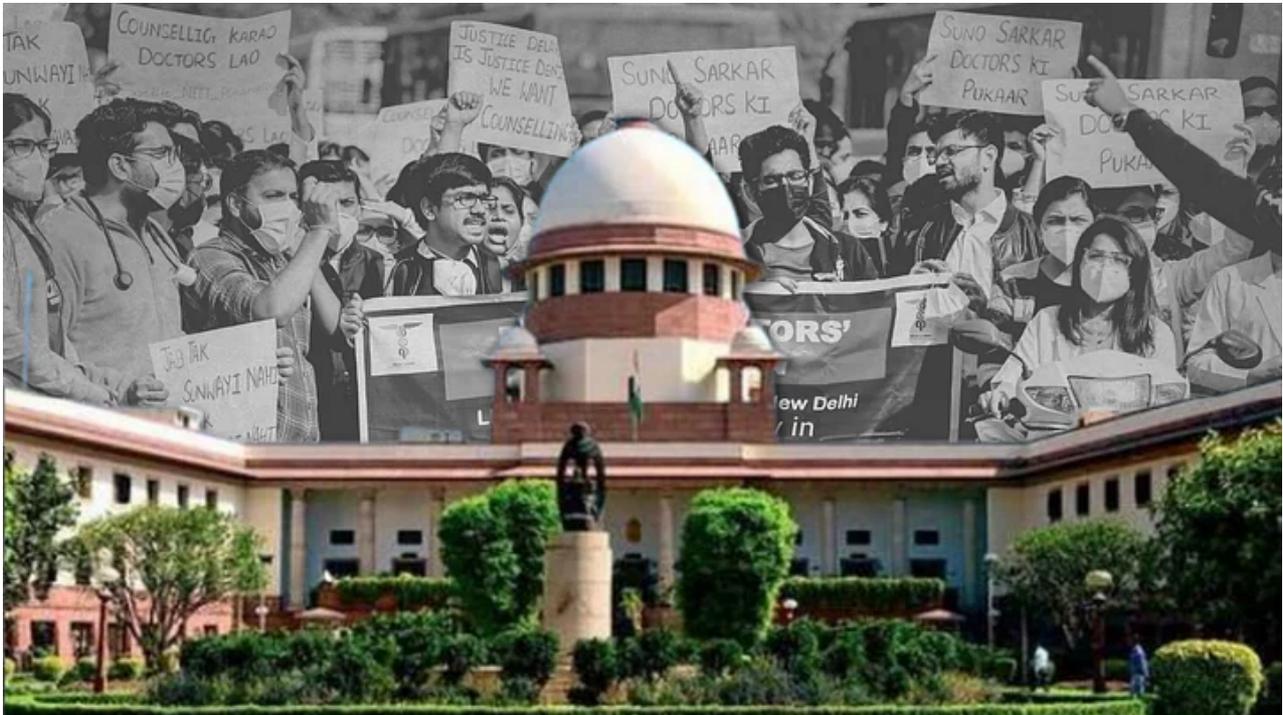


10% EWS Quota, Class Vs Caste: Can India Fix Its Broken Socio-Economic Policy?

thequint.com/voices/opinion/sc-on-ews-how-10-govt-quota-recognises-class-struggle-but-leaves-behind-caste-constitutional-amendment-supreme-court-verdict-on-reservation

November 9, 2022



On what could be considered as a big win for the Modi Government as part of its 2019 electoral promise, the Supreme Court on Monday, upheld the 103rd Constitution Amendment Act, granting 10% reservation to the Economically Weaker Sections (EWS) among the upper castes in a 3:2 constitutional decision.

A constitution bench that comprised the Chief Justice of India (CJI) UU Lalit, Justice Dinesh Maheshwari, Justice JB Pardiwala, Justice Bela M Trivedi, and Justice Ravindra Bhat delivered the verdict on the pleas challenging the EWS quota in government educational institutions and employment.

It was one of the rare judicial occasions where the Chief Justice was amongst the minority (dissenting) the 3:2 verdict.

Also Read

[EWS Quota Verdict Today: What Did Petitioners Argue in SC? What Did State Say?](#)



SC on EWS Reservation: Key Takeaways

There are three key points emerging from this major Supreme Court decision that seeks to accredit class-based considerations for affirmative action over other social categorisations of identity (from caste, race, ethnicity, et al).

Firstly, this verdict is likely to have a profound impact on the constitutional provisions of previously safeguarded affirmative action, particularly for SCs/STs and other listed communities envisaged and protected for reservation as per the founding fathers of the Indian Constitution.

Secondly, constitutionally, the verdict raises a big question mark in front of the SC on whether its own verdict in this case may violate the “basic structure of the Constitution”, a “structure”, that the Court itself considered sacrosanct since the 1973 landmark judgment of the SC in the *Keshavananda Bharati* case.

And thirdly, from a socio-economic perspective, it becomes pertinent to analyse to what extent such a cocktail recipe of affirmative action — now with another 10% quota for EWS category, will impact the already existing fault lines of a deeply stratified, broken socio-labour scenario.

Does The EWS Quota Guide Any Affirmative Action?

Let's address each point one at a time.

On the first point, it can be argued that the philosophical design of the Equality code of the Indian Constitution, established as per Article 15(1), 16 (1), 16 (2), 16 (4), and 17, affirmative action for Scheduled Castes [SCs] has a premier status in the sprawling range

of 'special provisions' the Indian affirmative action regime offers.

Its constitutional logic aside, as per Anant Sangal, it is critical to highlight that "the very rationale undergirding the affirmative action framework is such, that it is able to redeem itself as a social and moral reality most substantively when invoked primarily by the Supreme Court in India."

There is a special status of the Scheduled Castes (and Scheduled Tribes) in the Indian Constitution, arguing that the Equality Code itself is a radical response to India's deeply stratified social order, sectorised into the Varna social groups and those outside it, i.e. the pariahs

It was the Drafting Committee's umbilical linkage to India's collective historical realities that imparted the Equality Code with its modern-day shape and substance. In that limited sense, the induction of the EWS quota is an upsetting departure from the Code's normative ambitions.

As Galanter argues, the "purpose of compensatory discrimination was to promote equalisation of offsetting historically accumulated inequalities, which resulted in their forever economic deprivation and social decimation."

Still, the Indian Parliament's repeated experimentation(s) with affirmative action militated against the settled principles has often overlooked the historical rationale for 'quota' disbursement.

This is what I mean by the Indian Legislature and Judiciary's cocktail recipe of affirmative action. On the legislative side, no one political party can be deemed more responsible for this—all share equal blame.

Judiciary Needs To Sort Out the Reservation Issue

Ad hoc recipes of affirmative action seen from one state to another have resulted in a *khichdi* of judicial reviews and pronouncements.

A politically-charged, cocktail discourse surrounding the issue of reservation for oppressed or marginalised communities quite often result in a muddled scenario, presenting no coherent social policy or legally progressive framework for the upward social and economic mobility of (newly) reserved groups over time.

And, quite often, such a state of political paralysis, subsequently leaves too much in the hand of the courts to interpret and decide. The inevitable voids created from the lack of legislative interventions result in the yielding of extra-constitutional powers to the court itself.

The recent verdict is a classic testament of this.

What Qualifies As SC's 'Creamy Layer'

Earlier, the Supreme Court introduced the framework of 'creamy layer' in ensuring reservations in promotions for Dalits (Scheduled Castes) and Adivasis (Scheduled Tribes). The 'creamy layer' test is an umbrella concept that puts an income ceiling on people availing reservations in government jobs and education. Previous to this judgment, the concept was limited to the OBC (Other Backward Classes) quota only.

However, from the court's judgment, there are no deterministic criterion provided in ascertaining income ceilings for reserved groups nor is any information provided on how often the state may need to revise these ceilings (or, on what basis). Additionally, there are some fundamental issues of a wider (social) policy ramification that require closer attention.

One, the issue of reservation for SCs and STs is allowing for constitutional remedies and protection based on historical social injustices done to these groups due to discrimination based on their social identity and not on their state of economic deprivation alone, as the creamy layer test seeks to address.

As supported by PS Krishnan, "backwardness in the case of Dalits and Adivasis cannot be judged using the creamy layer framework, but because they are subject to untouchability" based on their birth.

An individual who is a Dalit or an Adivasi may become a district collector or a higher-ranked state official, but may still continue to be discriminated based on her/his social identity. It was for this very reason that SCs and STs were earlier excluded from the creamy layer economic test as their social backwardness had little to do with their economically deprived state.

How Can Equality of Reserved Groups Be Ensured?

While the creamy layer test seeks to work under the principle of ensuring equality of opportunity for members of the reserved groups, equality, for its own sake, must be substantive in nature and not just formal.

In ensuring equality of economic opportunity, there has to be a few essentials or pre-conditions included in designing reservation policies that principally accommodate a group's backwardness, inadequacy of representation and overall administrative efficiency in implementing the policy itself. A similar argument was made earlier by Rajeev Dhavan while defending the *Nagaraj judgment of 2006*.

Also, the issue of caste or identity-based discrimination must be viewed in separation from economic or class-based discrimination. Very few people from reserved groups are actually seen to be part of some higher income occupational group, so, an ad-hoc measure like the 'creamy layer' test can hardly be justified without concrete statistical evidence of some social trend observed within the group.

Thirdly, and lastly, a larger issue here remains concerned with the inadequacies of the Indian legislator to present or implement a coherent social policy for affirmative action needed for all reserved groups.

The challenge for India is that, while many sections of the society remain disadvantaged in terms of social and economic opportunities, political or legislative action has further shifted to reserved groups to much higher relative discrimination. See the case of access inequality below to understand the extend of concerns associated with the socio-economic upliftment of reserved groups/communities.

Socio-Economic Case for Reservation: Minimising ‘Inequality of Access’

In this author’s work on producing the Access (In)Equality Index (AEI) last year, one of the key analytical areas of our index work included a comprehensive diagnosis of the state of ‘access inequality’ for different social groups, or those disadvantaged by their social identity.

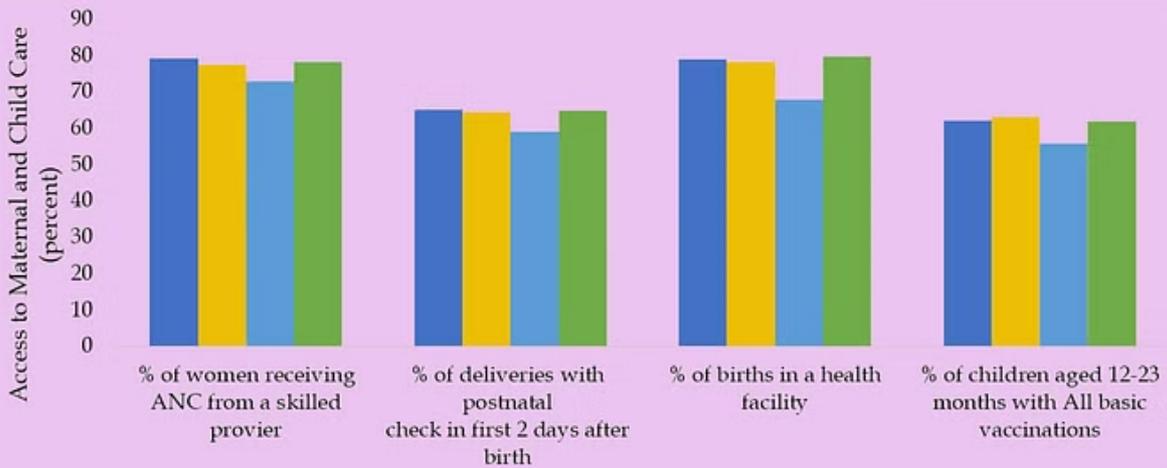
The National Family Health Survey 2015-16 (NFHS-4) shows that 45.9 percent of ST population were in the lowest wealth bracket compared to 26.6 percent of SC population, 18.3 percent of OBCs, 9.7 percent of other castes and 25.3 percent of those whose caste is unknown.

Skewed distribution of wealth and income co-exist with inequalities in access to opportunities, allocation of resources, availability of social capital for the Indian social structure. SC/ST/OBC households lag behind in overall socio-economic development because of unequal access to opportunities.

Access to basic amenities: Marginalised caste groups such as Scheduled Castes (SCs), STs and OBCs are not allowed to access the same water sources (e.g., wells or community stand-posts) as dominant caste groups in some rural villages in India. This is based in orthodox social beliefs which creates a barrier to access basic amenities, not only water, but also other necessities like community toilets, decent housing, etc.

Access to healthcare: There is a lack of effective access to health care by marginalised groups in India. This is more pronounced for maternal healthcare –primarily because these groups have been traditionally excluded and discriminated, suffer from high incidences of poverty, deprivations, and low levels of education & awareness, which have made their access to public healthcare tougher. The disparities are visible in the figure below.

Access to Maternal and Child Health Care: By Caste



Source: NFHS4

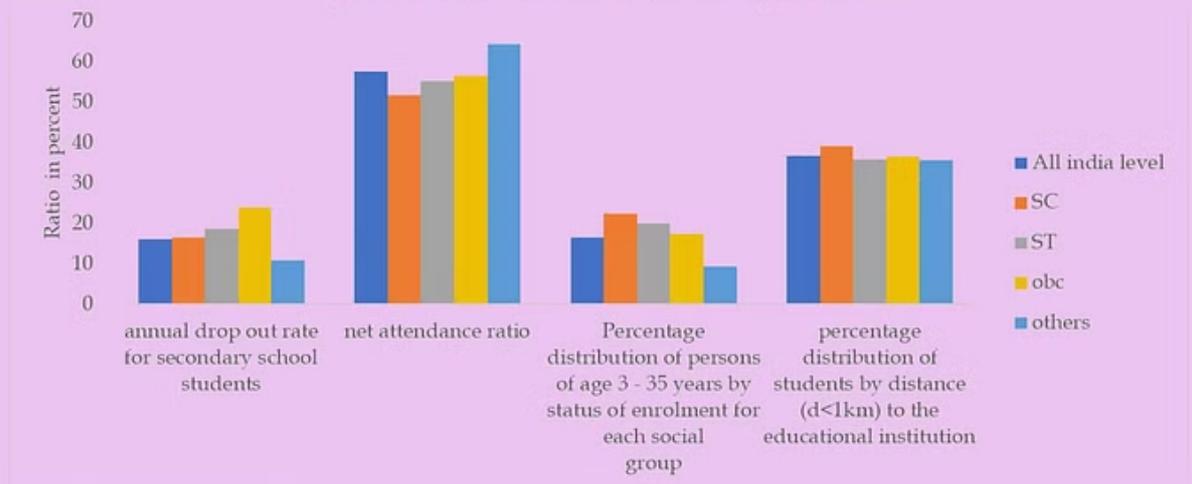
Access to Maternal, Child Health Care By Caste

Image: Chetan Bhakuni/The Quint

Access to primary/secondary education: More students belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes drop out of schools in Class 9-10 than all India average, indicated greater hardships in accessing and continuing schooling for marginalised students.

Boys belonging to the ST categories recorded the highest dropout rate with 25.51 percent followed by girls from the same category which recorded 22.49 percent. Though enrollment in secondary education for students belonging to SC, ST, OBC groups is higher than all India average, actual attendance is lower.

Drop Out, Attendance and Enrolment by Caste



Source : UDISE, NSSO

Drop Out, Attendance and Enrolment by Caste

Image: Chetan Bhakuni/The Quint

Access to decent work: NSSO data for 2009–10 shows that 92.1 percent of Scheduled Castes (SCs) in rural areas were landless or had marginal landholdings (one hectare or less), which points towards preponderance of SCs in casual labour. Such inequalities exist in the labour market and require deeper analysis. WPR for OBCs is lower than the all-India average, indicating lower access to jobs (see figure 3 below)

Percentage WPR (PS+SS) All Ages (2018-19) by social groups



Source: PLFS (2018-19)

Percentage WPR By Social groups

Image: Chetan Bhakuni/The Quint

Access to Legal Recourse: States struggle to also reach the adequate diversity in representation for Scheduled Caste, Scheduled Tribe, and Other Backward Classes. In terms of access to fair legal environment, as many as 55 percent of undertrials across the country are either Muslims, Dalits or tribals, who comprise 39 percent of the population —displaying a potential bias in arrests.

Among the states and Union Territories (UTs), the median value (the midpoint of a dataset) for scheduled caste officers against their sanctioned number was 76 percent. In other words, while 15 states and UTs have filled 76 percent or more of the scheduled caste officer quotas, another 21 had done less than 76 percent.

For SC constables, the median value was 89 percent, suggesting that states and UTs were more responsive in filling these vacancies at the constabulary level than at the officer level.

Diversity in Police (All India Average): Actual to Reserve Ratio (Jan 2020)



Source: IJR, 2020

Police Diversity: Actual to Reserve Ratio

Image: Chetan Bhakuni/The Quint

Police: Backward Castes, Dalits, and tribals constitute almost 67 percent of India’s population but their representation in police forces in the country is only at 51 percent. Tribals, who form 8.6 per cent of the population, have 12 percent representation in the police forces, placing them at a comparatively better position. OBCs fare the worst on the representation front. The data shows against a 41 percent share in the population, OBCs constitute only 25 per cent of the police forces.

Judges: The representation of OBCs or Other Backward Classes in the subordinate judiciary of 11 states adds up to 12 percent, lower than the community’s share of the population. Dalits comprised less than 14 percent of judges in the subordinate judiciary, including district courts, and tribals about 12 percent

Is India’s Reservation Policy Inclusive or Exclusive?

As a number of communities across states have received (or continue demand for) a higher representative proportion of reservation in areas such as higher education, employment opportunities etc, – and so the reservation pie growing larger – affirmative action across India seems to have become a method of exclusion rather than inclusion.

Recent cases from Haryana (agitation for Jat reservation), Maharashtra (protests for Maratha reservation) and Gujarat (Patel reservation demands) echo such socially-exclusive, divisive behaviour among groups (often culminating into violence).

Economic backwardness within social groups, surfacing from rising inequities within the distribution of economic resources, mustn't be substantiated as a legal reason for demanding a representative quota in alignment with other reservation policies for constitutionally safeguarded groups (such as SCs, STs) for protecting them against any form of social discrimination (with evidence of historical subjugation).

Class vs Caste Treatment in India

Class-based economic considerations are likely to 'caste' and other vital socio-identity based categorisations, which a Brahmin-Baniya order of the BJP's upper class political elite want to achieve, invisibilising the pain and suffering of those who have continued to suffer injustice historically (from Adivasis to Dalits).

What the Supreme Court will do, through the creation of the EWS category, is to allow the party to achieve that, and further perpetuate an explosion of deep-rooted social and subsequently economic inequalities, amongst, within and across reserved social groups in India.

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