



CONSTITUTIONAL SCRUTINY OF THE 103rd AMENDMENT: EXAMINING EWS RESERVATION AND THE BASIC STRUCTURE DOCTRINE

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Abstract

The 103rd Constitutional Amendment introduced a 10% reservation for economically weaker sections (EWS) among the general category, excluding Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs). This move sparked debates over whether economic criteria alone could justify reservations and whether the exclusion of traditionally marginalized groups was constitutional. This paper critically examines the constitutionality of the EWS reservation, arguing that while economic backwardness deserves state protection, the exclusion of SCs, STs, and OBCs who meet the same economic criteria raises concerns about equal opportunity. The decision to restrict EWS benefits to the general category effectively denies economically disadvantaged SCs and STs additional support, potentially contradicting the principle of substantive equality. The paper also highlights the absence of updated empirical data, as the policy continues to rely on the 2011 Census, thereby questioning the precision of its implementation. While the Supreme Court has upheld the amendment, the debate surrounding its constitutional validity persists, necessitating a more nuanced approach to reservation policies that balance economic and social disadvantages.

Keywords: 103rd Constitutional Amendment, EWS Reservation, Economic Backwardness, Reservation Policy.

Introduction

Government of India under the 103rd Amendment of the Constitution, by insertion of Articles 15(6) and 16(6), enabled 10% reservation for economically backward class specifically belonging to the General Category whose family income is below 8 lakhs *per annum*, agricultural land less than 5 acres, residential flat less than 1000 sq. ft. and having residential plot less than 100/200 sq. yards.

The constitutionality of the said provisions was challenged in the court in the case of *Janhit Abhiyan v. Union of India*¹, where exclusion of SC-ST and other backward classes was alleged to be infringing the basic structure doctrine. In this case, the Supreme Court in a 3:2 majority held such reservation by means of exclusion not violative of the basic structure doctrine and court added that the ceiling of 50% held in *Indra Sawhney v. Union of India*² Case can be exceeded. The article examines the validity of 103rd (Amendment) Act of the Constitution in the light of *Janhit Abhiyan v. Union of India*.

A Brief History of Reservation

The strata of Indian society were divided into various caste based categories since time immemorial. The Hindu society was categorized into various castes or *varnas*. The Brahmins

¹ (2023) 5 SCC 1

² AIR 1993 SC 477.



or priestly caste, the Kshatriyas or the warrior caste, the Vaishyas or merchant class and the laboring caste known as Shudras. It also included another class, the Dalits or untouchables. The caste based social hierarchy was strictly observed from the post Vedic times through social separation and endogamy. The system of caste ruled all facets of a person's life including his occupation and social stature. If the early Vedic times were categorized by casteless and classless society, the later period was characterized by economic and social inequalities and various caste based atrocities. The Scheduled Caste and Scheduled Tribe were people who were subjected to this age-old practice of class inequalities. To end this disparity, affirmative action in the form of reservation was adopted in the Indian Constitution.

The system of reservation was established during the late 19th century when India was still under the rule of the British Empire. The pivotal role of introducing the reservation system was undertaken by William Hunter and Jyotirao Phule. The Princely states of Mysore and Kolhapur were the first ones to advance their society socially and educationally through the system of reservation. Rajarshi Shahu, the King of Kolhapur made reservations for non-Brahmins in the education and employment sector in 1902.

The British government introduced elements of reservation in the Government of India Act of 1909. With the intent to resolve caste based conflicts in India, the then British Prime Minister Ramsay Macdonald introduced a communal award which assigned separate electorates for Scheduled Castes, Muslims, Sikhs, Buddhists, Indian Christians, Anglo Indians and Europeans. The depressed classes were assigned seats to be filled by election from constituencies in which they could vote. This was strongly opposed by many leaders including Mahatma Gandhi. Mahatma Gandhi saw the danger to Hinduism with the introduction of communal award and his threat to go on a fast unto death resulted in the signing of the Poona Pact. With the introduction of the Constitution of India, seats were reserved for Scheduled Caste and Schedule Tribe in education and employment sectors and the common practice of untouchability was abolished.

It was with the introduction of Mandal Commission by Prime Minister Morarji Desai, Other Backward Classes were brought under the ambit of reservation. It was established to recognize and uplift the socially and educationally backward classes. The first attempt to reserve seats at 10 % or quota for economically weaker sections was made by Narasimha Rao in 1992. The recommendations of the Mandal Commission were adopted by Prime Minister V.P. Singh and implemented 27% reservation for Other Backward Classes in education and employment sectors.

In *M. R. Balaji v. State of Mysore*³, the Supreme Court observed that social backwardness is also a result of poverty along with occupation and place of habitat. The object of making a special provision for the advancement of castes or communities is to carry out the mandate of the Directive Principle enshrined in Article 46. Unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality cannot be attained. Article 15(4) authorizes the State to take adequate steps to achieve this object. In *Balaji*, only 32% of the seats were available on merits, rest was given on reservation was held to be violative of Article 15(4) for the consideration of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Art. 15(4) can be special provision which excludes the rest of the society altogether. It was for the first time, in this case, that the Supreme Court held that reservation shall not exceed 50%.

The Question of Limit on Reservation- *Indra Sawhney*

³ AIR 1963 SC 649.



A notable effect of the *Janhit Abhiyan case*⁴ was that it overruled the decision in the landmark judgment of *Indra Sawhney v. Union of India*⁵ pertaining to the 50% ceiling in reservations. Until the former was pronounced, the latter, decided by a nine judge bench, was primarily relied upon in reservation cases. Popularly known as the Mandal Commission Case, the *Indra Sawhney* case emerged against the backdrop of the implementation of the Mandal Commission Report of 1979. Interestingly, the report also had a clause on introducing 10% reservation for the economically backward sections of the unreserved category⁶, which took the 103rd amendment to finally manifest.

The observation in *Balaji's case*⁷ that backwardness of a class under Article 15(4) has to be both social and educational and not either of the two was accepted in *Indra Sawhney*. The court approved the contentions on behalf of the petitioners that caste alone cannot be the basis for identification of backwardness. It was further added that neither can economic criteria be solely relied on to determine backwardness. However, exclusion of the 'creamy-layer'- ie., the socially better placed individuals amongst the other backward classes- has remained the norm ever since it has been recognized in this case. Given that creamy layer is excluded, it is fairly reasonable that the economically backward classes be included in reservation for a social balance⁸, as rightly observed in *Ashok Kumar Thakur v. Union of India*⁹.

Further, it was held that there was no constitutional bar on classification of backward classes into more backward classes and backward classes on the basis of social backwardness in order to ensure equitable distribution amongst them. One can observe that a similar division is done by the 103rd amendment to ensure that the weaker section amongst the unreserved category be given equal opportunity.

However, in the matter pertaining to the clause on 10% reservation for the unreserved, in *Indra Sawhney*, the court held that reservation solely on the basis of income/ property holding is not constitutionally valid as it creates a bar on the right of equal opportunity guaranteed under clause (1) of Article 16 of the citizens excluded from the said 10%.

As already mentioned, the judgment affirmed the 50% limit on reservations which was previously held in the *Balaji* case. The majority, however, was of the opinion that relaxation may be provided in this strict rule in extraordinary circumstances, owing to the diversity of the country, say for people from remote areas who are out of the mainstream national life. But it was emphasized that extreme caution has to be exercised in doing the same. Further, it was held that for the application of this rule, reservations should not exceed the 50% limit in any cadre or service in any given year, thereby overruling the carry forward rule propounded in *Devadasan v. Union of India*¹⁰.

Reservation in Promotion- *M. Nagaraj v. Union of India*¹¹

By the 77th Constitutional Amendment, the government introduced Article 16(4A) enabling the State to make any law regarding reservation in promotion for SC/STs. Further, Article 16(4B) was added by the 81st Amendment to the Constitution, which provides that reserved promotion posts for SC/STs that remain unfilled, can be carried forward to the

⁴ *Janhit Abhiyan v. Union of India* (2023) 5 SCC 1.

⁵ AIR 1993 SC 477.

⁶ Commission report

⁷ AIR 1963 SC 649.

⁸ DD Basu, *The Commentary on the Constitution of India*.

⁹ AIR 2008 SC (Supp) 1.

¹⁰ AIR 1964 SC 179.

¹¹ (2006) 8 SCC 212.



subsequent year. Article 16 (4B) also ensured that the ceiling on the reservation quota capped at 50% by *Indra Sawhney* for these carried forward unfilled posts does not apply to subsequent years.

In this case, the constitutional validity of both these amendments were challenged, wherein the Honorable Supreme Court validated the Parliament's decision to extend reservation for SC and STs to include promotion. It was held that to extend reservation in promotion three conditions must be satisfied by the State. Firstly, the State must show the backwardness of the class. Secondly, that the class is inadequately represented in the position/service for which reservations in promotion will be granted. Lastly, that the reservations are in the interest of administrative efficiency. This ruling of the Supreme Court overruled the decision in *Indra Sawhney* to the extent of expanding reservations in appointments under Article 16(4) to promotions.

The Controversy of the EWS¹² Reservation

In 2019, Government of India, through 103rd Constitutional Amendment brought in 10% reservation in public employment and educational institutions, for the economically backward sections in general category, expressly excluding the Scheduled Caste, Scheduled Tribe and Other Backward Classes. This was challenged in the Supreme Court in *Janhit Abhiyan v Union of India*¹³.

The key issue was whether the impugned Amendment breached or violated the basic structure of the Constitution by basing reservation solely on economic criterion and in excluding the SEBCs/OBCs/SCs/STs from its scope and in exceeding the 50% cap on reservation.

The Referral and the Questions Formulated

After consultation with the counsel for the respective parties, the Supreme Court of India noted, amongst others, the issues suggested by the learned Attorney General of India in the following words:-

“(1) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria?

(2) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the state to make special provisions in relation to admission to private unaided institutions?

(3) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation?

(4) Whether the cap of 50% referred to in earlier decisions of the Supreme Court can be considered to be a part of the basic structure of the Constitution? If so, can the 103rd Constitution Amendment be said to breach the basic Structure of the Constitution?”¹⁴

Among the above issues, the Supreme Court found the first three as the main issues and the rest are in the nature of supplementing and substantiating the proposition emerging from the said three issues.

The learned counsel for the petitioners argued that reservation addressed the historical inequalities faced by socially oppressed sections and that is a vehicle of positive discrimination. As expressed in *T. Devadasan v. Union of India and Another*¹⁵, *State of Kerala and Another*.

¹² Economically Weaker Sections among forward communities; hereafter EWS.

¹³ (2023) 5 SCC 1.

¹⁴ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at p. 6.

¹⁵ AIR 1964 SC 179.



v. N. M. Thomas and Others.¹⁶, *Indra Sawhney and Others v. Union of India and Others*¹⁷, and *M. R. Balaji and Others v. State of Mysore and others*¹⁸, reservations formed a congenital feature of the Constitution. As the 103rd Amendment seeks to empower the privileged who are neither socially and educationally backward nor inadequately represented, it violates the basic structure of the Constitution.

The main arguments put forward by the petitioners are as follows:-

1. The Constitution of India envisioned special provisions for the socially and educationally backward people because, due to certain primordial practices that a section of population was marginalized and they were devoid of material resources and education. These people were ostracized and stigmatized from public life and were deprived of basic liberties and equality. It was to remedy this historical inequalities positive discrimination in the form of reservation was introduced.
2. The basic structure of the Constitution has been violated by the amendment because, it seeks to empower the privileged sections of the society who are neither socially or educationally backward nor inadequately represented¹⁹.
3. The philosophy of reservation is violated. The amendment has vetoed the pre-requisite of inadequacy of representation and social and educational backwardness.²⁰
4. Exclusion of the SCs, STs and OBCs is against the idea of fraternity envisaged in the Constitution. The counsel highlighted and relied on the decision in *Prithvi Raj Chauhan v. Union of India and Others*²¹. Again exclusion of the backward class and inclusion of the forward class violate the basic structure of the Constitution. Large number of people among the backward communities are also backward along with being socially and educationally backward. This exclusion violates the equality code.
5. The purpose of positive discrimination was to put an end to the monopoly of certain classes. The creation of an egalitarian society was jeopardized by the amendment in question. The identification of the population is imprecise and is based on individual traits. The economic condition of an individual is multidimensional but financial incapacity is transient.
6. The Apex Court in *Indra Sawhney v. Union of India*²², held that economic criteria cannot be the sole consideration for granting reservation under Article 16. It is against the principle of substantive equality incorporated in the philosophy of the Constitution²³.
7. Article 46 cannot be employed for providing reservation. Again, exceeding 50% limit would violate the twin tests of width and identity²⁴.
8. The amendment reinstates the communal order of the government set aside in *Chepakam Dorairajan*²⁵.

¹⁶ AIR 1976 SC 490.

¹⁷ AIR 1993 SC 477.

¹⁸ AIR 1963 SC 649.

¹⁹ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at p. 8.

²⁰ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at P. 9.

²¹ (2020) 4 SCC 727.

²² AIR 1993 SC 477.

²³ *Janhit Abhiyan v. Union of India*, WP (C) 55/2019 at p. 16.

²⁴ *M. Nagaraj and Others v. Union of India and Others* (2006) 8 SCC 212; *Indra Sawhney v. Union of India* AIR 1993 SC 477; *Dr. Jaishri Laxmanrao Patil v. Chief Minister and Others* (2021) 8 SCC 1.

²⁵ AIR 1951 SC 226.



9. The amendment in question did not employ any parameters for identification of a backward class. The first Backward Classes Commission²⁶ employed 22 parameters.

10. 10 % reservation is given to a population which is only 5% of the total population of the country.

11. The amendment in question fails the twin test of intelligible differentia and rational nexus between the affirmative action and the object sought to be achieved.

12. Reservation cannot be used as a poverty alleviation scheme²⁷.

13. The Amendment is not based on any quantifiable data. Proper identification of a class is a *sine qua non* for the introduction of an affirmative action²⁸.

14. According to one of the counsels, it was argued that, reservation shall be granted as an anti-discriminatory measure but not as an anti-deprivation measure²⁹. Economic upliftment of the downtrodden could be achieved through implementing measures of poverty alleviation, but not through reservation. He also argues that both formal and substantive equality is breached by the impugned Amendment³⁰.

15. 50% ceiling limit has been emphasized by more than 54 judgments of the Supreme Court of India over a period of 60 years.

The EWS reservation is not based on 'economic condition' but on 'financial incapacity'. It was argued that whereas economic condition is multi-dimensional, financial incapacity is transient in nature rewarding poor financial behaviors and resultantly an unreliable criterion for conferring privileges. Additionally, it bases reservation on solely one criterion which is unacceptable.

It violates the twin objectives of the Equality Code enshrined under Article 14 to 17 as to formal and substantive equality which again forms the basic structure of the Constitution. Reservation was provided to atone for the perpetual discrimination and stigmatization which was the structural barrier keeping them from the mainstream. Reservation cannot be used as a poverty alleviation scheme.

The learned Counsel for the Respondent contended that, it has been held in *Bhim Singh v. Union of India*³¹, that a mere violation of Article 14 does not violate the basic structure of the Constitution unless the violation is a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. Only when it changes the identity of the Constitution can it be struck down. EWS reservation does not violate the Equality Code as the EWS among SC, ST and OBC are already enjoying the benefit of affirmative action. As held in *Indra Sawhney*, the 50% cap on reservation can be breached in an extraordinary situation and is therefore not an inviolable rule or part of the basic structure of the Constitution.

Arguments in Support of the Amendment

1. 103rd amendment does not violate the basic structure of the Constitution.

2. Mere violation of Article 14 does not vitiate the basic structure of the Constitution, unless 'the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal

²⁶ [http:// www.ncbc.nic.in](http://www.ncbc.nic.in).

²⁷ Janhit Abhiyan v. Union of India, WP (C) 55/2019 at p. 21

²⁸ Madhav Rao Scindia Bahadur v. Union of India (1971) 1 SCC 85.

²⁹ Janhit Abhiyan v. Union of India, WP (C) 55/2019 at p. 23.

³⁰ Janhit Abhiyan v. Union of India, WP (C) 55/2019 at p. 25.

³¹ Bhim Singhji v. Union of India and Others (1981) 1 SCC 166.



justice³². If only the identity of the Constitution is at stake, an amendment can be struck down³³.

3. Supreme Court, over the years, through various judgments, emphasized that, it is desirable to use poverty as the only basis for affirmative action. This opinion is taken because economic deprivation leads to social and educational backwardness³⁴.

4. Creation of a new class helps the achievement of economic justice.

5. It is permissible to violate the 50% cap as laid down in *Indra Sawhney* in extraordinary situation³⁵.

6. The amendment is strengthening the preambular vision of the Constitution i.e., to provide economic justice along with social and political justice.

7. Exclusion is inevitable in the concept of reservation, there is no violation of Equality Code in the exclusion of SC, ST and OBC³⁶.

8. In more than one earlier decisions of the Supreme Court occupation-cum-means test have been employed³⁷.

9. Nobody could expect permanency to the implementation of affirmative action. Entitlement to reservation and exclusion therefrom are not part of the basic structure of the Constitution.

Basic Structure Doctrine

The idea of basic structure was not discussed in the Constituent Assembly during the formulation of the Constitution of India. Justice Mudholkar in *Sajjan Singh v. State of Rajasthan*³⁸, made first reference to the concept of basic feature. The idea was accepted in *I. C. Golak Nath and Others v. State of Punjab and another*³⁹, 11 judge bench accepted the idea that certain parts of the Constitution is unamendable. The basic structure doctrine was elaborated by the Supreme Court in *Kesavananda Bharati v. State of Kerala*⁴⁰, Sikri, C.J. opined that, "Amendment of this Constitution does not include a revision of the whole constitution. In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble"⁴¹. A constitutional amendment can be considered as violating the basic structure only when what is sought to be withdrawn or altered is an inviolable part of the basic structure.

There is no cut-and-dried formula or a theorem which will supply a readymade answer to the question, what constitutes the 'basic structure'. In *Bhim Singhji*, it was said that, "a mere violation of the rule of equality does not violate the basic structure of the Constitution unless the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal

³² *Bhim Singhji v. Union of India and Others* (1981) 1 SCC 166.

³³ *M. Nagaraj and Others v. Union of India and Others* (2006) 8 SCC 212;

³⁴ *Vasantha Kumar* AIR 1985 SC 1495 and *Ashok Kumar Takur* (1995) 5 SCC 403

³⁵ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at p. 38.

³⁶ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at p. 39.

³⁷ *R Chitrlekha v. State of Mysore* AIR 1964 SC 1823.

³⁸ (1965) 1 SCR 933.

³⁹ (1967) 2 SCR 762.

⁴⁰ AIR 1973 SC 1461.

⁴¹ *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1 at p. 60.



justice”⁴². Again, if any constitutional amendment moderately abridges or alters the equality principles, it cannot be considered as violation of the basic structure⁴³.

Expanding Doctrine of Equality

It was held by the Court that the principle of economic democracy is to be taken as a compliment to political democracy. The word ‘economic’ has been used quite extensively throughout the Constitution. If the goal is an egalitarian socio-economic order, poverty needs to be addressed by the State. Relying on several precedents to draw out the importance of alleviating poverty such as *Janki Prasad Parimoo and Others v. State of J&K and Others*⁴⁴, the Court held that basing EWS reservation solely on economic criterion is not violative of the basic structure of the Constitution. The past decisions of the Apex Court is that it cannot apply only to reservation under Article 15(4), 15(5) and 16(4).

EWS reservation incorporates the principle of distributive justice which forms the bedrock of Articles 38, 39 and 46 of the Constitution. Exclusion of weaker sections already mentioned in Articles 15(4), 15(5) and 16(4) from EWS reservation does not violate the basic structure as it is a reasonable classification and “the moment there is a vertical reservation, exclusion is the vital requisite to provide benefit to the target group”.

Upholding the validity of the amendment, the Court held that the 50% ceiling limit is not a basic structure nor is it an inviolable rule and applies to reservations preceding the 103rd Amendment.

The Other Side: The Dissenting Judgment

In the dissenting judgment to the same, prepared by Ravindra Bhat, J for himself and CJI, U.U. Lalit, was made by considering the following points:

- Background of Article 14, 15 and 16 of the Indian Constitution have been discussed in the *Constituent Assembly Debates* and *Motilal Nehru Report 1928*. History of Article 17 which abolishes untouchability (Article 11(1) of Dr Ambedkar's draft Constitution) provided that: “any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished.”, it can be inferred that these Articles have been brought into ensure, mainly equality or in other words proper representation of the backward and SC/ST in education and in public employment, so as to put an end to the social and educational backwardness, these class of citizens have suffered under the old caste system in India.
- Social and educational backwardness is the test for backwardness of a class and caste is not the sole factor for class determination.
- To test the Constitutionality of the Amendment, the court relied on the *essence of rights test* or *twin test* as laid down in *M.Nagaraj*⁴⁵ case, where two tests-width test and identity test is to be done to test the Constitutionality. In the width test, amendment is expanded to its widest possible meaning to see if it violates any constitutional provision, and if the width test was met then they would move on to the identity test, this test would check whether the amendment seeks to alter the identity of the Constitution as a whole.
- Different values that underlie the Constitution and are manifested - either directly in the form of express provisions, or what can be inferred as basic “overarching” principles (*M. Nagaraj*) or what impacts the identity (*Kesavananda Bharati*⁴⁶, *Raghunathrao Ganpatrao, M.*

⁴² Janhit Abhiyan v. Union of India, (2023) 5 SCC 1 at p. 84.

⁴³ Janhit Abhiyan v. Union of India, (2023) 5 SCC 1 at p. 84.

⁴⁴ AIR 1974 Pat 197.

⁴⁵ (2006) 8 SCC 212.

⁴⁶ AIR 1973 SC 1461; (1973) 4 SCC 225.



Nagaraj, and *I.R. Coelho*⁴⁷ or takes away the “essence” of certain core principles, through amendments were examined.

- Principle of equality is the most important indispensable feature of the Constitution and destruction thereof will amount to changing the basic structure of the Constitution- *Kesavananda Bharati*⁴⁸, *Minerva Mills*⁴⁹, *Raghunath Ganpatrao* (para 142), *R. C. Poudyal*⁵⁰, *Indra Sawhney*⁵¹, *Indra Sawhney (2) v. Union of India*⁵², *M. Nagaraj*⁵³ and *I.R. Coelho*⁵⁴.
- The bedrock value which enlivens Articles 14, 15, 16, 17, 18, 29(2), and 325, is the *principle of non-discrimination*, forming different facets of equality principle enshrined in the constitution.
- Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated. The exclusion of those sections of society, for whose benefit non-discriminatory provisions were designed, is an indefensible violation of the non-discrimination principle
- The exclusionary clauses in articles 15(6) and Articles 16(6) damage and violate the basic structure of the Constitution.
- Caste alone could not be the criteria for determining social and educational backwardness for there are other religions like Muslims and Christians, where there is no concept of caste system and adopting such caste as criteria will result in inequality.
- Articles 38 and 39 read with Articles 41, 42, 43, 45, 46, 47 and 48, holistically, contribute to economic justice. Social justice implies removing all inequalities and affording equal opportunities to citizens in social as well as in “economic affairs”.
- The statistics (NSSO 2004-05) which this Report is based on, disclosed that in all, 31.7 crore people were below the poverty line (“BPL”), of which the scheduled caste population was 7.74 crores (i.e., 38% of total scheduled castes), scheduled tribe population was 4.25 crores (48.4% of total scheduled tribes), 13.86 crores of OBC population (which was 33.1% of total OBCs), and 5.85 crores of General Category (18.2% of total general category).
- Exclusion of the creamy layer of backward classes under Art. 15(4) is not an excuse for exclusion under art 15(6) and 16(6).
- Reliance on *Roop Chand Adlakha v. Delhi Development Authority*⁵⁵ - "To overdo classification is to undo equality."
- Article 46 comprehends all economically weaker sections of people, including SC/STs and OBC; (b) The mention of SC/STs in Article 46 is a reminder to the state never to ignore them from the reckoning whenever a measure towards economic emancipation under Article 46 is introduced by the State.

On the basis of the grounds given above, a dissenting judgment was passed which held that exclusion of SC/ST is a discriminative provision violating the equality code.

Recent Developments

⁴⁷ AIR 2007 SC 861; (2007) 2 SCC 1.

⁴⁸ AIR 1973 SC 1461; (1973) 4 SCC 225 at para 1159.

⁴⁹ (1980) 2 SCC 591; AIR 1980 SC 1979 at para 19.

⁵⁰ (1994) Supp (1) SCC 324; AIR 1993 SC 1804 at para 54.

⁵¹ 1992 Supp (3) SCC 217; AIR 1993 SC 477 at para 260-261.

⁵² (2000) 1 SCC 168 at para 64-65.

⁵³ (2006) 8 SCC 212 at para 31-32.

⁵⁴ AIR 2007 SC 861; (2007) 2 SCC 1 at para 105.

⁵⁵ 1989 Supp (1) SCC 116; AIR 1989 SC 307.



The Parliament passed the 103rd Constitution Amendment Act, 2019 and the Constitution has been amended to include the reservation based on economic criteria. The validity of the Amendment has been questioned in a series of petitions. The Supreme Court of India passed a judgment in the present case in question.

After the passing of the said judgment, review petition was filed by Jaya Takur⁵⁶, contending error apparent on face of the record. The main grounds urged to attract the contention of error apparent on the face of record was that the *Janhit Abhiyan* case was produced by a five judge bench and it overruled a nine bench judgment, *Indra Sawhney*⁵⁷. Given the circumstances, the question arises whether the *Indra Sawhney* judgment was overruled or not?

The *Indra Sawhney* judgment was passed in a case where the constitutionality of an Office Memorandum was under question. The said Office Memorandum permitted economic reservation but at the time when the said case was considered by the Supreme Court, there was no provision in the Constitution for reservation based on economic conditions. On that premises the Honorable Court struck down an Office Memorandum issued on the strength of the then existing provision for reservation implementing economic reservation. Therefore, the factual matrix in both the cases are entirely different as in *Janhit Abhiyan* case the question was regarding the Constitutional validity of amendment of the Constitution.

A judgment has two parts: *ratio decidendi* and *obiter dicta*. Only the *ratio decidendi* has binding force or precedential value and *obiter dicta* is not binding. Now if we consider the *Indra Sawhney* judgment, the main issue before the Court was the validity of the Office Memorandum and hence only that part of the judgment which deals with the same constitute *ratio decidendi* and whatever other observations made by the Court in the said judgment would constitute only the *obiter dicta* of the judgment which has no binding value. If we consider the issue of validity of the Office Memorandum, the Court can only confine itself to the Constitutional provision and there were no existing provisions in the Constitution permitting economic reservation and hence the same was held invalid.

As far as a judgment is concerned, only that part of judgment that is *ratio decidendi* and has binding value. Hence considering this aspect, *Indra Sawhney* can never be held as overruled by the *Janhit Abhiyan* case since both cases are different in factual and legal matrix. The Court has only deviated from the observations made in *Indra Sawhney* judgment, which is not impermissible. The same view was adopted by the Court in *Ashok Kumar Gupta v. State of U.P.*⁵⁸ whereby a 3-judge bench has deviated from the principles laid down in *Indra Sawhney* case taking the view that the said principle constitutes the *obiter dicta* of the judgment and hence is not binding.

Conclusion

Coming to analyzing the constitutionality of EWS reservation on the basis of precedence, it could be said that the equality code was brought into being to end caste based discrimination suffered by the backward classes of the society. It promotes the principles of non-discrimination and for this specific purpose through Art 15(4) and 16(4), reservations has been made for their representation in admission to educational institutions and public employment and into political offices. There have been reservation solely on the basis of caste for SC-ST and Other Backward Classes, but no reservations for the economically backward category belonging to general category.

⁵⁶ Jaya Takur

⁵⁷ 1992 Supp (3) SCC 217.

⁵⁸ 1997 (5) SCC 201.



It is the duty of the state to give proper representation to the economically backward class through reservation. However, exclusion of SC-ST citizens who satisfy the same classifiers for economically backward class, who constitute the majority of the poor, will, in a way, violate the equality principle but giving them inclusion in such reservation will amount to double benefits. But being socially educationally and economically backward, denying them reservation under the economically weaker section would violate their right to equal opportunity for keeping them in the same category as an economically forward SC/ ST would in turn be a situation of “treating unequals as equals”.

Although the question of constitutionality of the 103rd amendment has been settled by the Court for now, these doubts still persist in the labyrinth of judicial thought. Data still relied on is based on the last census taken in 2011. Despite the excuse of Covid-19, had the government taken genuine efforts to provide concrete data relating to the backwardness of citizens in the present scenario, it would have resulted in the implementation of reservation policies for the truly deserving.

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