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Constitutional Validity in the Economically Weaker Section Reservation

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ABSTRACT

"Equality" appears to be easy as a notion, but it is actually deceptively complex. Jurists differentiated among 'formal equality' and 'substantial equality' concepts of equality. A formal equality instance is a teacher who spends exactly the same quantity of time in a school on each student. But if the professor were to devote various quantities of time to distinct student organizations depending on their perceived requirements, it is an instance of substantial equality. While formal equality requires the state to treat people equally before the law, substantive equality recognizes the reality that equality exists only between equals and that perpetuating inequality is equal treatment. If certain classes of individuals have been put at a major disadvantage due to severe historical injustices, then the state can legitimately take beneficial action to remedy that condition until the former victims are able to expand their capacities and operate without the unique protections. The concept of significant equality dominates all democratic countries' global human rights law and domestic legislation.

In this paper, author tries to analyse The Constitution (103rd Amendment) Act, 2019, which has introduced two fresh provisions enabling the State to make a reservation of up to 10% for economically weaker segments' (EWS) of people other than the Scheduled Castes (SC), the Scheduled Tribes (ST) and the non creamy Other Backward Layer and how far is it justified with respect to jurisprudence of reservation.

Keywords: *Equality, Historical injustice, remedy, democratic, Economic weaker segments*

I. INTRODUCTION

The Constitution (103rd Amendment) Act, 2019, which entered into force on 14 January 2019, amended Articles 15 and 16 of the Constitution by introducing two fresh provisions enabling the State to make a reservation of up to 10% for economically weaker segments' (EWS) of people other than the Scheduled Castes (SC), the Scheduled Tribes (ST) and the non creamy Other Backward Layer. Article 15's fresh clause (6) enables the state to take any "unique provision" that includes reservations for admissions to academic organizations, whether

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assisted or unassisted, apart from minority instructional organizations under Article 30(1). Article 16's fresh clause (6) enables for reservations in state appointments or posts. The reservation for the new class will exceed the current 15%, 7.50% and 27% reservations for the SC, ST and OBC-NCL respectively, taking the complete reservations to 59.50%.

An 'Explanation' says that EWS is the kind that the State may notify on the basis of family revenue and other financial hardship factors from time to time. In its Office Memorandum No. 20013/01/2018-BC-II of 17 January 2019, the Ministry of Social Justice and Empowerment, Government of India has specified that only individuals whose households have a gross annual revenue below Rs.8 lakhs, or agricultural property below 5 acres, or residential flat below 1,000 sq. Less than 100 sq. ft. or housing plots. Municipal yards or housing plots of less than 200 sq. For reservation purposes, yards in fields other than notified Municipalities shall be recognized as EWS.

It is accurate that the Supreme Court has continuously held that economic backwardness cannot be the primary reservation requirement, and that reservation only gives the underrepresented categories the right to access and is not an anti poverty system. But such Supreme Court decisions engaged, as they existed, testing legislation or an executive order against both the constitutional provisions. They are now being denied that we have a constitutional amendment confirming economic backwardness as the only criterion for a fresh reservation category. It is therefore true that perhaps the Supreme Court has continuously held that the complete reservations should not exceed 50 percent in order to be sensible but not defeat or nullify the primary right to equality. The Court emphasized this is a binding rule rather than a mere rule of prudence. But this' 50% ceiling' is efficiently infringed by the recent amendment to the Constitution.

The perilous legal history of reservations in India indicates that from 1951 onwards, once the Supreme Court issued an negative decision on some aspect of educational or public employment reservations, Legislature reacted by amending to reverse or overcome the inconvenient judicial pronouncements. The 2019 Constitution (103rd Amendment) Act is the recent step towards overcoming the bar of the Supreme Court on economic backwardness criteria and the 50 per ceiling on complete reservations.

A fundamental system challenge is the only feasible court challenge to the validity of the 103rd Amendment. In the striking situation of **Kesavananda Bharati vs State of Kerala**[2], The Supreme Court held that the authority of the Government to amend the Constitution pursuant

[2] (1973) 4 SCC 225)

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to Article 368 was not complete and that even a constitutional amendment could be abolished if it destroyed or abrogated the' basic structure' of the Constitution. The sentence is not discovered in the Constitution and is an invention of the judiciary. The "doctrine of fundamental structure," also known as the "doctrine of constitutional identity," argues that there are some systemic and structural principles such as democratic type of government, republican form of government, federalism, equality, liberty, secularism, judicial independence, power of judicial review, and so on, constitutes the nucleus or core of the Constitution and gives it a specific' identity.' They go beyond the words of any specific article and underpin and link several associated constitutional articles. They are component of constitutional law even though in the form of regulations they are not expressly mentioned. They are beyond Parliament's amending authority because amending them would mean destroying the constitution's very identity.

In **Indira Nehru Gandhi v. Raj Narain**[3], the Supreme Court held that, for each case once it, the Court would decide the statement that any specific characteristic of the Constitution was 'a fundamental characteristic.' Until now, various judges have proclaimed a variety of characteristics 'basic' separately, in distinct instances. However, in several instances, this absence of unanimity did not impede the Supreme Court's application of the basic structure doctrine.

It should be noted that of the 72 Constitutional Amendment Acts passed since 1973, excluding latest, the Supreme Court invoked the doctrine of "basic structure" to overturn only seven of them, mostly in instances where a constitutional amendment endangered the authority of judicial review or the independence of the judiciary. While only some sections of the Amendment Acts were hit in six of these cases, the new Constitution (99th Amendment) Act, 2015 relating to the substitute of the Collegium scheme by the National Judicial Appointments Commission, was the first time an entire Amendment Act was struck down. That it does, the Court was reluctant to negate constitutional amendments, particularly those pertaining to reservations. Thus, in order to be successful in the legal challenge against the 103rd amendment, it must be shown that it has over-recognized the right to equality, which is component of the constitution's Basic Structure.

(a) Aims and Objectives

1. To know what is EWS Reservation

[3] AIR 1975 SC 2299

2. To know the whether it is Constitutional Valid or not
3. To know whether the Judiciary can Scrutinize it
4. To know the conditions to avail the Reservation
5. To know the Background of the EWS Reservation

(b) Research Question

1. Whether it is constitutionally valid?
2. What effect will the reservation put on the Society?
3. Whether Judiciary has the power to struck it down?

(c) Hypothesis

EWS is nothing but a politically oriented concept and in reality it will just benefit the Politicians and not the public in general.

II. THE CONSTITUTION AND THE INEQUALITIES BETWEEN GROUPS

In India, big parts of individuals had been in recent decades stereotyped due to the pervasive caste system and was subjected to stigmatized discrimination due to their birth, while a few socially and educationally advanced castes had caught a disproportionate amount of higher education and public employment. They could do the same not just because they were innately more worthy after all, but only because of their acquired social advantages and ties and the head begin of over a century they enjoyed, science have shown that no class of human beings is genetically inferior to any other. The Indian Constitution aimed at redressing past injustices and correcting the real imbalance in higher education and public employment by delineating an "equality code." Article 14 ensures for all individuals equality before the law and equal protection of the law. Article 15(1) prohibits discrimination on the basis of religion, ethnicity, caste, gender or place of birth for any citizen. Article 16(1) ensures equal opportunities in public employment for all people. A associated provision is Article 29(2) which prohibits denial of admission to any state-run academic establishment or state-run instructional institution on the basis of religion, ethnicity, caste or language only. These provisions, which are centered on individuals, ensure official equality. They express displeasure with categories based on certain identification markers.

In the other side, Articles 15 and 16 (3) to (5) and 46 (which forms part of the unenforceable State Policy Directive Principles) are designed to encourage meaningful equality. They provide the fundamental structure for affirmative action in favor of the parts of society that are grossly

represented and pathetically ignored. In Article 16(4), the word "backward classes" involves SC and ST. Article 46 requests the State to encourage and safeguard from social injustice and all types of oppression the instructional and financial interests of the weaker segments, in particular SC and ST. All of these provisions are group-centered as people have historically experienced discrimination; it was because of their participation of certain communities as females, as lesser castes, etc. There are two arguments for reservations of such a group based strategy:

1) Rather than making them meaningless, it appears to strengthen and reinforce group identities such as sex, caste or ethnicity. The counter argument would be that a group based strategy is inevitable and a needed evil given the manner in which segregation has played out historically. Other than by taking into consideration gender; substitute for caste and race; you cannot remedy gender-based discrimination. Although India's Constitution has used term'class'rather than "caste" to define a recipient category qualified for reservation, there is theological turmoil among various Supreme Court rulings that have retained caste as an "appropriate criterion", "sole criterion" or "dominant criterion" for class definition[4].

2) Although there is little controversy over the identity SC and ST and the historical, institutionalized segregation against such two organizations, the victimization circumstances experienced by the different Shudra castes are matters of degree with a broad spectrum of variations. The incorporation of a Shudra caste in the OBC category creates sensible allegations to include "on the margin" of other castes, and any cut offs are likely to be viewed as arbitrary and unfair. The evaluation practice can have what statisticians call the error of type 1 (wrongful inclusion of undeserved groups) and the error of type 2 (wrong exclusion of deserving groups). The issue of powerful castes / individuals inside the OBC also coincides with all or most of the advantages. It can be rectified by implementing the "creamy layer" idea by which reservation advantages exclude individuals with revenue or assets higher than defined boundaries.

(A) The Warning Principle of Ambedkar and the Judiciary

Dr. B.R. Ambedkar predicted the chance of unrestricted rates of reservation resulting from political compulsions. In 1948 he had pointed out to the Constituent Assembly that reservation, although vital, should be no exception of minority nature:

[4] In "**M.R.Balaji v. State of Mysore**" 1963 AIR 649, the Supreme Court held that caste could be a relevant criterion to identify a backward class but not the sole or dominant criterion. In "State of Kerala v. N.M. Thomas 1976 AIR 490", the Court held that caste could be the sole criterion to determine backwardness. In "**Indra Sawhney v. Union of India AIR 1993 SC 477**", the Court held that caste could be the dominant criterion but not the sole criterion in identifying a backward class.

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"Supposing, for example, that reservations have been rendered for a society or a catalogue of communities, totaling about 70 percent of the overall government posts and only 30 percent of the unreserved posts have been retained. Can anyone tell from the point of perspective of providing impact to the first principle, namely equal opportunities, this is satisfactory? In my judgment it can't be. The places to be allocated must therefore be restricted to a seat minority If honourable Leaders know this stance that we must protect two stuff, namely the concept of equal opportunities and, at the same moment, meet the demands of groups which have not previously been represented in the State, then it is sure they will agree that, unless you are using such a qualifying sentence as backward" the reservation exception will eventually eat. Nothing remains of the law."[5]

In **M.R. Balaji v. State of Mysore**[6], the Supreme Court extended this reasoning to remove the 68% reservation made pursuant to Article 15(4) for admission to medical and engineering schools in the (then) State of Mysore and ruled that the reservation should not in any event exceed 50%.

As per this perspective, Articles 15(4) and 16(4), which provide for reservations in education and public employment, act as "exceptions" to the equality and non discrimination regulations of Articles 15(1) and 16(1), thereby infringing' 50 per roof' leads to reverse discrimination. In N.M Thomas, from that point of perspective, the Supreme Court created a deviation. It held that Article 16(1), as a facet of the equality doctrine, allows a fair classification of all individuals likewise located with regard to the law just as Article 14 does. Article 16(1) itself allows reservations and preferential treatment without Article 16(4). Seen in this manner, Article 16(4) is not the exception to Article 16(1), but an "emphatic re-establishment" and aims to create explicit what Article 16(1) already implies.

Additional support for this line of reasoning is provided through the use of non discrimination clause-

"Nothing in this Article shall stop the State from expressing its intensions in a most explicit manner" in Article 16(4), which is a legislative instrument, that the authority conferred therein is not in any manner restricted by the primary clause, i.e. Article 16(1), however, falls outside.[7] Therefore Article 16(1) states a integrated vision of equality comprising both formal equality and significant equality ideals within it. Articles 15(1) and 15(4) apply the same logic." This is

[5] *Constituent Assembly Debates*, CLPR (Mar. 12 2021, 10:15 AM) https://cadindia.clpr.org.in/constitution_assembly_debates/
[6] 1963 AIR 649
[7] T. Devadasan v. Union of India 1964 AIR 179

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not an intellectual quibble, but a very practical matter. The "50 percent ceiling" logic of M.R. Balaji for reservations was based on the claim that the exemption cannot be extended to crush the rule. If Article 16(4) does not constitute the exception to Article 16(1), otherwise this reasoning is no longer valid and there's nothing to stop the State from violating the' 50% ceiling' for reservations only if the overall population of the underrepresented classes themselves is less than 50%, which is not the case in India. In **K.C. Vasant Kumar v. State of Karnataka**[8], two learned judges of the Supreme Court came to the exact opposite findings on this issue-one held that N.M. Thomas (1975) undermines the rule of "50% ceiling" in M.R. Balaji, while another said it didn't.

(B) The Mandal Judgment's Middle Path

This issue was again discussed by the Supreme Court **Indra Sawhney v. Union of India** well known as the case of the Mandal Commission. Endorsing N.M Thomas's interpretation, ruled by the Supreme Court:

"Backward classes mentioned in Article 16(4) of the Constitution can be identified only on the basis of caste and not economic conditions. The economic criterion laid down would cover majority of the population of India, thereby depriving substantial minority of their right to equality and recognition of the right to be selected on merits in open competition. Therefore, it will be against the basic structure of the Constitution."

"As any power shall be implemented reasonably and fairly, so shall the authority conferred by Clause (4) of Article 16 be exercised fairly within reasonable bounds and be much more reasonable than to say that the reservation under Clause (4) shall not exceed 50% of appointments or posts, with the exception of some exceptional situations as explained below. The clause created subject to Article 16(4) in the interests of certain sections of society must be evaluated against the guarantee of equality set out in Article 16, Clause (1), which is a pledge to all citizens and to society as a whole. It should be noted that Dr. Ambedkar himself regarded reservation to be "limited to a minority of seats." No other member of the Constituent Assembly suggested otherwise. Therefore it is obvious that perhaps the founding fathers never regarded a majority of seats reservation. The irresistible conclusion that follows from the above discussion is that the reservation mentioned in Article 16 Clause (4) should not exceed 50 percent was never expected."

In short, the Supreme Court's Indra Sawhney ruling is an agreement or middle path between M.R.Balaji and N.M. Thomas. It struck a balance between formal equality and significant

[8] 1985 AIR 1495

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equality by reaffirming the "50% ceiling" rule. Curiously, the Supreme Court left a small loophole open saying:

"Whereas 50 percent is the rule, some exceptional conditions underlying the diversity of this country and the people need not be neglected. It may happen that in far flung and remote areas the population that lives in such regions may need to be treated differently since they are outside the public sphere of domesticity and because of their specific circumstances and character traits, some relax." It is appropriate to point out that when, in reaction to the Patidar agitation, the Government of Gujarat issued an executive order providing for 10% reservations in higher education and public employment for "economically weaker sections" of unreserved categories with annual income below Rs.6 lakhs" in 2016, the same was quashed by the Gujarat High Court (2016) on the basis of the Indra Sawhney preliminary ruling.

III. PAST BASIC STRUCTURE CHALLENGES RELATING TO RESERVATION

Since India's Constitution came into force in 1950, both the Center and the States introduced reservations for SC and ST while reservations for backward classes were enacted by several states. But the Center postponed introducing backward class reservations. It did not take any intervention on Kaka Kalelkar's First Backward Classes Commission (1955) report. The Second Backward Classes Commission (1980) report, led by B.P. Mandal was adopted, after a gap of almost 10 years in August 1990.

The Mandal Commission recognized 3,743 groups (both Hindu and non-Hindu) as "Other Backward Classes," making up almost 52% of India's inhabitants. But in subservience to the Supreme Court's rulings restricting the complete reservation to 50%, the Commission suggested only 27% reservation in Central Government employment in favor of OBC in relation to the 22.50% reservation still in place in favor of SC and ST.

In order to satisfy the protesting forward castes that were angry about the application of reservations for OBC, in September 1991, the Government of India released an executive order reserving 10% of vacancies in civil posts and facilities for other "economically backward segments of individuals not covered by any of the current booking systems." This boosted the complete reservation to 59.50 percent, significantly higher than the Supreme Court's 50 percent ceiling.

It can be observed that this 10% reservation was similar to what the 103rd Amendment aims to do other than that the 1991 order didn't have the support of an amendment to the Constitution. The Supreme Court regarded the legality of the 27% reservation for OBC in Indra Sawhney; the 10% reservation for economically backward segments of society other than OBC,

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SC and ST; and a variety of other reservation problems. Some of its major choices have been as follows:

- It maintained OBC's 27% reservation topic to the exclusion of the "creamy layer."
- It overturned the 10% reserve for economically backward segments and ruled that only and solely with regard to financial criteria can a backward class of people be recognized.
- It ruled that reservations should really be restricted to the original appointments only and not expanded to promotions.
- It held that in any specified year the reservations including reserved vacancies carried forward or backlog should not exceed 50% of the appointments.
- It held that reservations can be managed to make in a service or category if the State is concerned that there is insufficient representation of the backward class of people. It held that promotional relaxation of qualification marks and assessment norms is not acceptable.

(A) Countering of Judgments by Amendments

Indra Sawhney resulted in a recent rash of constitutional amendments that, in turn, resulted in the fundamental structural problems of these amendments. First, Tamil Nadu's 69 percent SC, ST, Backward Classes (BC) and Most Backward Classes (MBC) reservations were in violation of Indra Sawhney's reaffirmed "50 percent ceiling" rule. The State attempted to sideline this rule by implementing the 1994 Law on "Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in instructional establishments and appointments or posts in facilities under the State)" and by adopting the 1994 Law on the Constitution (76th Amendment) to also include this statute in the Ninth Schedule of the Constitution in order to lay beyond the limit. **In I.R Coelho vs. State of Tamil Nadu**[9], the Supreme Court held that there was no absolute protection from judicial scrutiny for the legislation set out in the Ninth Schedule. The legitimacy of any constitutional amendment (including the introduction of any fresh law in the Ninth Schedule) made after 1973 (i.e. after Kesavananda Bharati) must be assessed on the guiding principle of the doctrine of the Basic Structure. The Supreme Court, however, still has to apply I.R Coelho's decision (2007) to the Tamil Nadu laws.

Second, a dispute arose in the bar on reservation in promotions as the same has been liked by SC and ST staff so far. Thus, the Constitution (77th Amendment Act) was implemented in

[9] Appeal (civil) 1344-45 of 1976

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1995 and a fresh clause (4A) was added to Article 16, which provides for reservations in promotions for SC and ST staff.

Third, the requirement that the proportion of reserved vacancies to be filled in any year, including reserved vacancies carried forward or backlog, should not exceed 50% was inefficient since the complete reserved vacancies in the present vacant positions were already 49.50% and it would've been practically hard to fill the reserved vacancies in the backlog. Thus, the Constitution (81st Amendment) Act, 2000, was implemented to introduce a new clause (4B) in Article 16 that permitted the discrimination of the backlog vacancies from the current vacancies and lifted the 50%'cap' on the backlog vacancies which would be treated as a separate class. While the 50% ceiling on present vacancies and for the framework as a whole should remain, it is up to the government to either fill in one go or distributed the vacancies over several years. It might be observed that Article 16(4B) makes for reservations the first, albeit indirect, constitutional mention of the "50 per ceiling rule," which until then had been a rule established by the courts. Fourthly, SC and ST staff had enjoyed the facility to relax qualifying marks and assessment norms in promotional reservations, but Indra Sawhney considered such relaxation to be unacceptable.[10] Accordingly, the Constitution (82nd Amendment) Act, 2000, was implemented and a provision was added to Article 335 restoring the authority to ease qualifying marks and assessment norms in matters of promotional reservations for SC and ST staff.

Another dispute arose because of the Supreme Court's decisions in **Union of India v. Virpal Singh Chauhan**[11] and **Ajit Singh v. State of Punjab**[12] that held that SC and ST staff profit from rapid promotion on the basis of reservations could not achieve' consistent seniority' at the promotional stage. In other words, although at a later stage the senior general candidates would be promoted to next level than that of the reserved candidates, they would "catch up" on their seniority and be regarded again as senior to the reserved candidates. Since staff of SC and ST had previously enjoyed consequential seniority, Article 16(4A) was again modified by the Constitution Act (85th Amendment) Act, 2001, which provides for the award of significant seniority on promotion to them.

The Supreme Court regarded the obstacle of the Basic Structure against the 77th, 81st, 82nd and 85th constitutional amendments [i.e. Contrary to the constitutionality of Articles 16(4A),

[10] S. Vinod Kumar vs. Union India (1996) 6 SCC 580
[11] 1996 AIR 448
[12] 1967 AIR 856

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16(4B) and 335] in **M. Nagaraj v. Union of India**[13] . The Court ruled that equality is the core of democracy and therefore a fundamental characteristic of the Constitution, but "one must differentiate between both the inherent concept of equality and its particular concepts"

(B) Tests for the Basic Structure Doctrine

In order to determine whether or not amendments to the invalidated Constitution were ultra vires the basic structure doctrine, two tests, namely the "width test" and the "identification test" were put forward by the Supreme Court. The wide test" examines the limits of the amending authority whether or not the changes have wiped out any of the constitutional criteria. These include 50% cap for all collected reservations (quantitative restriction), the idea of creamy layer (qualitative exclusion), the backwardness and inadequacy of representation (compelling reasons), and general administrative effectiveness.

The "identification test" examines if the amendment has, over and above recognition, changed the identification of the Constitution. By implementing these twin trials to the four amendments challenged, the Supreme Court held that none of them breached the Basic Structure doctrine. It indicated with the following comments: '"We reaffirm that the 50 per cent ceiling limit, the notion of creamy layer and the convincing factors, namely backwardness, inadequacy of representation and general administrative effectiveness, are constitutional conditions without which equal opportunities framework of Article 16 would collapse."

In **T.M.A Pai Foundation v. State of Karnataka**[14], While addressing numerous issues relating to private education and the freedoms of private organizations (both assisted and unhelped), the Supreme Court ruled that the creation and operation of an instructional organization, whether for donation or profit, is an "occupation" and that the right to practice this is also a fundamental right throughout the significance of Article 19(1) (g) of the Constitution. In **P.A. Inamdar v. State of Maharashtra**[15], the Court held that in admissions to private, unaided academic organizations, the state could not impose reservations. Such an encroachment was not a "sensible limitation" within the significance of Article 19(6), and no authority under Article 19(6) was conferred on the State to control admissions or implement the State's reservation policy in private, unassisted academic organisations.

The Constitution (93rd Amendment) Act, 2005, was enacted to resolve this decision, adding a fresh clause (5) to Article 15. This gave the State the authority to make reservations for SC,

[13] Writ Petition (civil) 61 of 2002; further referred as M. Nagaraj
[14] Writ Petition (civil) 317 of 1993
[15] Appeal (civil) 5041 of 2005

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ST, and OBC-NCL in admissions to academic organizations, whether assisted or unassisted, other than minority academic organizations protected by Article 30(1) of the Constitution. It should be noted that in private, unassisted academic organisations, the fresh Article 15(6) implemented by the Constitution (103rd Amendment) Act, 2019 makes the same reservation for EWS.

Although reservations for OBC-NCL in Central Government posts and facilities were made after Indra Sawhney, reservations in Central Government instructional institutions (including assisted organizations) had to delay another 15 years until the Parliament adopted Law 5 of 2007 under Article 15(5). The legality of this Act was challenged against the 93rd Amendment [and Article 15(5)] a fundamental structure challenge was raised in **Ashoka Kumar Thakur v. Union of India**[16]. The Supreme Court held that Act 5 of 2007 was constitutionally permissible and that Article 15(5) is at best a "mild abbreviation or modification" of the concept of equality and did not infringe the doctrine of the Basic Structure in so far as it refers to the instructional facilities retained and supported by the central government. Since in this situation no private institution emerged and there was no argument about the constitutionality of Article 15(5) with respect to private, unassisted academic institutions, the problem remained open to be decided in a future situation.

In **Pramati Educational and Cultural Trust v. Union of India**[17] , the Supreme Court regarded and dismissed the issue of the Basic Structure of Article 15(5) to the extent that it concerns private instructional organizations without assistance. The Court held that Article 15(5) doesn't in any way alter or ruin the identities or abolish the fundamental right of private instructional organizations without assistance guaranteed under Article 19(1) (g) to continue their "occupation."

"Article 15(5) promotes the constitutional goals and reinforces the targets that the Constitution seeks to achieve and allows Parliament to take legislative action in that direction. Far from influencing, or subverting or affecting, any fundamental characteristics of the Constitution, it strengthens it.

But Article 15(5) is merely an allowing provision, and Parliament has yet to pass legislation to effectively enforce reservations for SC, ST, and OBC-NCL in private academic organizations without assistance.

Thus, that portion of the fresh Article 15(6) that offers for reservations for '"EWS other than

[16] Writ Petition (civil) 265 of 2006
[17] Writ Petition (C) No. 416 Of 2012

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SC, ST, and OBC-NCL" in private, unassisted instructional organizations is likely to face the challenge of the Basic Structure. However, the point is that the remainder of the 103rd amendment will face the very same challenge.[18]

IV. LEGAL INFIRMITIES IN THE 103RD AMENDMENT

The Mandal Commission successfully implemented 11 criteria in all to define "other backward classes" (OBC): four of these have been social criteria, three were educational, and four were economic. There was a weighting of 3 points for each social criterion, 2 points for each instructional criterion, and 1 point for each financial criterion. The fundamental assumption has been that socially and educationally backward groups are also usually economically backward, and not exclusively socially and educationally backward groups. The Committee rated castes / classes on a scale from 0 to 22; those with a rating of 50% (i.e. 11 points) were classified as "socially and educationally backward" and the remainder was classified as "sophisticated." Even when a caste / class fulfilled all four financial requirements, it wouldn't be backward unless it fulfilled some social or educational backwardness requirements as well.

Policymakers agree that every single criterion social, academic, financial or any other is bound to be incorrect in determining a complicated notion like "backwardness," and we need composite criteria. In Indra Sawhney, therefore, the Supreme Court was right in governing that a backward class of citizens cannot be recognized solely and completely by reference to financial criteria and quashing the 10% reserve for economically backward segments. The Court noted that although social and educational characteristics are comparatively unchangeable and readily provable, economic backwardness is a readily influenced or falsifiable criterion. In such a reservation, the Supreme Court also discovered a legal incapacity: "Reserving 10% of vacancies between many open competition applicants on the grounds of income / property holding means excluding those above line from those 10% seats. The issue is whether this can be permitted constitutionally? We don't believe so. This may not be acceptable to exclude a citizen from becoming regarded on the grounds of his revenue or property holding exclusively for appointment to an office under the State. Although the state job is really designed to benefit the individuals (that it may also be a livelihood source is secondary) no other bar can be developed. Any such bar would be incompatible with Article 16's Clause (1) guarantee of equal opportunities. The said clause in the Office Memorandum of 25.5.1991 fails on this floor alone and is therefore proclaimed as such.

[18] Amandeep Shukla, *10% Quotas in all colleges, universities from this year: Prakash Javdekar*, HINDUSTAN TIMES (Mar 12, 2021, 10:18 AM) https://www.hindustantimes.com/education/10-quotas-in-all-colleges-universities-from-this-year-prakash-javdekar/story-LPt46oJ86GN20Em7LIZGbM.html

Whether such a decision even now holds good in view of the recent amendment to the Constitution[Articles 15(6) and 15(6)] affirming economic backwardness as the sole criterion for reservation is a moot point. Even if not, the issue of financial backwardness continues a readily controlled or fabricated fluctuating criterion. If the Supreme Court stipulates the Constitution (103rd Amendment) Act, 2019, as ultra vires the doctrine of "equality" in the "basic structure," it might not be for the implementation of economic backwardness as the sole reservation criterion, but for other reasons. The following are among this amendment's obvious legal infirmities.

First, the Supreme Court has consistently ruled that the convincing cause under Articles 15(4) and 15(5) for reserving admission to academic organizations has to be that a class, besides being "socially backward," must be "educationally backward."

Similarly, the convincing reason for having reservations in government employment pursuant to Articles 16(4) and 16(4A) has to be that, besides being "awkward", the class is not properly represented in state facilities. These convincing reasons are component of the Supreme Court's "width test" in M. Nagaraj to determine the legitimacy of a constitutional amendment in the light of a fundamental threat to the framework.

But the fresh Article 15(6), which provides for unique clause including reservation for "EWS other than SC, ST and OBC-NCL" in academic organizations, is vague about the important "academic backwardness" situation. The fresh Article 16(6), which provides for "EWS other than SC, ST and OBC-NCL" to be reserved for public employment, is also quiet on the main condition of "not properly reflected in state services." Thus, Articles 15 and 16 were collectively incompatible with the 103rd Amendment.

The omissions appear intentional and extend to a clear demonstration that "EWS other than SC, ST and OBC-NCL" is not educationally backward and not insufficiently depicted in government facilities, where case the reservation is not needed at all. It may be contended that the use in Articles 15(6) and 16(6) of the non obstant clause "Nothing in this Article shall prevent the State from" suggests that the power conferred on it is alone and are not restricted by other Articles 15 and 16. Also the non obstant clauses cannot save Articles 15(6) and 16(6) from being questioned on the grounds that they discriminate in favor of' EWS other than SC, ST and OBC-NCL' vis-à-vis SC, ST and OBC-NCL because they make this new classification of beneficiary qualified for educational and public employment reservations without strong reasons for' educational backwardness' or' insufficient representation' This is a clear breach of Article 14 and is unable to pass the 'wide test' prescribed in M. Nagaraj.

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Secondly, the Remark of Objects and Reasons for the 103rd Amendment relates to the Directive Principle of State Policy contained in Article 46 of the Constitution, which stipulates that the Government shall, with specific care, promote and defend the instructional and financial interests of the weaker segments of the population and, in specific, the Scheduled Castes and the Scheduled Tribes. The Statement of Objects and Reasons then goes on to declare:

"Nevertheless, economically weaker segments of people were also not eligible for reservation advantage. In order to fulfill the mandate of Article 46 and to guarantee that economically weaker segments of people have a reasonable opportunity to receive higher education and participate in jobs in state services, it was agreed to amend the Constitution of India.'

What we are seeing is a legal misdirection with the Statement of Objects and Reasons discussing EWS in particular, whereas Articles 15(6) and 16(6) of the Constitution Act, 2019 provides for reservations only for' EWS other than SC, ST and OBC-NCL.' This disharmony between the item and the outcome is, and is inappropriate, a severe legal flaw.

Furthermore, as per the canon of statutory interpretation called ejusdem generis, if a general phrase follows or precedes specific phrases or the enumeration of individuals or things relating to a separate category, then the general expression should not be provided its broadest significance, but only the limited significance of that category. For instance, if a legislation relates to motor powered vehicles such as scooters, bicycles, cars, buses, trucks, tractors and others, then a tribunal may use ejusdem generis to argue that such vehicles do not include aircraft, as the list includes only land-based transport. Furthermore, as per the canon of statutory interpretation called ejusdem generis, if a general phrase follows or precedes specific phrases or the enumeration of individuals or things relating to a separate category, then the general expression should not be provided its broadest significance, but only the limited significance of that category. For instance, if a legislation relates to motor powered vehicles such as scooters, bicycles, cars, buses, trucks, tractors and others, then a tribunal may use ejusdem generis to argue that such vehicles do not include aircraft, as the list includes only land-based transport. The concept is based on the fact that even if the legislature had meant to use an unlimited general expression, it wouldn't have hesitated to use the specific phrases or enumerations at all.

In implementing ejusdem generis to Article 46, it is evident from using the specific phrases "educational and economic interests," "in particular, of the Scheduled Castes and Scheduled Tribes", "shall defend them from social injustice and all forms of oppression", that the general

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phrase "weaker sections of the population" cannot be assigned its broadest significance in order to include such things as this.

"EWS except SC, ST and OBC-NCL." Article 46 is intended for "SC, ST and OBC-NCL" which are probable to be educationally and economically backward as well as victims of social injustice and exploitation. It is an ironic situation that the 103rd Amendment aims of excluding these courses from its purview. The 103rd Amendment cannot therefore depend on assistance from Article 46; on the contrary, it undermines the credibility of it and breaches the "identity test" prescribed in M. Nagaraj by damaging the Constitution's equality code.

Thirdly, the "Statement of Objects and Reasons" for the 103rd amendment to the effect that the EWS "was mainly prevented from attending higher education and public employment institutions because of their economic incapacity." But no empirical statistics or research study for "EWS other than SC, ST and OBC-NCL" or even for EWS generally supports this average. No such research was conducted even when the government of India made the 10 percent reservation for economically backward segments in 1991 or the government of Gujarat in 2016.

The Supreme Court has repeatedly held, both before the 1992 Indra Sawhney judgment and after, that "the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment" before making reservation. The choices were taken on all times arbitrarily without any due diligence to appease the forward castes.

For instance, in **Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation**[19], the Supreme Court dismissed the decision of the Jharkhand Government to combine the Extremely Backward Class and the Backward Class and to decrease the reservation from 12% and 9% respectively to 14% due to the lack of empirical information and research. This was also one of the reasons why the 2016 Gujarat Ordinance quashing provided for 10 percent EWS reservation.

Due to a lack of empirical information and research study to support the reservations for "EWS other than SC, ST and OBC NCL," the 103rd Amendment lacks the "wide test" prescribed in M. Nagaraj to test the validity of a constitutional amendment in the context of a fundamental structural challenge.

Fourth, reservation is intended to encourage meaningful equality through remedial intervention in assistance of societies under represented segments. Is this description answered by socially

[19] Appeal (civil) 3430 of 2006

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and educationally developed classes such as the Hindu forward castes and also by non-Hindus? According to a written response provided by the Union Minister of State for Personnel, Jitendra Singh, to the Lok Sabha in December 2018, the proportion of SC, ST and OBC in the central public institutions as of 1 January 2016 was 17.49%, 8.47% and 21.57% respectively. This indicates that approximately 25 years after Indra Sawhney, the representation of OBC was lower than actual.[20] This also demonstrates that "groups other than SC, ST and OBC" held 52.47 percent of the posts, for whom the combined share of the overall population is less than 25 percent.

According to Credit Suisse Group AG's Global Wealth Report 2018 published in October 2018, 51.5% of the country's wealth is owned by the wealthiest 1% of Indians, 77.4% by the wealthiest 10%, 86.6% by the wealthiest 20%, and 4.7% by the lowest 60%. Although caste wise break-ups are often not accessible, it is sensible to believe that excluding a few exceptions, SC, ST, and OBC-NCL are more likely to be in the bottom 60%, while the Hindu forward castes are more likely to be in the top 20%.

Thereby, the 103rd amendment does have the impact of improving and solidifying the representation of Hindu forward castes and others who are already over represented in government facilities compared to their population, who have nearly monopolized corporate boardrooms, and who own a disproportionate proportion of the country's wealth. This brings violence, as is frequently understood, to the notion of equality and shifts anything beyond acceptance and fails the "identification test" prescribed in M. Nagaraj.

Fifth, the Rs. Eight lakhs revenue limit and the asset limits prescribed to determine economic backwardness are the same as the boundaries set to determine OBC's' creamy layer.' This would imply that the 103rd Amendment virtually erases the distinction between both the OBC-NCL (who are socially and educationally backward) and the 'EWS other than SC, ST and OBC-NCL' (who were not socially backward and about whom there was no empirical information to demonstrate that they are educationally backward). This would be a situation of equal treatment of unfairnesses.

In addition, as per a written response provided by Vijay Goel, the Union Minister of State for Statistics, to the Lok Sabha in August 2018, India's per capita revenue in 2016-17 was just Rs.82,229. In India, the annual revenue limit for revenue tax purposes is presently Rs.2.50 lakhs and more than 97% of the population is below that limit. So, for the category 'EWS other

[20] , *OBC Representation in Central Jobs Less Than Actual Quota: Government*, THE WIRE (Mar 12, 2021, 10:19 AM), https://thewire.in/rights/obc-representation-in-central-jobs-less-than-actual-quota-government

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than SC, ST and OBC-NCL,' the very elevated annual revenue limit of Rs.8 lakhs makes it too broad-based and unfair to the poorest of the poor. It is not, in other words, a sensible categorization of all individuals likewise located with regard to the law. It would be a situation of treating discrepancies similarly in the category "EWS other than SC, ST and OBC NCL."

In **M.G. Badappanavar v. State of Karnataka**[21], the Supreme Court held that "equality is the fundamental characteristic of the Constitution and any treatment of equals as inequalities or any treatment of inequalities as equals breached the Basic Structure of the Constitution." The revenue threshold for determining economic backwardness cannot therefore be worse than the income limit for determining OBC's "creamy layer "; it must be smaller. Indeed, to be reasonable to the poorest in the category "EWS other than SC, ST and OBC-NCL," the annual revenue threshold for economic backwardness requires to be set well below India's average annual per capita revenue of Rs.82.229. A comparable argument holds good in determining economic backwardness for the assets criteria. The constitutionality of the Ministry of Social Justice and Empowerment's Office Memorandum of 17 January 2019 is therefore dubious.

Sixth, the 103rd amendment infringes the "50% ceiling" rule for complete reservations that has been continuously maintained by the Supreme Court since M.R. Balaji as keeping a correct equilibrium around official equality and substantive equality, and having, albeit indirectly, a constitutional imprimatur in Article 16(4B) implemented by the Constitution Act (81st Amendment) 2000. Thus, one of the circumstances (quantitative restriction) of the "wide test" prescribed in M. Nagaraj fails to determine the validity of a constitutional amendment in the light of a fundamental challenge to the structure.

Throughout these years, the "50 percent ceiling" ratio was the primary judicial barrier to the demand from different pressure groups for higher reservation. I cannot see the Supreme Court plugging reservations at any threshold other than 50 percent with any adequate judicial logic; any higher limit will be artificial and artificial and lack credibility.

V. CONCLUSION

In India, castes/classes that are numerically important but socially and educationally backward used electoral politics and their legislative influence to promote their interest in education and public employment. As stated previously, the Supreme Court has usually agreed on constitutional amendments pertaining to reservations, and the only two regions where it has so far taken a strong stand are the "50 per cent ceiling rule" and the "creamy layer" idea. Whether

[21] 2001 (1) KarLJ 236

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the Supreme Court will lay like a rock and reaffirm the "50% ceiling rule" or enable it to be washed away by the political currents continues to remain to be seen. Possible the following situations:

Hypothetical situation 1: The Supreme Court completely quashed the Constitution Act (103rd Amendment) of 2019 as ultra vires the doctrine of "Basic Structure." The amendment ceases, as discussed in the previous chapter, both the "wide test" and the "identity test" prescribed in M. Nagaraj; disturbs the sensitive equilibrium between official equality and significant equality; treats inequalities as equals; enhances and cements the representation of castes / classes that have already been over-represented; and thus over-recognizes the Constitution's equality code.

Hypothetical situation 2: The Supreme Court partially quashed the amendment, the part in which the complete reservations exceed 50% and the absurdly elevated revenue and asset limit set by the central government in its O.M. From 17 January 2019. The Court may recommend that the "EWS other than SC, ST and OBC-NCL" revenue and asset boundaries should be set at a much lesser rate so that only the truly deserving among them will profit from the reservation. These boundaries must be equal to or below the average or average per capita of the country's population's annual revenue or asset holdings and should be reviewed periodically. The Court might also order a equitable reduction in the quotas for all four categories so that the complete reservations do not exceed 50%. This might not be politically acceptable because it will reduce the current SC, ST and OBC-NCL quotas, and it is unlikely whether the bullet will be bite by the Supreme Court.

Hypothetical situation 3: The Supreme Court postponed the issuance of orders and enables drifting issues. This situation is not as ridiculous as it might seem at first sight when we remember that the final order was not adopted in 25 years with regard to the Tamil Nadu Act for 69% reservations placed in the 1994 Ninth Schedule. It can be observed that while the Supreme Court was fast to award a stay against the application of a 27% reservation for OBC in Central Government employment in 1990 and a stay against a 27% reservation for OBC in Central Education Institutions in 2007, it refused to grant a stay against a 10% reservation for "EWS other than SC, ST and OBC NCL". If the Court postpones passing final orders, the longer the 10% reservation is enjoyed by the "EWS other than SC, ST and OBC NCL," the harder it becomes to strike it both judicially and politically. However such things won't come to a pass and that the Supreme Court will shortly adjudicate the amendment's constitutionality.

Hypothetical situation 4: The Supreme Court upholds the 103rd Amendment with the present

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income: The Supreme Court maintains the 103rd amendment with the current OBC-NCL revenue and asset boundaries. It will involve a bench that is bigger than the nine judge panel that adjudicated Indra Sawhney to overrule many of its choices. This is going to be the worst scenario. There's no going back once the Lakshman Rekha is passed. The OBC will start demanding 52 percent proportional representation and have the political muscle to do so. The SC and ST will start to demand proportional representation in states / UTs where they have big populations and will also be an efficient pressure group. It is correct that in Indra Sawhney, the Supreme Court held that "appropriate representation" referred to in Article 16(4) is not the same as "proportional representation." But to "correct" it, it will only take one more constitutional amendment or a bigger bench. Then we may end up with about 90% reservations for OBC-NCL, SC, ST, and EWS leaving only 10% for the General Category and mocking the basic right to equal opportunities. If, for reasons quoted in the appropriate previous paragraphs, we exclude scenarios 2 and 3, the Supreme Court actually has only two alternatives before it: either strike the Constitution (103rd Amendment) Act, 2019 as a whole, or maintain it and be ready to let the genius of proportional representation out of the bottle. In Indian Constitutional Law, this will be a very significant choice.

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