judiciary Post-1950</i>	155
II. THE ROLE OF THE JUDICIARY IN DEVELOPING THE CRITERION OF ECONOMIC BACKWARDNESS.....	157
A. <i>The Apprehension of the Judiciary Against the ‘Misuse’ of Reservation</i>	158
B. <i>Criticism of ‘Creamy Layer’ Tests by Scholars</i>	160
III. CHALLENGES POSED BY THE CONSTITUTION (103 RD AMENDMENT) ACT, 2019	162
A. <i>Constitutionality of Reservation for Economically Weaker Sections</i>	164
1. <i>Contradictions in the Scope of the Term ‘Economically Weaker Sections’</i>	164
2. <i>Preference for Economically Backward Classes and Prejudice Against Socially Backward Classes</i>	165
B. <i>From an Invalidated Office Memorandum to a Constitutional Amendment</i>	166
CONCLUSION	169

INTRODUCTION

*“The social origin of our higher judiciary and most of our senior counsel has affected the quality of the decision handed down by the courts. A critic has observed that the “gross effect of the litigation” on the policy of preferential treatment or compensatory discrimination has been to “curtail and confine it”.*¹

-Madhu Limaye

¹ MADHU LIMAYE, CONTEMPORARY INDIAN POLITICS, 208 (Sangam Books, 1987).

The rights to equality guaranteed under Articles 14-18 are fundamental rights. The Constitution of India provides for the reservation of seats in educational institutions aided by the state and in employment in government services, to the backward classes.² Reservation, as affirmative action is called in India, has been mired with controversies since the founding years of the Constitution.³ Jurisprudence on this issue has developed since 1950 through reactions between the judiciary and legislature in the form of court decisions and constitutional amendments respectively.⁴ The court in multiple cases in the past has declared that Article 15(4) and Article 16(4) are not instances of poverty alleviation programs.⁵ Yet, the concept of the 'creamy layer' was introduced into judicial decisions initially through surmises which was premised on opinion without evidence. Later, the concept transformed into an established position of law.⁶

Initially, the 'creamy layer' test was applied for reservation of Backward Classes (**BCs**) only. Since 2018, two major developments in reservation jurisprudence have taken place in India. Firstly, the Supreme Court explicitly decided in *Jarnail Singh v. Lachhmi Narain Gupta (Jarnail Singh)*⁷ that the 'creamy layer' test applies to Scheduled Castes (**SCs**) and Scheduled Tribes (**STs**) as well. Secondly, a constitutional amendment was made in January 2019 to introduce reservation for economically weaker sections of the society other than SCs, STs, and Other Backward Classes (**OBCs**), based on family income.⁸ The amendment has been

² INDIA CONST. art. 15, art. 16.

³ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

⁴ The first amendment introducing Article 15(4) was introduced after *Champakam Dorairajan*. Article 16(4-A), 16(4-B) and the very recent Article 16(5) was introduced to undo the 9-judge bench decision in *Indra Sawhney*. Article 335(2) to undo *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580

⁵ *Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420, *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267.

⁶ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

⁷ *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.

⁸ India Const. amend. 103, art. 15(6) & art. 16(6).

"Article 15 (6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, — (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category. Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."

Article 16(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

challenged before the Supreme Court in *Janhit Abhiyan v. Union of India*.⁹ The matter is pending the consideration of the Court.

A similar constitution bench of five judges had earlier held that the SCs and STs are homogenous constitutional classes which cannot be further classified into more and less backward groups based on the individual status of members of the community.¹⁰ However, from the decision in *Jarnail Singh*, one may infer that there has been a subsequent shift in the perception of the judiciary wherein reservation is construed as an individual-oriented right based dominantly on economic capacity. Identification of community through an economic lens and individual-oriented entitlement is contradictory to the visions of the drafters of the Constitution of India.

It is important therefore, to revisit our history to recall the primary characteristics of reservation as was envisioned by the constitution-makers for independent India. Although bound by the common law principle of precedence, reservation jurisprudence in India has shifted from the historical struggle of the depressed classes to addressing economic difficulties, based on massive obiter dicta in various judgments. Judicial apprehension regarding predatory availing of reservation by the economically well-off among the notified communities initially appeared in the obiters of judicial decisions and has subsequently shifted to the ratio. This paper examines, thus, whether the important constitutional principles under Articles 15 and 16 are re-written through judicial interpretations and constitutional amendments.

The paper is divided into three sections. The first section deals with the historical struggle of depressed and backward classes for reservation from the time of drafting of the Government of India Act, 1919, to the drafting of the Constitution of India, 1950, and its subsequent interpretation by the judiciary. The second section deals with the emergence of the economic criterion for identification of reserved categories by the judiciary and its culmination into the concept of the 'creamy layer' test. The third section deals with the possible erosion of the core principles behind reservation through the Constitution (One Hundred and Third Amendment) Act, 2019. The research infers that unlike the previous amendments to Articles 15 and 16 which were reactions to court decisions, the present amendment made by the parliament was not a consequence of immediate provocation caused by judicial decision(s). Rather, it is meant to entrench an office memorandum which was invalidated by the court in

⁹ *Janhit Abhiyan v. Union of India*, W.P. (Civil) no. 55 of 2019.

¹⁰ *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394.

Indra Sawhney v. Union of India (**Indra Sawhney**) on the grounds of violation of Article 16(1). This amendment contradicts the salient features of reservation jurisprudence. The court may therefore be required to revert to the established position of law through non-application of the ‘creamy layer’ test on the SCs and STs as was laid down in *Indra Sawhney*. A petition to this effect is pending before the Supreme Court.¹¹ Additionally, the Court may declare reservation for economically weaker sections as unconstitutional since it may alter the identity of reservation clauses and consequently violate the basic structure of the constitution. This issue is also pending consideration before the Supreme Court.¹²

I. HISTORY OF RESERVATION IN THE INDIAN CONSTITUTION

The SCs, STs and the backward classes of India have been described by the courts as the downtrodden sections of the society.¹³ However, the downtrodden-ness of these communities has been primarily examined through an economic lens.¹⁴ A careful study of the history of the Constitution building process and the Constituent Assembly Debates (**CAD**) will reveal that reservation was not meant to be a poverty alleviation program. A significant portion of the CAD has been assigned for reservation in the legislature.¹⁵ It was evident from the discussion in the Constituent Assembly that reservation in legislature was meant to secure representation of the oppressed communities in governance. Therefore, it is absurd to believe that the reservation of seats in the legislature was meant for alleviation of poverty. Similarly, reservation in employment was guaranteed by the constitution keeping in mind the distribution of powers among the organs of the State.¹⁶ Hence, it cannot be called a poverty alleviation scheme. The history of the Government of India Act, 1919, explores the objectives with which reservation was demanded and how the depressed classes negotiated with the Constitution building process during that time.

¹¹ *The State of Punjab v. Davinder Singh* (2020) 8 SCC 65. A three-judge bench in this case has referred the issue to a seven judge bench to revisit the decision of *E.V. Chinnaiah v. State of Andhra Pradesh* which declared SCs and STs as homogenous constitutional classes which cannot be categorized further.

¹² *Janhit Abhiyan v. Union of India*, Writ Petition (C)No. 55 of 2019.

¹³ See *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

¹⁴ See *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495, *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

¹⁵ Representation of the SCs and STs in the legislature was an important issue discussed at different points in time over the three years of debate in the Constituent Assembly. See, generally for example, *CONSTITUENT ASSEMBLY DEBATES*, Volume VII, November 30, 1948; *CONSTITUENT ASSEMBLY DEBATES*, Volume IX, August 25, 1949 & 14th October 1949 to mention a few.

¹⁶ LIMAYE, *supra* note, 1 at 207-208.

A. Conditions of Support Placed on Behalf of Dalits to be Governed by Majority Rule During the Drafting of Government of India Act, 1919

The untouchables were treated as statutory minorities under the Government of India Act, 1919. The Montague Chelmsford Report which preceded the drafting of the Act of 1919 recognized that special protection should be made for the depressed classes. However, during the drafting of the Act, it could not take a conclusive stand on this issue other than providing them some token representation in the legislature.¹⁷

When the plan for drafting the Government of India Act, 1919, began, Dr. Ambedkar placed a few conditions on the fulfilment of which the depressed classes would agree to be governed by majority rule. Among these, particularly worth mentioning was the demand for the free enjoyment of equal rights under Part XI of the Government of India Act, 1919.¹⁸ It was suspected, and rightly so, by Ambedkar that obstruction by orthodox Hindus is not the only obstacle for depressed classes. According to Ambedkar, there were certain practices by high caste Hindus which were far more dangerous than even violence. One such practice was social boycott. The depressed classes suffered both from a lack of social strength and economic independence against the upper-caste Hindus. Whenever depressed classes attempted to exercise their rights, they were ostracized and evicted from their property. This was followed by stalling of employment or any other village services which they were provided and also the prohibition of the use of public properties such as common-well, public paths, etc.¹⁹ One may note that the demand for access to public services without discrimination was upheld ultimately through Article 15 of the Constitution of India, 1950.

But the mere guarantee of non-discrimination was not enough. Therefore, another important condition laid down by Ambedkar was the representation of depressed classes in the

¹⁷ 17 B.R. AMBEDKAR, DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES (pt. 1) 80 (photo. reprint 2014) (2003).

¹⁸ AMBEDKAR, *Id* at 82 which stated “Whoever denies to any person except for reasons by law applicable to persons of all classes and regardless of any previous condition of Untouchability the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells and other watering places, public conveyances on lands, air or water, theatres or other places of public amusement, resort or convenience whether they are dedicated to or maintained or licensed for the use of the public shall be punished with the imprisonment of either description for a term which may extend to five years and shall also be liable to fine.”

¹⁹ AMBEDKAR, *supra* note 17, at 83. This apprehension also found mention in the Constituent Assembly by Muniswamy Pillai who sought notification of the SCs and STs through central government instead of local government. He claimed that at local level, the vengeance of politically dominant upper caste may lead to non-notification of communities who raise their voice against oppression and claim equal rights. See, Shri Muniswamy Pillai’s statement in the Constituent Assembly, see, CONSTITUENT ASSEMBLY DEBATES, Volume IX, September 17, 1949 1641.

public services.²⁰ He observed that the upper caste Hindus have largely monopolized the public services by abusing the law or misusing the discretion vested in them while administering the law. He recommended that recruitment in public services may not be merely regulated in the interest of depressed classes but for all other communities as well.

Ambedkar's proposal in this regard appeared like this:

“(1) There shall be established in India in each Province a Public Service Commission to undertake the recruitment and control of the Public Services.

(2) No member of the Public Service Commission shall be removed except by a resolution passed by the Legislature nor shall he be appointed to any office under the Crown after his retirement.

(3) It shall be the duty of the Public Service Commission subject to the tests of efficiency as may be prescribed,

(a) to recruit the Services in such a manner as will secure due and adequate representation of all communities, and

(b) to regulate from time to time priority in employment in accordance with the existing extent of the representation of the various communities in any particular service concerned.”²¹

While clause (2) of this condition appears in modified forms in the Constitution of India, 1950,²² for recruitment and termination of civil services, clause (3) of the condition has been adopted in modified form in Article 16 and Article 335 of the Constitution of India, 1950.

There were two more conditions placed by Ambedkar which are significant to understand the objective of reservation from his perspective. Firstly, he believed that the depressed classes should not only be given special representation in public services but also have the means to redress non-implementation of this promise under the Constitution itself.²³

²⁰ AMBEDKAR, *supra* note 17, at 87-88.

²¹ Memorandum titled “A Scheme of Political Safeguards for the Protection of the Depressed Classes in the Future Constitution of a self-governing India” from Dr. Ambedkar at the Indian Round Table Conference to the Minorities Committee 48; see *supra* note 17, at 88.

²² INDIA CONSTI art. 316, art. 317.

²³ AMBEDKAR, *supra* note 17, at 89 reads as: “In and for each Province and in and for India it shall be the duty and obligation of the Legislature and the Executive or any other Authority established by Law to make adequate provisions for the education, sanitation, recruitment in Public Services and other matters of social and political advancement of the Depressed Classes and to do nothing that will prejudicially affect them.

(2) Where in any Province or in India the provisions of this section are violated an appeal shall lie to the Governor-General in Council from any act or decision of any Provincial Authority and to the Secretary of State from any act or decision of the Central Authority affecting the matter.

(3) In every such case where it appears to the Governor-general in Council or to the Secretary of State that the Provincial Authority or Central Authority does not take steps requisite for the sue execution of the provisions of

Secondly, Ambedkar cautioned in clear terms to not delineate depressed classes merely based on their economic conditions, although economic deprivation most often coincides with social deprivation. He claimed that the poverty of the depressed classes is largely due to social prejudice, and this is what differentiates ordinary caste labour from depressed caste labour. Although the economic deprivation of both the classes may appear similar, the social resources available to depressed class labour are extremely limited.²⁴

Another founding father of the Dalit social movement, Jyotiba Phule had also concluded that the Brahmans could maintain their power and position of oppression by maintaining control over state power including revenue collections, taxes, and state takeover of peasant lands even during colonial rule. Therefore, one of the ways of challenging caste oppression was through the representation of oppressed castes in government positions.²⁵ Phule's opinion has been subsequently iterated by Indian socialist activist and essayist Madhu Limaye. According to Limaye, although the executive has the various ministries as its apex, the real executive powers are exercised by bureaucrats. Therefore, although reservation in the legislature is necessary, it is inadequate. To ensure substantive equality of opportunity in governance, reservation for the SCs and STs was necessary in recruitment and in promotions to government services.²⁶

B. Backwardness – Not Economic, but Social and Educational as per the Constituent Assembly Debates

In the Constituent Assembly, the scope of the term 'backward' which appears in Articles 15 and 16 came up for deliberation and debate. Initially, only the term 'Scheduled Caste' was mentioned in the statutes. The term 'backward' was introduced at a national level in the draft Constitution. By this time, only some provincial statutes had attempted to define the scope of backward classes. This caused some speculation and apprehension among the members of the Assembly. The qualifier 'backward' was not only meant to identify the communities who would be eligible for reservation but the scope of this term was also meant to indicate the objectives behind reservation to be guaranteed by the Constitution. Was the term

this Section then and in every such case, and as for only as the circumstances of each case require the Governor-General in Council or the Secretary of State acting as an appellate authority may prescribe, for such period as they may deem fit, take remedial measures for the due execution of the provisions of this section and of any of its decisions under this Section and which shall be binding upon the authority appealed against.”

²⁴ AMBEDKAR, *supra* note 17, at 89-90.

²⁵ GAIL OMVEDT, UNDERSTANDING CASTE: FROM BUDDHA TO AMBEDKAR AND BEYOND, 26 (Orient Blackswan, New Delhi, 2011)

²⁶ *Supra* note 1, at 207.

backward to be defined from a communal perspective? Was it meant to dilute the category of SCs or was it meant to describe communities apart from, and in addition to, the SCs? This issue was discussed in the Assembly on November 30th, 1948. Harijans, who were enlisted in the list of SCs, were most definitely considered for reservation. Further, the scope of backward communities was deliberated upon since there was also consensus regarding the need for upward social mobility of the middle castes who were deprived of social and educational advancements. Mr. Aziz Ahmad Khan of the United Provinces suggested the removal of the term ‘backward’ from the Article²⁷ so that the government may from time to time provide reservation for any group which is underrepresented in public services. The qualifier ‘backward’, according to him, would mean that the government would be forced to guarantee reservation only for those communities shackled by backwardness under this Article. That is, the government would not be free in the future to consider other communities for reservation on the basis of religion or from upper-caste but less-represented groups.²⁸ This amendment was not moved. This shows that though the scope of the term ‘backward’ appeared vague, there was clarity regarding the objective behind reservation. It was not meant to ensure proportional representation of communities. The vagueness associated with the term was refuted by Shri T. Channiah from Mysore. He argued that there has never been any ambiguity with the term ‘backward classes’ in the Southern states. The term unambiguously refers to those communities which are socially and educationally backward. Economically backward communities are not included within this term.²⁹

Regarding the objective behind the constitutional guarantee of reservation, Shri Chandrika Ram of Bihar added that besides the SCs, the backward classes comprising the middle castes also deserve to be considered for reservation. Though they are not considered untouchables, communities deprived of political rights cannot attain prosperity.³⁰ Shri Kakkan from Madras argued that the Harijans were not appointed in government services primarily

²⁷ THE CONSTITUENT ASSEMBLY, THE DRAFT CONSTITUTION Article 10 reads as:

10(1) There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them. Be ineligible for any office under the State.

(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the service under the State.

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

²⁸ CONSTITUENT ASSEMBLY DEBATES, Volume VII, November 30, 1948.

²⁹ *Id.*

³⁰ *Id.*

because the higher officers appointed and promoted people of their own communities.³¹ There was strong opposition for reservation from Seth Damodar Swarup from the United Province). He claimed that the Public Service Commission was impartial and would guarantee against any discrimination. However, Shri Santanu Kumar Dass from Orissa refuted this claim stating that due to existing inequality, even the most impartial institutions cannot be impartial. Also, people from different vulnerable communities could be elected to the Constituent Assembly only because of reservation.³² Ambedkar, while clarifying the objective behind reservation, claimed that the provision aims at breaking the monopoly of a few communities in public administration to provide opportunities to deprived communities. Further, according to Ambedkar, the term 'backward' guarantees a balance between the principle of equality of opportunity and special protection to deprived communities. Without the qualifier 'backward', such balance will be destroyed.³³

Considering that historically, upper-caste people were employed in the public services, the administration was filled with people from only a few communities. Reservation therefore aimed at breaking this monopoly³⁴ to ensure allocation of decision-making authority among all communities including the vulnerable and depressed classes. It was not meant for the economic upliftment of people.

C. Interpretation of 'Backward Classes' by the Judiciary Post-1950

The Supreme Court of India has settled the position of law on the term 'backwardness' through a series of cases.³⁵ The *Indra Sawhney* case attempted to examine different aspects of reservation to finally put to rest all possible controversies related to the issue.³⁶ This included the introduction of the 'creamy layer' test among the OBCs in employment³⁷ and in admission in higher educational institutions aided by the state.³⁸ The 'creamy layer' test excludes those

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ JYOTIRAO PHULE, GULAMGIRI (1873); Also see, Nandini Gooptu, *Caste and Labour: Untouchable Social Movement in Upper Uttar Pradesh in the Early Twentieth Century*, in 2 CASTE IN MODERN INDIA 110 (Sumit Sarkar and Tanika Sarkar eds, 2015).

³⁵ This question has been brought before the Supreme Court since a long time. One of the earlier cases is M.R. Balaji v. State of Mysore, AIR 1963 SC 649. However, this issue has gained better shape in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 and *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 cases in later years.

³⁶ See the majority opinion delivered by Justice B.P. Jeevan Reddy in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

³⁷ *Id.*

³⁸ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

members from the OBC communities who have crossed the economic threshold which made them 'backward'. 'Creamy layer' is thus a judicially developed test. It is not mentioned in the constitutional text. Until the release of Mandal Commission Report, there was no consensus as to who constituted the Socially and Educationally Backward Classes (**SEBCs**) under Article 15(4) and more generally, the backward classes under Article 16(4). The failed Kaka Kalelkar Commission Report³⁹ which remained unimplemented due to the lack of a unanimous decision on the composition of backward classes also reflects the uneasiness and lack of consensus in identifying backward classes for reservation.

SCs and STs are defined in the Constitution of India.⁴⁰ Hence, until recently, the courts have been cautious not to interfere with the SCs and STs which were notified under Articles 341 and 342 of the Constitution by further categorization of these communities.⁴¹ In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*⁴² as well as *State of Kerala v. N.M. Thomas (N.M Thomas)*⁴³, the SCs and STs have been deemed as classes that stand on a substantially different footing as compared to the rest of the communities in India. Backward classes, as per the court, would comprise of those dismally depressed communities who are economically and educationally comparable with the SCs and STs. Such was the state of distinction between the SCs and STs on the one hand and other weaker sections on the other, that it was decided in *N.M. Thomas* that the classification of the SCs and the STs as special categories could be justified even under Articles 15(1) and 16(1) of the constitution, whereas, for other weaker sections, the classification has to conform with Articles 15(4) and 16(4) based on the case at hand. That no further classification of the SCs and STs is permissible⁴⁴ and that the 'creamy layer' test does not apply to the SCs and the STs⁴⁵ were also settled positions of law until the Supreme Court changed its opinion.⁴⁶ The 'creamy layer' test was introduced for the SC and the ST categories at promotion levels in services tacitly, through a 5 judge bench decision.⁴⁷ A different nomenclature in the form of three-prong tests of backwardness, inadequate representation, and efficiency of administration was used by the court. In *Jarnail*

³⁹ BACKWARD CLASSES COMMISSION, KAKA KALELKAR COMMISSION REPORT (1955).

⁴⁰ INDIA CONSTI. art. 341, art. 342. Also, see Art. 366(24) and (25) for definitions of Scheduled Castes and Scheduled Tribes.

⁴¹ For example, *supra* note 6, at para 803, *supra* note 38 at para 182.

⁴² *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

⁴³ *Supra* note 13.

⁴⁴ *Supra* note 10.

⁴⁵ *Supra* note 6.

⁴⁶ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

⁴⁷ *Id.*

Singh,⁴⁸ the Supreme Court struck down the backdoor application of the ‘creamy layer’ test to the SCs and STs. Instead, it held that the ‘creamy layer’ test shall be applied to the SCs and STs in the same way as it is applied to the OBCs. The blanket application of the ‘creamy layer’ test to all the reserved categories for the purposes of reservation was thus brought by the *Jarnail Singh* decision.⁴⁹

II. THE ROLE OF THE JUDICIARY IN DEVELOPING THE CRITERION OF ECONOMIC BACKWARDNESS

The judiciary has played a significant role in introducing the ‘creamy layer’ test to the Indian reservation system. The apprehensions presented by judges through obiters about misuse and the appropriation of the benefits of reservation by the economically well off among the backward classes first injected the concept of the ‘creamy layer’ into reservation discourse. Warning about the dangers of reservation, Justice V.R. Krishna Iyer in *N.M. Thomas* opined that:

“In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is

⁴⁸ *Supra* note 7.

⁴⁹ For more detail on this case, see “*Jarnail Singh and Others v. Lachhmi Narrain Gupta and Others: Supreme Court of India declares application of creamy layer test on the Scheduled Castes and Scheduled Tribes*”, [52 VRU:WCL, 383-395 (2019)].

calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism.⁵⁰

Though Iyer J. clarified subsequently that only social science research and not judicial impressionism would lead one to the truth behind these apprehensions,⁵¹ this suspicion sowed through *N.M. Thomas* found momentum in *K.C. Vasanth Kumar v. State of Karnataka*⁵² in which the warnings of Iyer J. were reiterated by Chinappa Reddy J. Subsequently, the 'creamy layer' test was validated by the Court in the *Indra Sawhney* decision.

While classifying the poorer section of the backward classes from the non-poor backward classes for the apportionment of seats, the Court in *Indra Sawhney* intended to clarify that the poorer section among OBCs has to be determined in the context of social backwardness. The Court cautioned that there is a requirement for the equitable apportionment of seats among the poorer sections of OBCs and other OBCs.⁵³ Yet, in the same decision, the Court upheld the 'creamy layer' test as an economic test meant for a social purpose. The Court refrained from laying the attributes of the 'creamy layer' test. However, it acknowledged that both the legislature and the executive are equipped to lay down the criteria.⁵⁴ Through office memorandums, income and occupational positions had been laid down as criteria to exclude the 'creamy layer' among OBCs post-*Indra Sawhney*.⁵⁵

A. The Apprehension of the Judiciary Against the 'Misuse' of Reservation

Courts have often apprehended that reservation schemes are usurped by the economically well off among the backward classes. This suspicion has two major consequences. Reservation has been validated by the court as an individual-oriented policy wherein the economic hardship of individual members has played an important role in convincing the court about the need for reservation.⁵⁶ Secondly, stigma, or the lack of it, faced by a person is evaluated based on wealth possessed by the person.⁵⁷ The economic assessment of this stigma gave rise to the 'creamy layer' test. On what basis exceeding importance is given

⁵⁰ *Supra* note 13, at para 124.

⁵¹ *Id.*

⁵² AIR 1985 SC 1495.

⁵³ *Supra* note 6, at para 843.

⁵⁴ *Supra* note 6, at para 859.

⁵⁵ Office memorandum from the Ministry of Personnel, Public Grievances and Pension Department of Personnel and Training (May 27, 2013), https://documents.doptirculars.nic.in/D2/D02adm/36033_1_2013-Estt-Res.pdf. This Office Memorandum was struck down in *Indra Sawhney* decision.

⁵⁶ *Supra* note 38, at para 386.

⁵⁷ *Supra* note 38, at para 388.

to the economic aspects of an individual is not known. The Supreme Court has rejected the Marxist notion of class in the identification of backward classes.⁵⁸ At the same time, scholars argue that Nehruvians and left socialists have erroneously ignored caste. Instead, they premise class as the main site of discrimination in modern India. In doing so, the Hindu identity was taken for granted. It was believed that religion and caste identities could be ignored and subverted for economic and technological advancements.⁵⁹

The reservation system is premised on the eradication of discrimination faced by a person for being a member of an oppressed community. Thus, while equality of opportunity guaranteed under Article 16(1) was perceived as an individual right by the court,⁶⁰ reservation is governed by Article 16(4A) based on membership in backward classes.

The Mandal Commission Report recommended the determination of backwardness dominantly based on caste.⁶¹ This recommendation was confirmed in *Indra Sawhney* wherein it was held that caste can be a dominant criterion, though not the sole criterion.⁶² Thus, a combination of caste and class led to the exclusion of the ‘creamy layer’ among backward classes. It was possible to apply the ‘creamy layer’ test to backward classes because no specific criterion was mentioned to identify this category by the Constituent Assembly at the time of framing the Constitution. The identification of backward classes was left to assessment by the local government.⁶³ The same was not the case for the SCs and STs. They are notified based on their social identities through a meticulous procedure.⁶⁴ In 2018, through the Constitution (One Hundred and Second Amendment) Act, the same procedure for identification of the SCs and STs, has been introduced for the identification of SEBCs in the central list for reservation.⁶⁵ Economic conditions of individual members of the SCs and the STs did not adversely affect their opportunity for reservation in educational institutions and public employment until recently.

A five-judge bench which was constituted to determine the correctness of the tacit introduction of the ‘creamy layer’ test on the SCs and STs in 2006, confirmed that the test

⁵⁸ *Supra* note 6, at para 778.

⁵⁹ OMVEDT, *supra* note 25.

⁶⁰ *Supra* note 6, at para 814.

⁶¹ B.P. MANDAL ET AL., 1 REPORT OF THE BACKWARD CLASSES COMMISSION 56 (1980)

⁶² *Supra* note 6, at para 82.

⁶³ Constituent Assembly Debates Vol. VII, 30th November 1948.

⁶⁴ INDIA CONSTI. art. 341(2), art. 342(2).

⁶⁵ India Const. amend. 102, § 4.

applies to the SCs and STs as well.⁶⁶ In doing so, the Court relied upon *Indra Sawhney* for the application of the ‘creamy layer’ test to backward classes which is embedded in the general principle of equality under Article 14 and 16(1). According to the court, it is only with the exclusion of the ‘creamy layer’ that a compact class is formed which conforms to the test of homogeneity.⁶⁷

B. Criticism of ‘Creamy Layer’ Tests by Scholars

After *M Nagaraj*, several scholars had expressed their disagreements regarding the application of the ‘creamy layer’ test to the SCs and STs. Economist Sukhadeo Thorat argued that the exclusion of the ‘creamy layer’ is both theoretically and empirically flawed, since discrimination is faced by both economically well-off and weaker sections among SCs because of their social identities. He also cautioned that the exclusion of the ‘creamy layer’ will lead to their under-representation and halt the ongoing progress of Dalit communities.⁶⁸ The accuracy of Thorat’s claim is reflected in a case filed against CISCO by California’s Department of Fair Employment and Housing⁶⁹ at the United States District Court, Northern State of California. This case was brought against CISCO System Incorporation for enabling two of its upper caste Hindu Indian employees to discriminate against a Dalit Indian employee in the United States. This case serves as a classic example of how economic achievements of a person from a socially oppressed community does not guarantee protection against social discrimination.

Legal scholar Kalpana Kannabiran expressed disagreement with the decision stating that “the crux of affirmative action rests on caste-based discrimination - that is, on grave social disabilities arising from caste status.” Formulation of the concept of the ‘creamy layer’ amounts to articulating acts of discrimination based on economic status alone which results in the distortion of the realities of disadvantaged castes, Dalits, and Adivasis. According to her, “the systematic denial of justice concerning atrocities is inextricably linked to the whittling down of entitlements through the arbitrary action of undefined concepts.”⁷⁰

⁶⁶ *Supra* note 7, at para 21.

⁶⁷ *Supra* note 7, at para 15.

⁶⁸ Sukhadeo Thorat, *Understanding Caste*, TOI (Lucknow), (Nov. 14, 2006), <https://timesofindia.indiatimes.com/edit-page/understanding-caste/articleshow/433442.cms>.

⁶⁹ California Department of Fair Employment and Housings, an agent of the State of California v. CISCO System and Other, <https://regmedia.co.uk/2020/07/01/cisco.pdf>.

⁷⁰ Kalpana Kannabiran, *Reservation and the Creamy Layer*, THE HINDU, (Oct 24, 2006), <https://www.thehindu.com/todays-paper/tp-opinion/reservation-and-the-creamy-layer/article3064833.ece>.

Yet another political economist, K.S. Chalam, cautioned against the use of economic identifier for determination of the ‘creamy layer’. According to him, there may exist two different categories based on economic criterion. Whereas the National Sample Survey data uses income or occupation for defining a class and is also used for exclusion of ‘creamy layer’ among OBCs for reservation, the Marxian concept of class is based on property and the sources of production which are not fluid categories.⁷¹ The economic basis for exclusion in reservation is required to be long term stability as opposed to temporary wealth earned through the availing of reservation.⁷² Arguably, an economic class is also defined by intellectual property as well as social capital.⁷³ Reservation, according to Chalam, is not only meant for removing backwardness based on historical inequalities but is also a step forward in resolving them.⁷⁴ Therefore, it is imperative to differentiate temporary financial stability earned through availing reservation in employment, from more permanent economic stability earned through property ownership and intellectual and social capital, which overpowers caste stigma and ensures economic independence even without reservation. It is also important to note that the terms mentioned in the constitution are ‘socially and educationally backward classes’ in Article 15 and ‘backward classes’ in Article 16. The clauses do not mention backward *persons*; rather, it mentions backward *classes*. Therefore, membership in a class is decisive for the purposes of reservation; but the ‘creamy layer’ test developed by the judiciary subsequently holds otherwise.

Chalam further argues that the application of the ‘creamy layer’ test amounts to double counting on an economic basis for the backward classes. According to him, the Mandal Commission had taken sufficient care and used economic as well as educational indicators to identify backward classes. At least two of the four economic indicators take into consideration the economic property base of the caste to identify backwardness. On top of this, therefore, if the government applies another economic test of the ‘creamy layer’, then it amounts to double counting as well as further marginalization of the group.⁷⁵

Thus, it may be concluded that what surfaced through obiters as mere possibilities subsequently and gradually resulted in the establishment of legal principles. In the process,

⁷¹ K.S. CHALAM, *CASTE-BASED RESERVATION AND HUMAN DEVELOPMENT IN INDIA* 43 (Sage Publications, New Delhi, 2007).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ CHALAM, *supra* note 71, at 62.

⁷⁵ CHALAM, *supra* note 71, at 55- 56.

besides its application on flexible categories, the principle has entered into the core of the notification process adversely affecting those communities which the constitutional texts deem to be backward.

III. CHALLENGES POSED BY THE CONSTITUTION (103RD AMENDMENT) ACT, 2019

Equal treatment for equal and unequal treatment for unequal⁷⁶ is an underlying principle of equality under Articles 14 to 16 of the constitution. Treatment as an equal as opposed to equality through identical treatment has guided the implementation of reservation schemes.⁷⁷ Article 14 mandates classification based on intelligible differentia and a rational nexus between the class and the objective of the law.⁷⁸ Accordingly, classification as SC, ST, and backward classes also has to pass the test of Article 14. However, EWS does not constitute a class for the purposes of intelligible differentia. It is a residual fluid category which comprises of every person who does not belong to SC, ST, and backward classes, and does not possess economic assets beyond the limit set by the government from time to time. Also, the Constitution has already acknowledged SC, ST, and backward classes as categories which are more concrete, distinct, and pass the tests of intelligible differentia and rational nexus, and which have been notified in the Constitution accordingly. Economic criterion alone neither passes the test of intelligible differentia nor the test of rational nexus as is required under Article 14 as well as Article 16(1) of the Constitution.

One common argument used by opponents to perpetual reservation is that economic mobility automatically leads to upward social mobility.⁷⁹ According to this theory, it is enough if reservation is implemented temporarily since reservation results in economic mobility. Reservation must therefore, cease after two or three generations because of upward social mobility achieved through public employment. However, there are various accounts which prove that such presumptions are contradictory to social reality. For example, a survey conducted on untouchability in the mid-eighties⁸⁰ shows that employment in government posts and economic mobility do not automatically lead to acceptance at a social level. Recently, the incident where an upper-caste employer, also a scientist in the Indian Meteorological

⁷⁶ M.P. Singh (ed.), V.N. Shukla's Constitution of India 49 (12th ed., Eastern Book Company, Lucknow, 2013).

⁷⁷ Mahendra P. Singh, *Are Articles 15(4) and 16(4) Fundamental Rights?*, (1994) 3 SCC (Jour) 33.

⁷⁸ *Supra* note 76 51.

⁷⁹ See for example, Dipankar Gupta, *Towards Affirmative Action*, 33 *India Int'l Centre Q.*, 150-161, (2006).

⁸⁰ S.S. Sharma, *Untouchability, A Myth or Reality: A Study of Interaction Between Scheduled Castes and Brahmins in a Western U.P. Village*, 35 *Sociological Bulletin*, 73-75, (1986).

Department, filed a complaint against her domestic help for misrepresentation of caste, shows the deep caste bias which exists among persons employed within government institutions as well.⁸¹ The incident of caste based discrimination by upper caste Hindu Indian employees against their Dalit colleague in Silicon Valley in California is another example which reflects that acquisition of economic wealth cannot protect the socially marginalized against social discrimination.⁸² Reservation is not a capacity-building project. It is a guarantee against discrimination and an acknowledgment of the perpetual discrimination faced by the socially oppressed classes. To put it bluntly, reservation is neither a crutch,⁸³ as has been lamented by the court, nor a vehicle for the reserved categories. It merely guarantees a clearer and obstacle-free path for the socially oppressed communities to walk on.

Sociologist Gail Omvedt argues that the main objective of reservation has been to remove caste-based monopoly on social resources. It is not meant to lift the depressed castes from below poverty line. The upward economic mobility of some of the individuals from depressed castes as a consequence of reservation, should be merely seen as a collateral effect.⁸⁴ Omvedt also cautions that breaking caste monopoly through reservation often creates unorganized and small middle-class sections within depressed castes. Instead of perceiving this phenomenon as a success of reservation, it is used by opponents to prove that it does not help in consistent upliftment.⁸⁵ However, the existence of such middle classes is not a negative outcome of reservation. Rather, by diluting the rigidity of class, reservation makes a bold attempt to reveal the artificiality of caste-based hierarchy. Further, breaking a thousand years of monopoly takes time and creates various intermediate situations that do not necessarily reflect the holistic outcome of reservation.

Unless reservation in employment is explicitly guaranteed, people from the socially backward communities largely remain absent from services because of presumed inefficiency and prejudice. For example, until 2008, the countrywide-known Indian Institutes of Technology did not have faculty reservation for the SCs, STs, and OBCs, though reservation

⁸¹ Vidula Sonagra & Nachiket Kulkarni, *The 'Non-Brahmin' cook from Pune and the myth of 'Caste-less' Middle Class*, 52 EPW Engage, (2017). Though one may claim that such prejudice has occurred outside the course of her employment as a government employee, within the private sphere of her life, one must not overlook the fact that unlike private sectors, decision making in government services are more distributed. The employees through their seniority become decision makers and cast the prejudice on their colleagues and junior employees.

⁸² *Supra* note 69.

⁸³ Justice Jeevan Reddy in *supra* note 36, at para 828.

⁸⁴ *Caste or Economic Status? What should we base reservations on?*, EPW Engage, (2019).

⁸⁵ *Id.*

existed to some extent in administrative posts. This decision by the Ministry of Human Resource Development to introduce reservation in faculty posts has been opposed by the institutions, presuming that “with reservation in faculty positions [...] IITs will crumble”.⁸⁶

A. Constitutionality of Reservation for Economically Weaker Sections

1. Contradictions in the Scope of the Term ‘Economically Weaker Sections’

Social ostracization, educational backwardness, and historical injustice are the criteria that determine eligibility for reservation. Economically weaker sections are present among all communities. EWSs are not outcomes of social discrimination. Rather, flawed economic policies and unemployment, among other reasons, are responsible for the existence of economically weaker sections. Despite economic backwardness, the presence of upper castes in political, social and cultural spheres reveals that it is caste-based discrimination and not economic backwardness that lies at the heart of social injustice.⁸⁷ The fallacy of reservation for EWS through the constitutional amendment of 2019 can be understood further through an examination of the Right of Children to Free and Compulsory Education Act of 2009 (RTE). As per Section 2(d) of the Act, ‘child belonging to disadvantaged group’ means a child belonging to categories mentioned in Article 15(4) of the Constitution that is, SCs, STs, SEBCs or such other groups which are disadvantaged owing to social, cultural, economic, geographic, linguistic, gender or such other factors as may be specified by appropriate government through notification. Section 2(e) of the Act defines ‘child belonging to weaker section’ to include a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government by notification. Under the RTE, economically weaker sections are defined solely based on the income of the family. Based on these definitions, the children belonging to Sections 2(d) and 2(e) of the Act overlap. The definition under Section 2(e) does not explicitly exclude the economically weaker sections among the socially backward classes. This is to say that economic identity alone cannot constitute a class.

A similar example may be found in Article 46 of the Constitution.⁸⁸ The Constitution does not define the weaker sections of the people. Such an attempt was also given up by the

⁸⁶ See for example, Hemali Chhappia, *HRD orders faculty quota, Directors Livid*, TOI, (June 28, 2008); See also, the paranoia of faculty members of IITs against reservation in Prof. M. Balakrishnan, *OBC Reservations: An IIT Faculty Member’s View*, https://www.ee.iitb.ac.in/~hpc/old_studs/hrishi_page/random/reservation.pdf.

⁸⁷ Sandeep Kumar, *Reservation that is Anti-Reservation*, 54, EPW, (2019).

⁸⁸ INDIA CONSTI. art. 46.

Constituent Assembly.⁸⁹ The Supreme Court, therefore, had applied a means test to determine EWS based on annual income in the 90s.⁹⁰ However, the *Indra Sawhney* case clarified that “weaker sections of people” is wider than SCs, STs, SEBCs and “backward class of citizens” and includes all sections of the society that are rendered weak due to various circumstances which may include poverty, and natural as well as physical shortcomings.⁹¹ The Court did not say that economically weaker sections exclude socially backward communities.⁹² The mandate presented before the state under Article 46 of the Constitution requires the promotion of educational and economic interests of the ‘weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes’.⁹³

The Constitution (103rd Amendment) Act, 2019, introducing reservation for EWS⁹⁴ explicitly excludes SCs, STs, SEBCs, and backward classes from its clauses even though backwardness may arise out of physical disabilities and geographical isolation, etc., besides social discrimination. Therefore, when the SCs, STs, SEBCs, and backward classes are excluded, a group constituted on the basis of inadequate family income cannot be categorized as a class. They merely constitute a group which comprises of people solely disadvantaged based on economic backwardness. An economic criterion cannot be the basis of providing reservation. Articles 15(4) and 16(4) are meant to alleviate caste-based discrimination. A person born into an upper-caste family or are related to members of notified communities by marriage cannot be entitled to reservation.⁹⁵ Reservation under the Indian Constitution is not based on the utilitarian or distributive justice principles.⁹⁶ Based on records from the Constituent Assembly and through assessments by noted Indian jurists, one can safely conclude that reservation is premised on the principle of compensatory justice and is targeted only for those communities who are socially disadvantaged.⁹⁷

2. Preference for Economically Backward Classes and Prejudice Against Socially Backward Classes

⁸⁹ *Supra* note 28. Also see *Supra* note 76, at 382.

⁹⁰ *Id.*

⁹¹ *Supra* note 6, at para 552.

⁹² *Supra* note 6, at para 196.

⁹³ INDIA CONSTI. art. 46.

⁹⁴ INDIA CONSTI. art. 15(6), art.16(6), *inserted vide* the Constitution (One Hundred and Third Amendment) Act, 2019.

⁹⁵ *Supra* note 76, at 99.

⁹⁶ *Id.*

⁹⁷ *Id.* Also see Professor B. Errabbi, *Protective Discrimination: Constitutional Prescriptions and Judicial Perceptions*, Delhi Law Review Vol. 10 & 11, 1981-82, 72.

Caste-based discrimination is a collective phenomenon. Individual economic mobility does not automatically remove the stigma of caste. The Constitution (103rd Amendment) Act, 2019, reflects caste-based prejudice. For the upper caste economically weaker sections, it is presumed that but for the economic poverty, these sections of the upper caste population would have been eligible for admission in educational institutions and appointments in public services. Thus, their inclusion in reservation did not trigger debates on meritocracy in the same way as reservation for the SCs, STs, and OBCs have done. However, for the backward classes entitled to reservation, namely, the SCs, STs, SEBCs and backward classes, a member is not only required to prove membership of a community notified for reservation but also to show that they are also economically backward and do not fall within the 'creamy layer'. Further, for the socially backward classes, it took 69 years for Supreme Court to acknowledge that efficiency of administration has to be assessed in the context of social justice as opposed to a narrow interpretation of talent and success.⁹⁸

The excess importance placed on economic backwardness over social backwardness amounts to delegitimizing the lived realities of the social oppressions faced by depressed classes in favour of economic disadvantages faced by forward communities. As discussed in the previous section, there was a consensus in the Constituent Assembly that the government did not have free reign to include any community in this provision as it deemed fit. Social and educational backwardness were the key components for the notification of communities under these provisions. Therefore, this amendment is a departure from the constitutional vision.

B. From an Invalidated Office Memorandum to a Constitutional Amendment

The Constitution (103rd Amendment) Act, 2019 is not a novel idea. An office memorandum challenged in *Indra Sawhney* provided for up to 10% reservation for economically weaker sections of the society who did not fall in the reserved category under Articles 15 and 16 of the Constitution.⁹⁹ The Court invalidated the memorandum. The bench decided that a person cannot be barred from consideration for appointment in public services solely based on property holding or income. Employment under the state is meant to serve the people. It is a secondary consideration that employment under the state also serves as a source of livelihood for those who are appointed in the posts. Therefore, according to the court, any bar created based on the economic status of a person directly violates Article 16(1) of the

⁹⁸ B.K. Pavithra v. Union of India, (2019) 16 SCC 129 paras 129- 137.

⁹⁹ *Supra* note 6, at para 845.

Constitution.¹⁰⁰ This opinion delivered in *Indra Sawhney* also finds corroboration from eminent Indian jurists. Along with some jurists like B. Errabbi¹⁰¹, Mahendra P. Singh also strongly agrees that representative or distributive justice is a matter of equality and can be attained through Article 14 itself.¹⁰² Reservation clauses do not guarantee distributive justice. This proposition is also a settled position of law emphasized by the Supreme Court of India in multiple cases.¹⁰³

Another constitutional irregularity which arises out of The Constitution (103rd Amendment) Act, 2019, is that the new clauses (6) of Articles 15 and 16 are not coherent with the rest of the provisions of Articles 15 and 16. One may recall this issue through the statements made by Ambedkar in the Constituent Assembly. Ambedkar mentioned that with the inclusion of the term ‘backward’, a balance is struck between the first two clauses of Articles 15 and 16 with the last clauses.¹⁰⁴ This is to say, the right to equality of opportunity and the right to non-discrimination is balanced with the right to treatment as an equal.¹⁰⁵ Secondly, doubts were posed regarding the nature of the relationship between the clauses of Articles 15 and 16. Whether Articles 15(4) and 16(4) are exceptions to the fundamental rights guaranteed through clauses (1) and (2) of Articles 15 and 16 remained a matter of debate until the Supreme Court decided otherwise in *N.M. Thomas*.¹⁰⁶ Finally, in *Indra Sawhney*, it was emphasized by the Court that Article 16(4) is a facet of equality guaranteed under Article 16(1). Clause (4) does not derogate from clause (1) of Article 16. Rather, it provides positive support and content to Article 16(1).¹⁰⁷

One must also recall on this issue the dilemma presented before the court on the issue of caste-based discrimination through reservation. Without laying out the details, it suffices to say that the court has laid down that reservation does not amount to discrimination based on caste because in the identification of backward communities, only those castes which are

¹⁰⁰ *Supra* note 6, at para 845.

¹⁰¹ Professor B. Errabbi, *Protective Discrimination: Constitutional Prescriptions and Judicial Perceptions*, Delhi Law Review Vol. 10 & 11, 1981-82, 72.

¹⁰² *Supra* note 76, at 99.

¹⁰³ *Id.*

¹⁰⁴ *Supra* note 28.

¹⁰⁵ *Supra* note 76.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

socially and educationally backward, are notified.¹⁰⁸ Therefore, classification is not based on caste alone.

Neither Article 15(1) nor Article 16(2) enumerate economic condition as a ground of non-discrimination. Various other grounds such as disabilities, sexual orientations, etc. are also not enumerated in these two clauses. The reasons behind their absence are, however, different. While the later grounds were not even deliberated in the Constituent Assembly as requiring positive action under Articles 15 and 16, the former ground was deliberated and rejected by the members.¹⁰⁹

The constitutional validity of Articles 16(4A) and 16(4B) was challenged before the Supreme Court in *Nagaraj*. While upholding the validity of these two constitutional amendments, the Court laid down two tests to determine if there is a violation of the basic structure of the constitution. The width test checks against moving beyond the scope of a provision. The identity test checks against the alteration of the characteristics of the provision.¹¹⁰ The scope of reservation provisions has been to include all socially and educationally backward communities. Any class identified solely based on economic backwardness has been rejected by the drafters in the constitutional text and also by judges in courts of law. As for the identity test, it needs to be reiterated that reservation is not a poverty alleviation scheme. The provisions appear in the fundamental rights chapter of the Constitution to provide protection against social discrimination and eradicate social and educational backwardness. Therefore, the Constitution (103rd Amendment) Act, 2019 may not pass the identity test either. This indicates that the Constitution (103rd Amendment) Act may violate the basic structure doctrine.

Finally, *Indra Sawhney* has already declared that reservation solely on an economic basis directly violates 16(1) of the constitution. Therefore, the mere conversion of an invalidated office memorandum into a Constitutional Amendment does not cure the conflict created between Article 16(1) and 16(6) of the Constitution.

The constitutionality of the Constitution (103rd Amendment) Act, 2019 has been challenged before the Supreme Court. The decision of the Court is awaited. In a recent five judge bench decision of the Supreme Court concerning a related issue of reservation, this

¹⁰⁸ *Supra* note 13, at para 169.

¹⁰⁹ *Supra* note 28.

¹¹⁰ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 para 102.

matter was raised before the court.¹¹¹ However, the court refrained from commenting on the issue since the matter is pending before the court.

CONCLUSION

A constitution may be interpreted with an originalist approach or a functionalist approach. Courts should not be forced to constantly adjudicate constitutional principles with the apprehension that certain interpretations of the constitutional provisions will unsettle the majority and the socially dominant classes. The interpretation of the constitution has to be guided by the rule of law. While interpreting provisions on reservation under the Indian Constitution, the Supreme Court has often had to play the role of a negotiator between those favouring the status quo of social hierarchy and those seeking social change. In the process of maintaining peace, the court had to strike a balance between opposing demands and reach some agreements; interim injunctions on implementation of orders, imposing a 50% ceiling on reservation, and introducing the 'creamy layer' test for backward classes are some prominent examples. Though many of these decisions were taken by the court to maintain peace, they have subsequently been incorporated in jurisprudence.¹¹² There are some basic features of reservation in India which can be understood from the CAD, the constitutional text, and the decisions of courts. Among these sources, only the CAD have remained timeless and static. Both the constitutional text and the decision of courts have changed their characters over time. The changes have been slow, and the shifts have been one step at a time. However, through the introduction of the 'creamy layer' test for the SCs and STs and the introduction of reservation for EWS among the non-backward classes, the judiciary and the legislature respectively have taken risky steps which may move away from the basic constituents of reservation. While upholding the constitutional validity of the amendment introducing reservation in promotion, the court laid down the width and identity tests to assess the violation of the basic structure. These tests laid down in *Nagaraj* show that the basic characteristics of a constitutional provision cannot be stretched to such width that it loses its identity. The application of the 'creamy layer' test to the SCs and STs may appear like a mere extension of existing practice. In the same way, the introduction of reservation for economically weaker sections among non-backward classes in addition to the 50% reservation for backward classes may appear as a benign step to extend benefits to poor classes of people. However, one may find that these two

¹¹¹ Jaisri Laxman Rao v. Chief Minister, Civil Appeal No. 3123 of 2020.

¹¹² Mahendra Pal Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, 1 NUJS L. Rev. 194, 197-198, (2008).

alterations change the basic characteristics of reservation. The application of the ‘creamy layer’ test to the deemed socially backward classes legitimizes and prioritizes economic backwardness as the primary cause of inequality. A nine-judge bench¹¹³ had cautioned against the application of the ‘creamy layer’ test on the SCs and STs which a subsequent five-judge bench has ignored. This is judicial impropriety. Regarding the latest Constitutional Amendment introducing reservation for the EWS, an office memorandum invalidated by the court on merit has been transformed into a constitutional amendment. Also, the CAD reveal that reservation on the grounds of economic backwardness has been deliberated upon by the assembly and has been rejected. Both of these developments run the risk of restoring the status quo of social hierarchy which the Constitution aimed at dismantling. Petitions seeking non-application of ‘creamy layer’ test to the SCs and STs and invalidation of the Constitutional Amendment providing reservation to EWS, are pending before the Supreme Court. These two decisions will determine the foundation on which equality jurisprudence in India shall thrive.

¹¹³ *Supra* note 6.