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Research Article

Equality, Affirmative Action, and Economically Weaker Sections in India

Sukrit Garg *
Faculty of Law, NALSAR University of Law, India

Vikash Kumar Upadhyay
Faculty of Law, Nirma University, India

ABSTRACT: The Indian Parliament has brought about various measures of positive discrimination to address social inequalities. One such measure taken by the Indian Parliament was amending the Constitution of India in 2019, creating a category of 'Economically Weaker Sections' to make special provisions for them. This article aims to assess the politico-legal issues surrounding the policy of reservation for the economically deprived classes. The article employs the doctrinal method to study the policy and critically analyses the Janhit Abhiyan v. Union of India (2023) 5 SCC 1 judgment where the Supreme Court of India upheld the constitutionality of the Constitution (103rd Amendment) Act 2019. The article analyses the arguments of parties and opinions of the Court against two major constitutional principles – the promotion of substantive justice by relying upon a comparative conception of equality and securing the identity of the Constitution by adhering to the basic structure doctrine. This paper argues against restricting the application of basic structure doctrine to cases where the 'essence' of the structure has been stripped. Such restriction may curtail the ambit of application of the doctrine, and it may adversely affect the enjoyment of fundamental rights. The interpretation that reservations are an exception to the principle of equality, rather than an extension thereof, runs contrary to the notion of equality conceived by the Constitution and grants them a contingent legitimacy. If the 'essence test' is accepted for the application of basic structure doctrine, then the perception of reservation as being non-essential to equality also protects such policy measures from basic structure review.

KEYWORDS: Equality, Reservation, Economically Weaker Sections, Basic Structure Doctrine, Affirmative Action.

I. INTRODUCTION

The Constitution (103rd Amendment) Act 2019 enabled the State to make special provisions (including reservations regarding admission to educational institutions and appointments or posts) in favor of any Economically Weaker Section (EWS)

* Corresponding author, email: sukrit.garg@nalsar.ac.in; svengarg@gmail.com

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of citizens.[1] The EWS was construed as being other than those covered under the Scheduled Castes/ Scheduled Tribes and Other Backward Classes. Further, in the case of reservation, the special provision would be in addition to the existing reservations. However, this would be subject to a maximum of 10% of the total seats in each category. On November 7, 2022, a five-judge bench of the Supreme Court of India delivered a judgment on the constitutionality of the amendment. The challenge raised against the constitutional amendment for violating the basic structure of the Constitution on the ground of breach of the 'equality code' failed by a 3:2 majority.

This paper aims to critically analyze the amendment and the judgment of the Indian Supreme Court that pronounced its constitutionality. The amendment and the judgment have been studied considerably in the brief period since the decision. Gopal Guru, in his editorial comment to an issue of Economic and Political Weekly, states that the moral justification for reservation is "democratization of opportunity structures and the universalization of respect" and that the EWS quota lacks this justification, thereby fragmenting the principle of reservation.[2] Harish S. Wankhede has argued that the policy and the judgment thereon have "disturbed the conventional political guidelines and constitutional principles" and that it appears to be a poverty alleviation program.[3] The judgment has been scrutinized by Professor M. P. Singh, who has assessed the various criticisms the judgment received and opined that it deserves a reassessment in the light of previously settled principles concerning the economic criterion of reservations.[4] Some empirical works have also provided a data-driven view to contextualize and assess the policy.[5] However, the paper is concerned with the

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1 The power to amend the Constitution has been given to the Indian Parliament by the Constitution. See *Constitution of India, Article 368*, 1950.

2 Gopal Guru, "Fragmenting the Principle of Reservation" (2022) 57:47 Economic and Political Weekly.

3 Harish S Wankhede, "Does EWS Reservation Redraft the Principles of Social Justice?" (2023) 58:8 Economic and Political Weekly at 20.

4 MP Singh, "Reservation for Economically Weaker Sections: The EWS Quota" (2023) 53:1 Social Change at 94.

5 Abusaleh Shariff, "Effecting Equity and Equality of Opportunity in a Socially Diverse India" (2023) 53:1 Social Change at 108. See also: Sunny Jose et al, "EWS Quota: A Policy against Evidence" (2023) 53:1 Social Change at 117.

legal contours and consequences of the policy and limits itself to doctrinal discussions.

This paper shall provide closer scrutiny and a critical assessment of the determinations of the apex court in the judicial review of the Constitution (103rd Amendment) Act 2019. The paper begins by tracing the backdrop of the 103rd Amendment. We shall, then, discuss the issues raised and the arguments forwarded in the challenge to said amendment. Finally, we have attempted to appraise the majority and minority opinions expressed in the judgment in the light of established principles of constitutional interpretation.

II. METHODOLOGY

The article employs the doctrinal and analytical method to study the Constitution (103rd Amendment) Act 2019, which enabled the State to create measures of positive discrimination for the EWS in society. It critically analyses the Janhit Abhiyan judgment of the Supreme Court of India, which upheld the constitutionality of the said amendment to the Indian Constitution. The judgment provides an adequate source of a comprehensive discourse on the policy measure. The article analyses the arguments presented by the parties and the opinions of the court against two major constitutional principles – the promotion of substantive justice by relying upon a comparative conception of equality and securing the identity of the Constitution by adhering to the basic structure doctrine.

III. BACKDROP TO THE 103RD AMENDMENT

The Constitution of India adopts a comparative conception of equality.[6] It understands equality as a relative concept, treating equals equally and unequally differently.[7] Furthermore,[8] the state is obliged not only to attempt to remove

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6 JK Mittal, "Right to Equality and the Indian Supreme Court" (1965) 14:3 The American Journal of Comparative Law at 422.

7 *State of West Bengal v. Anwar Ali Sarkar, 1 SCC 1*, 1952.

8 MP Singh, "Fundamental Rights, State Action and Cricket in India" (2005) 13:2 Asia Pacific Law Review at 203. See also: Shameek Sen, "Transformative Constitution and the Horizontality Approach: An Exploratory Study" (2019) 10:2 Indian Journal of Law and Justice at 141. See also:

inequalities but also to address them by making provisions for positive discrimination.[9] The Constitution enables the State to make special provisions for those who have long been in a disadvantageous position. Initially, Articles 15 and 16 had one provision each regarding positive discrimination. Clause (3) of Article 15 enables the State to make special provisions in favor of women and children.[10] Clause (4) of Article 16 enables the State to reserve appointments or posts in favor of any backward class of citizens.

Since the commencement of the Constitution, several amendments have expanded the State's ability to engage in positive discrimination. The amendments made to Articles 15 and 16 mostly appear in the form of responses of the Parliament to judgments delivered by the Supreme Court.[11] The targeted subject matter of these amendments ranges from generally empowering the State to make special provisions for the advancement of 'socially and educationally backward classes of citizens' and extends to more specific matters of admission in educational institutions. These include reservation in promotions, recognition of consequential seniority for those promoted through reservations, and the extent of carrying forward unfilled seats of vacancies to future years.

The amendments to the Constitution set the platform for the State to create special provisions and reservations. They were, however, soon faced with specific questions of constitutional importance. While the questions were multifaceted, we shall discuss two major issues: a) the beneficiaries targeted by the provisions and c) the extent to which special provisions may be created for the targeted beneficiaries.

Sujith Nair, "Horizontal Application of Fundamental Rights: Benign or Misconceived" (2023) 7:2 Comp Const L and Admin Law Journal at 76.

9 Positive discrimination is an act of State where the State gives an advantage to those groups who have been treated unfairly due to their caste, sex, age, etc. See Prakash Sharma, "Equality and Protective Discrimination under the Constitution of India" (2010) 1:1 Indian Journal of Law and Justice at 92.

10 MP Jain, *Indian Constittutional Law*, 8th ed ed (Gurgaon: Lexis Nexis, 2019).

11 In the initial years of the commencement of the Constitution, Parliament and State Assemblies tried to give reservations for certain communities which was struck down by the Supreme Court. In order to overcome these judgments, the Parliament brought amendments to Arts. 15 and 16. This style to overcome the judgments of the Supreme Court continued in the 21st century. The Constitution (103rd Amendment) Act, 2019 is also an attempt to overcome the judgments of the Supreme Court. It has been discussed in the next part of this paper.

A. The Targeted Beneficiaries under Articles 15 and 16

Prior to the 103rd Amendment, the targeted beneficiaries of special provisions under Article 15 were 'socially and educationally backward classes of citizens' whereas, under clause (4) of Article 16, were 'any backward class of citizens.' From a textual perspective, both articles target the common group of the 'backward class of citizens.' Article 15 uses a qualification and requires the backwardness to be both social and educational. For a long time, the Constitution did not define the term 'backward class of citizens.' Article 340 empowered the President to appoint a Commission to investigate the conditions of the socially and educationally backward classes in India and to make recommendations for improving their conditions. This power has been exercised twice. In 1953, the President appointed the first backward class commission under chairman Kaka Kalelkar, which submitted its report in 1955. The Kalelkar Commission Report discussed around fifteen factors of backwardness with their anti-thesis criteria constituting non-backwardness. The factors of backwardness were based on sex, economic background, family education, beliefs, skills, nature of employment, caste, and place of residence.[12] The report was, however, rejected in 1961 alleging that the identification of backward classes was not done based on objective criteria.[13] The President appointed the second backward class commission in 1978 under the chairmanship of B. P. Mandal, which submitted its report in 1981. The Commission undertook massive research, and based on its report, it evolved eleven criteria of backwardness grouped into three broad categories: social, economic, and educational. Further, the three categories of backwardness were not considered of equal importance. Though economic criteria were considered important, it was to have the least consideration for assessing backwardness. The social indicators were given a weightage of 3 points each, whereas educational and economic indicators were given a weightage of 2 points and 1 point each,

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12 *Report of the Backward Classes Commission*, by Government of India (1955).

13 Shrinindhi Narasimhan, "Being Dalit, Being Muslim: Caste, Religion, and the State in India" (2021) 16:2 St Anthony's International Review at 179.

respectively. [14] The Report was implemented in India by the V P Singh government in July 1990 and led to mass upheaval in the country.[15]

The Courts' jurisdiction has often been invoked to assess the criterion of backwardness adopted by the State. In such cases, the Court assesses whether the factors used to identify backward classes could be viewed as 'constitutional' indicators or backwardness, and how suitable such factors are as the indicators. In *M. R. Balaji v. State of Mysore*,[16] the Court defined the meaning of backwardness under Article 15(4). The Court stated that backwardness should not be relative to the conditions of the most advanced classes and that it must be both social and educational for Article 15(4). Caste was recognized as a relevant factor in the determination of backwardness; however, it could not be the sole factor or the dominant test. The Court identified poverty as a significant basis for determining backwardness along with other economic factors like the nature of occupation and place of habitation. The Court appreciated the complexity of the task of determining backwardness and observed that sociological, social, and economic considerations can, together, enable us to resolve the question. In *R. Chitralekha v. State of Mysore*,[17] the Court reiterated its position on caste as a factor for assessing backwardness. It observed that determining backwardness without reference to caste would not be improper in law. The Court further elaborated in *P. Rajendran v. State of Madras*,[18] that caste may be a class of citizens where it is found that the caste as a whole was socially and educationally backward. In *State of U. P. v. Pradip Tandon*,[19] the Court recognized factors like traditional unchanging occupations, place of habitation and its environment, ability to make effective use of resources, neglected opportunities, and living in remote places as relevant for determining backwardness. In *Kumari K. S. Jayasree v. State of Kerala,*[20] the Court held that though caste and poverty are relevant for the determination of

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14 A Ramaiah, "Identifying Other Backward Classes" (1992) 27:23 Economic and Political Weekly at 1203.

15 K Balagopal, "This Anti-Mandal Mania" (1990) 25:40 Economic and Political Weekly at 2231.

16 *AIR 1963 SC 649*, at para 22 .

17 *AIR 1964 SC 1823*, at para 15.

18 *AIR 1968 SC 1012*, at para 7.

19 *1 SCC 267*, 1975, at para 15.

20 *3 SCC 730*, 1976, at para 21.

backwardness, neither of them can solely form the basis of recognition of a class as backward.

The judgments of the higher courts laid down varying principles for the determination of backwardness. Further, economic and social considerations were given varying importance in determining backwardness.[21] In order to relieve the provisions from the resulting confusion, clear guidelines were requested from the Supreme Court regarding the question in the case of *K. C. Vasanth Kumar v. State of Karnataka*.[22] The clarity expected from the judgment was not received as all five judges gave different judgments identifying different factors with varying importance for determining backwardness. While other judges accepted caste as a relevant factor, *Justice Desai* rejected the same as a suitable ground for determination of backwardness because it would legitimize and perpetuate the caste system, would be against the secular character of the Preamble, and does not augur well with people belonging to religions other than Hinduism.[23] For him, the only criteria for determining backwardness could be economic. He has elaborated his contention in the following words:

> "The bank balance, the property holding, and the money power determine the social status of the individual and guarantee the opportunities to rise to the top echelon…If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

It was finally through the *Indra Sawhney v. Union of India* judgment that the Supreme Court gave definitive principles regarding the interpretation of constitutional provisions surrounding affirmative action in India.[24] Though caste

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21 P P Rao, "Right to Equality and the Reservation Policy" (2000) 42:2 Journal of the Indian Law Institute at 193.

22 *AIR 1985 SC 1495*.

23 *Ibid,* at para 25.

24 *Supp (3) SCC 217*, 1992.

was recognized as a relevant factor for determining backwardness, it was held that no backward class could be identified solely based on economic criteria. However, identification may be made on the consideration of occupation-cum-income without reference to caste. The general direction of the judgments of the Supreme Court on the indices of backwardness has been to use the economic criteria as only one of the factors and not the sole factor. This consideration was also concretized by the Sawhney judgment. This ruling became the first challenge for any State action attempting to provide positive discrimination solely based on economic criteria.

B. Extent and Ceiling of Benefits Granted

Ceiling to reservations refers to a quantitative maximum limit, up to which policies of reservation of opportunities could be afforded to the targeted beneficiaries.[25] The Supreme Court considered the question of ceiling to reservations in the judgment of *M. R. Balaji v. State of Mysore*,[26] where the Court held that any special provision should be made within reasonable limits, the suggested limit was "less than 50%". The Court applied the ceiling of 50% in the judgment of *T. Devadasan v. Union of India*.[27] The ceiling faced some challenges in the judgments of *State of Kerala v. N. M. Thomas*,[28] and *Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India*,[29] where the Court upheld special provisions exceeding the 50% ceiling. In *Indra Sawhney v. Union of India*,[30] the Supreme Court observed that the special provisions made for certain classes of citizens should be balanced against the promise of equality made to citizens at large. The Court held that the reservation contemplated under the enabling provisions shall not exceed 50%. The Court, however, did not set the ceiling in stone and provided for situations when, in extraordinary circumstances, the ceiling may be breached.

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25 Abhinav Chandrachud, *These Seats are Reserved: Caste, Quotas and the Constitution of India* (India: Penguin Random House, 2023).

26 *AIR 1963 SC 649*, *supra* note 16, at para 34.

27 *AIR 1964 SC 179*.

28 *AIR 1976 SC 490*.

29 *AIR 1981 SC 298*.

30 *AIR 1993 SC 477*.

Recently, in *Dr. Jaishri Laxmanrao Patil v. State of Maharashtra*,[31] the Supreme Court rejected the plea to refer the Indra Sawhney judgment to a larger bench for reconsideration. The maximum limit of reservation allowed under the Constitution is 50%, which was held as a ratio of the judgment, and was therefore binding under Article 141 of the Constitution.[32] Any breach of the ceiling would be allowed only on the criteria of the exception made out in the Sawhney judgment, which should be demonstrated and justified by quantifiable data.

C. The Constitution (103rd Amendment) Act, 2019

The above discussion helped us understand that according to the authoritative interpretation of the constitutional provisions, economic criteria cannot be the sole criteria for the identification of backward classes of citizens, and any special provision may not be made beyond the 50% ceiling except in extraordinary circumstances. In this situation, the State could not create special provisions, especially those related to reservation, purely on economic considerations. Further, they found it difficult to create such provisions wherever possible due to the 50% ceiling (when the reserved categories already covered 49.5% on the grounds of social and educational backwardness). Such difficulties in addressing the issues of the people placed in an economically disadvantageous position provided the platform for Parliament to bring changes to the constitutional provisions.

On January 8, 2019, the Constitution (124th Amendment) Bill 2019 was introduced in the House of the People (Lower House of the Indian Parliament) by the then Minister of Social Justice and Empowerment, Mr. Thaawar Chand Gehlot. The House of the People passed the Bill, as introduced, on the same day and by the Rajya Sabha on the next day. It received the President's assent on January 12, 2019, and became the Constitution (103rd Amendment) Act, 109.[33] Clauses were added (6) to Article 15 and Article 16. They enabled the State to

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31 *8 SCC 1*, 2021.

32 Julius Stone, "The Ratio of the Ratio Decidendi" (1959) 22:6 The Modern Law Review at 597.

33 M R Madhavan, "Hurrying through a legislation on reservation quota", (2019), online: *The Hindu* <https://www.thehindu.com/opinion/op-ed/hurrying-through-a-legislation/article62110397.ece>.

make special provisions for positive discrimination in favor of EWS of citizens.' The newly created EWS category did not include the categories for whom enabling provisions were already available in the Constitution. Hence, Scheduled Castes, Scheduled Tribes, and Other Backward Classes shall not be considered in the definition of the EWS. Further, the explanation appended to clause (6) of Article 15 provides minimum guidance regarding the standards for recognizing the EWS. The identification of the new category shall be performed based on 'indicators of economic disadvantage,' including family income. By creating the EWS category separate and distinct from backward classes, the Amendment has attempted to relieve the State from the confines of the judgments that barred recognition of backwardness solely on economic grounds.

The Amendment has also expressly stated that any provision for reservation created for the EWS shall be in addition to the existing reservation. Hence, the quantum of reservation already granted shall not be adversely affected by it. Further, any reservation granted to the EWS category shall not exceed 10% of the post in each category other than the backward classes. The Amendment, therefore, allows for a breach of the 50% ceiling set to reservations by the Sawhney judgment.

The Amendment, due to its multiple responses to the existing constitutional principles, was challenged for violation of the basic structure of the Indian Constitution. The challenge posed to the Amendment, with the contentions of the parties and the judgment delivered by the Apex Court, shall be discussed in the forthcoming parts of the paper.

IV. THE CHALLENGE AND CONTENTIONS

Several writ petitions were filed before the Supreme Court of India challenging the Constitution (103rd Amendment) Act 2019 on the grounds of violating the basic structure of the Indian Constitution. In this part, we shall discuss the contentions of the petitioners and the respondents.[34] G. Mohan Gopal led the

[34] Yaniv Roznai, "The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments" (2013) 62:3 The International and Comparative Law Quarterly at 557. See also: Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2010).

arguments for the petitioners, and Mr. K. K. Venugopal and Mr. Tushar Mehta led the arguments in support of the Amendment.

A. Contentions against the Amendment

A substantial challenge against a constitutional amendment may arise on the sole ground of violation of the basic structure of the Constitution. The doctrine protects the basic features of the Constitution that give it its identity against amendments that attempt to alter the fundamental nature of the Constitution.[35] The petitioners' challenge is premised on the ground that special provisions solely based on economic criteria, exclusion of the socially and educationally backward classes from the said provisions, and the breach of the 50% ceiling by the Amendment violates the 'Equality Code' which forms part of the basic structure of the Indian Constitution. The primary contentions against the Amendment may be narrowed down to four major arguments. Firstly, the petitioners proposed that social justice is a congenital feature of the Indian Constitution. The purpose of reservation and special provisions is to ensure that those who are socially backward may be uplifted and enabled to lead meaningful lives with dignity. The foundation of social backwardness as a pre-requisite for special provisions is, arguably, obliterated by the Amendment, which has allowed the creation of special provisions solely on economic criteria. Challengers of the Amendment further argued that reservations are anti-discrimination measures and not anti-deprivation measures. Hence, the creation of reservations on the grounds of economic deprivation ought not to be sustained.[36]

The second argument was premised because any class created for positive discrimination ought to have restricted confines. Further, such a class ought to be homogeneous, have a common origin, and have numerical strength. Any class created solely on economic criteria would be transient and relative and would not fulfill the aforementioned requirements. Further, any reservation created for such a class would not be an ameliorative measure as people will always be poorer than others. Therefore, while other special provisions for the EWS might be able to

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35 Gary Jeffrey Jacobsohn, "Constitutional Identity" (2006) 68:3 The Review of Politics at 361.

36 *Janhit Abhiyan v Union of India, 5 SCC 1, 80*, 2023.

remedy the deprivations, reservations granted on the same ground would be persistent as the EWS would always remain 'inadequately represented.' Reservation aims to ensure participation and representation, not used to alleviate poverty.[37] Additionally, the opposition argued that the Amendment is based only on financial criteria and not on economic status. The Amendment mentions only family income as a concrete ground of identification, and the 'other indicators of economic disadvantage' mentioned in the explanation to clause (6) of Article 15 are unclear at best.

The third argument pertains to the exclusion of the Scheduled Castes, Scheduled Tribes, and Other Backward Classes from the benefits granted to the EWS. They argued that the exclusion was made without any intelligible differentia, i.e., poverty strikes all alike, and there is nothing about the socially deprived sections of the community that intelligibly excludes them from the pangs of poverty. Further, the object of the Amendment was to ensure the alleviation of the poorer sections of society, and the exclusion of the socially deprived sections of the community has no rational nexus with the said object of the Amendment.[38] The opposition also argued that the exclusion of SCs, STs, and OBCs violates the principle of fraternity,[39] which is a part of the basic structure of the Indian Constitution.[40]

The fourth and final leg of the argument challenged the breach of the 50% ceiling of reservations as being violative of equal opportunity. They also argued that the breach violates the twin test of width and identity as propounded by the Court in *M. Nagaraj v. Union of India*.[41] The ceiling breach would, as argued, be against the width test as it would violate the basic principle of equality embedded in the

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37 *Ibid,* at 82-84.

38 *Ibid,* at 88-89.

39 *Ibid,* at 81.

40 *Prathvi Raj Chauhan v Union of India, 4 SCC 727*, 2020.

41 *8 SCC 212*, 2006. In this judgment, a five-judge bench of the Indian Supreme Court laid down the test to determine whether a constitutional amendment is against the basic structure of the Constitution. The test assesses two factors: a) whether the constitutional limitations on the exercise of power of amendment were recognised by the Parliament, and b) whether the amendment alters the basic identity of the constitutional principles. The test regarding the first factor is called the 'width test', and the test regarding the second factor is called the 'identity test'. See also: *I R Coelho v State of Tamil Nadu, 2 SCC 1*, 2007.

Constitution, and it would be against the identity test as the violation of the equality code would adversely affect the identity of our Constitution.[42]

B. *Contentions in Support of the Amendment*

Supporting arguments for the Amendment may be summarised in three heads. Firstly, the supporters argued that rather than violating the basic structure of the Constitution, the Amendment fosters it by adhering to the duties enjoined on the State by Articles 38 and 46 of the Indian Constitution to eliminate social, economic, and political inequalities and to promote justice. The creation of the new class of EWS strengthens the basic structure of the Constitution by fostering the promise of economic justice made by the Preamble to all citizens of India. Further, the Constitution placed no bar on the Parliament against demarcating a new section of people to protect their fundamental rights.[43] Secondly, excluding the SCs, STs, and OBCs from the newly created class does not violate the basic structure of the Constitution. Those who are economically weak among the aforementioned classes have already been granted the benefit of affirmative action by way of reservations in educational institutions and public employment, political representation through legislative bodies, et cetera. Rather, the inclusion of the classes in the newly created EWS category would be equivalent to granting them double benefit, which would have violated the principle of equality. Further, the provision of reservation for the EWS is in addition to the existing reservation for the SCs, STs, and OBCs.[44] Hence, the Amendment does not, in any way, affect the reservation up to 50% for the aforementioned classes. Thirdly, supporters argued that the 50% ceiling is not a sacrosanct rule, and breach of the same is allowed in extraordinary situations by the *Indra Sawhney* judgment.[45] Additionally, the 50% rule is only for the classes mentioned under Articles 15(4), 15(5) and 16(4). As the class of the EWS has been created separately and as distinct from the classes of the aforementioned provisions, the newly created class is not bound by the ceiling of 50%.

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42 *Janhit Abhiyan v Union of India, 5 SCC 1, 84*, 2023.
43 *Ibid,* at 94-96.
44 *Ibid,* at 95.
45 *Indra Sawhey v Union of India, Supp (3) SCC 217*, 1992, at para 810.

V. THE JUDGEMENT: MAJORITY AND MINORITY OPINIONS

The Supreme Court constitution bench in the matter comprised five judges. The decision was given in support of the Constitution (103rd Amendment) Act, 2019 by a 3:2 majority. Justice Dinesh Maheshwari, Justice Bela M. Trivedi, and Justice J. B. Pardiwala gave the majority opinion in three separate judgments. Justice S. Ravindra Bhat penned the minority opinion in one judgment for himself and the then (Chief Justice of India) CJI U. U. Lalit. In this part, we shall discuss and critically analyze the majority and minority opinions of the Court. We shall begin by mentioning the primary questions that the Court identified for consideration. Based on the opposing arguments regarding the challenge to the Amendment, the Court identified the following principal points for determination:

> " a) As to whether reservation is an instrument for inclusion of socially and educationally backward classes to the mainstream of society and, therefore, reservation structure singularly on economic criteria violates the basic structure of the Constitution?
>
> b) As to whether the exclusion of classes covered under Articles 15(4), 15(5), and 16(4) from getting the benefit of reservation as EWS violates the Equality Code and, thereby, the basic structure doctrine?
>
> c) As to whether reservations for EWS of citizens up to 10%, in addition to the existing reservations, results in the violation of basic structure on account of breaching the 50% ceiling?"[46]

Our discussion will be restricted to the three questions above.

A. Majority Opinion: Upholding the Constitutionality of the 103rd Amendment

The majority opinion of the Court, given in three separate judgments, holds the Constitution (103rd Amendment), 2019 to be constitutionally valid. Given the challenge made, the preliminary task for the Court was to set out the boundaries of the basic structure doctrine and whether all intrusions into the equality code may be said to be violations of the basic structure. After considering the judgments contributing to the development of the basic structure doctrine, the Court pointed out that there is no cut-and-dried formula to provide an answer to

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[46] *Janhit Abhiyan v Union of India, 5 SCC 1, 99*, 2023.

questions regarding the constitutionality of constitutional amendments. The Court noted:

> "The nature of amendment and the feature/s of the Constitution sought to be touched, altered, modulated, or changed by the Amendment would be the material factors for an appropriate determination of the question."[47]

The Court then assessed the equality code, the feature of the Constitution that the opposition accused the Amendment of violating. The question sought to be answered by the Court was whether all violations of the equality code may be said to breach the basic structure, and if not, then how should we distinguish the violative breach of equality from the non-violative breach? The judges answered this question by relying on the following observation made by Justice Krishna Iyer in *Maharao Sahaib Shri Bhim Singhji v. Union of India*:[48]

> "Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalization processes are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce legislation for reducing glaring economic inequality, their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable, or unscrupulous travesty of the quintessence of equal justice. If legislation does go that far, it shakes the democratic foundation and must suffer the death penalty."

The operative principle for the Court was that amendments that moderately abridge or alter the equality code cannot be said to be violating the basic structure unless the violation is "a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice." Therefore, any argument challenging constitutional amendment ought to address not just the violation of the values basic to the Constitution, rather, they ought to show that the violation affected the essence of the stated value and could not be counted among the peripheral injustices surrounding the value. Having established the operative principles set out by the Court, we shall now discuss the Court's response to the three principal points for determination.

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47 *Ibid,* at 129.

48 *1 SCC 166, 186*, 1981.

1. Whether Economic Criteria as a Sole Basis of Reservation Violates Basic Structure?

To resolve this question, the Court raises a preliminary question: whether reservation may be said to be a part of the basic structure of the Constitution. If reservation itself does not form a part of the basic structure, then appendices to the execution of reservation shall also be excluded from the inviolable core of the Constitution. The Court observed that after a study of the provisions granting reservations in Part III of the Constitution – Arts 15 and 16 – these provisions were carefully crafted to be 'enabling provisions.' Such provisions only confer a discretionary power on the State. They do not recognize the fundamental right of any person to benefit from affirmative action, nor do they impose a positive obligation on the State to take steps for positive discrimination. They are included as a measure of abundant caution to protect the State when it chooses to take steps 'to raise the downtrodden.'[49] Because reservation is neither a right nor an obligatory affirmative action measure mandatorily imposed by the State, it is not of quintessential importance to the equality code. Further, the Court observed:

> "(Reservation) is nevertheless an exception to the general rule of equality and hence cannot be regarded as such an essential feature of the Constitution that cannot be modulated."

The Court, thus, established that though equality is a basic feature of the Constitution, reservation, being an exception to equality, and provisions for reservation being merely enabling in nature, cannot be said to be a quintessential feature of equality. Therefore, modifications in norms of reservation cannot be said to be violative of the basic structure doctrine.

Having resolved the preliminary question, the Court establishes the importance of economic justice to the constitutional scheme by citing proceedings of the Constituent Assembly, the Preamble to the Constitution, and constitutional provisions, including Arts 38, 39A, 46, 243G, and 243W.[50] The Court observed

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[49] *Janhit Abhiyan v Union of India, 5 SCC 1, 136*, 2023.

[50] *Articles 38, 39A and 46 in Part IV* of the Indian Constitution that deals with directive principles of state policy. The provisions of this Part contain principles which are not enforceable in any court, but are fundamental in governance, and the State is dutybound to apply these principles in its actions. Article 38 directs the State to promote a social order that is instructed by social, economic and political justice. Article 39A directs the State to ensure equal justice and free legal aid. Article 46 directs the State to promote educational and economic interests of Scheduled

that the Constitution has given equal emphasis to economic justice, just as it gives to social justice. The Court further observes:

> "(If) an egalitarian socio-economic order is the goal…, the deprivations arising from economic disadvantages, including those of discrimination and exclusion, need to be addressed by the State; and for that matter, every affirmative action has the sanction of our Constitution, as noticeable from the frame of Preamble as also the text and texture of the provisions contained in Part III and Part IV."[51]

The reasoning of the Court depicting the space for economic justice in the constitutional vision is evident from the Preamble and the provisions of the Constitution. Though this has always been the case, we have a series of judgments, as discussed in the previous part of this paper, where reservation solely based on economic criteria has been deemed unconstitutional. The Court noted that wherever reservations on solely economic criteria were ruled unconstitutional, it was to convey the principle that:

> "…(to) avail the benefit of affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and not the economic disadvantage alone."

The Court, thus, established the limitation of the earlier rulings on economic criteria as the sole basis for granting reservations – the bar on the granting of reservation on such a criterion applies only to cases where the benefit has attempted to be given under clauses (4) and (5) of Article 15, and under clause (4) of Article 16. The judgments do not constitute a bar on granting of reservation only on economic criteria by or under any provisions other than the ones mentioned above. Neither do the terms of the provisions of a constitution, alone, constitute a bar on the power of the Parliament to amend the Constitution to create enabling provisions to address economic disadvantage through measures of affirmative action.

In brief, the Court answers the question based on the three following findings. Firstly, reservation is not an essential feature of the equality code and, therefore, not a part of the basic structure. Second, economic justice is one of the goals of

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Castes, Scheduled Tribes and other weaker sections of the society. Article 243G enables the State Legislatures in India to empower Panchayats (institutions of local self-governance in villages) to prepare plans for economic justice and execute them. Article 243W grants a similar power to the State Legislatures in India with respect to Municipalities (institutions of local self-governance in urban areas).

51 *Ibid,* at 142-143.

the Constitution. Lastly, judgments barring the grant of reservation on purely economic criteria apply only to Articles 15(4), 15(5), and 16(4) and do not oust the possibility of granting reservations on purely economic criteria by or under other provisions. The majority judges, therefore, resolve the first question by holding that economic criteria as a sole basis of reservation do not violate the basic structure of the Constitution.

2. Whether the Exclusion of the Socially and Educationally Backward Classes from EWS Reservation Amounts to a Violation of Basic Structure

The socially and educationally backward classes can be afforded reservation by the State under Articles 15(4), 15(5), and 16(4). The Constitution (103rd Amendment) Act 2019 creates a new class of EWS that excludes the socially and educationally backward classes. The Court observed that in recognizing the entitlement of a class of citizens to affirmative action under the previous articles, several factors are considered, such as caste, residence, occupation, and poverty. Having already recognized the interests of a class of citizens on economic grounds, the Court held that "if the Parliament has considered it proper not to extend to those classes another benefit of reservation carved out for other EWS, there is no reason to question the Parliament." The Court held that the socially and educationally backward classes have no valid grievance against their exclusion from the new provisions of reservation for other classes of economically weak citizens. The Court observed:

> "It gets, perforce, reiterated that the compensatory discrimination, by its very nature, would be structured as exclusionary in order to achieve its objectives. Rather, if the classes for whom affirmative action is already in place are not excluded, the present exercise itself would be of unjustified discrimination."[52]

The Court decided the question on two key findings: a) that reservation is an exclusionary principle, and b) that no claim lies for the socially and educationally backward classes as similar enabling provisions are already available in the Constitution. Hence, excluding a class already enjoined the benefit cannot be discriminatory. Therefore, the exclusion of the socially and educationally backward classes from EWS reservation does not amount to a violation of the basic structure.

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[52] *Ibid,* at 162.

3. Whether a Breach of the 50% Ceiling Violate the Basic Structure?

The enabling provisions for the grant of reservation to the newly constituted, EWS by the Constitution (103rd Amendment) Act 2019 provide that any reservation so extended shall be "in addition to the existing reservation and subject to a maximum of 10% of the posts in each category." This provision allows the total amount of seats reserved for one or the other classes to surpass the 50% ceiling (the ceiling having been recognized by the Supreme Court in *Indra Sawhney judgment*,[53] and by the Constitution, since after the Constitution (81st Amendment) Act, 2000 that inserted Article 16(4B) as a guiding principle for the determination of the 50% ceiling).[54] The majority of judges did not deem the breach of the 50% ceiling to violate the basic structure. The Court studied the various judgments where the Supreme Court discusses the 50% ceiling. They concluded that all observations made by the Court regarding the 50% ceiling must be understood, strictly concerning the reservation obtained under Articles 15(4), 15(5), and 16(4). It should not be overstretched and applied to a completely different class created under other provisions of the Constitution. Moreover, the Court noted that the ceiling was not inflexible or inviolable and even maybe breached in exceptional circumstances.[55] Lastly, for the Court, the ceiling to the reservation was not an essential counterpart of the principle of equality, and thus, a breach of the ceiling by way of a constitutional amendment does not violate the basic structure of the Constitution.

B. Minority Opinion: Holding the 103rd Amendment to be Unconstitutional

Justice S. Ravindra Bhat penned the minority opinion for himself and (then) CJI U. U. Lalit. The minority opinion holds the Amendment unconstitutional due to the exclusionary treatment of the socially and educationally backward classes by the newly inserted clause (6) in Articles 15 and 16. It, however, stands in limited agreement with the majority opinion regarding the suitability of economic criteria for affirmative action.

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53 *Indra Sawhey v. Union of India, Supp (3) SCC 217*, *supra* note 45.
54 *Jaishri Laxmanrao Patil v State of Maharashtra, 8 SCC 1*, 2021.
55 *Indra Sawhey v. Union of India, Supp (3) SCC 217*, *supra* note 45, at para 810.

The minority opinion read the principle of equality as essential to the Constitution. For the Court, non-discrimination constitutes the bedrock of equality, and equality is inseparably tethered to non-discrimination. Further, the Court read the idea of positive discrimination in favor of communities suppressed for centuries as integral to the principle of non-discrimination. As the socially and educationally backward classes are a part of the people who have faced intergenerational inequities, the Court read the injunction not to exclude or discriminate against SC/ST communities as the essence of equality, thereby forming part of the basic structure doctrine. As the Amendment treats the socially and educationally backward classes through exclusion, the minority opinion read it as contravening the basic structure of the Constitution in line with the aforementioned principle.

The Court further observed that the new class of EWS of citizens, created after excluding the socially and educationally backward classes, does not merely create a new class; rather, the new class has been created within the category of those who are not socially and educationally backward. The Court read the classification as against the principle of equality. If the basis of classification is economic deprivation, then the social identities of the individuals ought to have become irrelevant. The fact that the SEBCs are already beneficiaries of reservation was understood not to be a distinguishing factor. The Court neither found an intelligible differentia in the demarcation of the classes nor any rational nexus of the distinction drawn with the object of the Amendment – to eliminate poverty. The Court observed:

> "Poverty debilitates all sections of society…The exclusion of those sections of society, for whose benefit non-discriminatory provisions were designed, is an indefensible violation of the non-discriminatory principle, a facet that is entwined in the Equality Code, and thus reaches the level of offending or damaging the very identity of the Constitution."[56]

C. Minority Opinion: Point of Agreement with the Majority Ruling

Despite holding the Constitution (103rd Amendment) Act 2019 unconstitutional on the grounds of exclusion of the socially and educationally backward classes, the

[56] *Janhit Abhiyan v Union of India, 5 SCC 1, 316*, 2023.

minority opinion was in part in agreement with certain observations of the majority ruling. Justice Bhat agrees that economic criteria may be the sole criteria for Article 15. The Court observed that economic emancipation is a facet of economic justice and is essential for meaningful liberty and equality. The Court stated:

> "Without economic emancipation, liberty – indeed equality, are mere platitudes, empty promises tied to "ropes of sand." The break from the past – which was rooted in the elimination of caste-based social discrimination, in affirmative action – to now include affirmative action based on deprivation, through the impugned Amendment, therefore, does not alter, destroy or damage the basic structure of the Constitution. It adds a new dimension to the Constitutional project of uplifting the poorest segments of society."[57]

The agreement that exists for the role of economic criteria under Article 15 does not, however, extend to Article 16. The Court observed that the ground of reservation for the backward classes under Article 16 is their underrepresentation in public employment. It was the notion of representation that was found to be the link between reservation and public employment. The minority opinion held that the economic criteria of reservation created by the Constitution (103rd Amendment) Act 2019, fails to address the question of inadequate representation for Article 16 and therefore violates the equality of opportunity, which is assured by the Preamble and Article 16(1) alike.

VI. CRITIQUE

Several determinations made in the judgment require separate consideration. In this critique, we shall address some of the contentious determinations made by the Court. We shall concentrate on three major determinations: a) that mere abridgment of basic features is not sufficient for violation of the basic structure; basic structure shall be violated when 'what is essential to the basic structure' has been violated; b) that economic criteria may be a ground for grant of benefit of reservation; c) that the 50% ceiling is not sacrosanct to the idea of reservations, and d) that breach of 50% ceiling on economic grounds is covered under the Sawhney exception. The critique has not confined itself to the limitations of the judicial system. The assessment of the determinations has been undertaken, identifying them not merely as judicial conclusions but also as operative principles in a constitutional democracy.

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[57] *Ibid,* at 325.

A. EWS Reservation and Basic Structure

A recognized basic feature is not an undefined name lacking attributes and requisites. The identification of a basic feature is generally accompanied by the recognition of its contents and confines. The Court in appropriate cases, regularly narrates the confines of any applicable feature, which is, then, used to assess the viability of any claim regarding violation of basic features.[58] In this ruling, the majority opinion required "a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice" for intrusions against equality to violate the basic structure doctrine.[59] An abridgment or alteration of the principle, which does not take away its essence, is not sufficient for invoking the basic structure of the doctrine. This determination is valuable so far as it recognizes that principles do not find easy replication in society and often require moderation and alteration so that the desired goals may be fulfilled. This fact is addressed by our Constitution as well, which recognizes equality as a cardinal principle but does not attempt to restrict it to its absolute form. The comparative conception of equality has taken strong roots in our system by permitting class legislation on the grounds of reasonable classification and by incorporating the idea of positive discrimination in the text of the Constitution.[60]

Despite its value, the requirement of violating the essence of basic features can create complexities. It could narrow down the application of the basic structure doctrine and compromise its ability to protect the identity of our Constitution. In the case at hand, the reservation was not found to be essential to the 'equality code' by the majority ruling. This finding held that changes in the rules of reservation ought not to be considered for violation of the basic structure. Thus, it effectively excluded the area of reservation from being governed by the equality code in its execution. Hence, if unequal practices are introduced in reservation policy by amending the Constitution, such practices would remain beyond challenge as the basic structure doctrine could not be invoked. This leads to the

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58 Virendra Kumar, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance" (2007) 49:3 Journal of Indian Law Institute at 365.

59 *Janhit Abhiyan v Union of India, 5 SCC 1, 130*, 2023.

60 Subrata Roy Chowdhury, "Equality before the law in India" (1961) 19:2 Cambridge Law Journal at 223.

possible use of constitutional amendments as a tool to harm the content of the liberal values that the Constitution enshrines.

Even if the reservation is perceived as an exception to the principle of equality, it does not oust the possibility of violation of equality in the framing and execution of the reservation policy. Equality is a cardinal principle of the Constitution, and only such limitations and abridgments ought to be made which are permissible under the Constitution. Excluding the application of equality code on the ground that its 'essence' has not been stripped, or its essential field of application is not affected shall effectively curtail the ambit of application of this fundamental right.

We agree that there is no cut-and-dried formula to define basic structure. However, the Court has to see the Constitution in its entirety and not in bits and pieces while applying the doctrine of basic structure. The idea behind reservation was not to empower people economically but rather to empower people socially and educationally so that those who had witnessed historical injustice due to their caste could join the mainstream in new India.[61] The idea to empower economically originally was kept under directive principles of state policy in Part IV of the Indian Constitution, which was based on the resources of the State. However, as the Constitution is a dynamic document, certain directive principles of state policy have a place in fundamental rights like equal pay for equal work, right to education, et cetera. These fundamental rights, which are for economic justice, are not in favor of any group; rather they are available to everyone irrespective of their caste, sex, place of birth, et cetera. The idea of economic justice, which is enshrined in the preamble, Part III, and Part IV is not based on positive/protective discrimination, rather it operates on "No Discrimination".[62] While economic justice targets all citizens, positive discrimination, in the furtherance of social and political justice, is required to advance those who suffered social and political injustice due to their caste or historical injustice.

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61 Anand Teltumbde, "Reservations within Reservations: A Solution" (2009) 44:41–42 Economic and Political Weekly at 16.

62 Uday Shankar & Divya Tyagi, "Socio-Economic Rights in India: Democracy Taking Roots" (2009) 42:4 Law and Politics in Africa, Asia and Latin America at 527.

We submit that the economic basis of reservation ought not to be a part of positive/protective discrimination in part III of our Constitution, and it is against the principle of the equality code, therefore it is against one of the basic features of the Constitution (equality), and it violates the basic features. The Hon'ble Supreme Court has already given a verdict against the economic basis as the ground for reservation earlier, which has been discussed previously in this paper.

B. Economic Criteria as a Ground for Reservation

Let us consider the second determination related to considering economic criteria as a ground for granting reservation. At the outset, nothing in the Constitution seems to explicitly bar the recognition of economic criteria for the grant of benefit of reservation. However, the mere availability of power shall not be the final determinant of justification of any policy measure. While the Court might not have the locus to restrict the exercise of power where no constitutional bar exists, the democratic institutions and processes should assess the viability of economic criteria to grant reservation benefits. The argument that reservation is an anti-discrimination and not an anti-deprivation measure was unsuccessful before the Court.[63] The aim of equality is not to do away with differences between people. Rather, it is to ensure that the differences between the people do not substantially and adversely affect their ability to pursue their goals in life. So long as people have the liberty to make meaningful decisions in their lives, differences shall remain. Economic differences shall always be found in a free society. The aim of equality is to ensure that the inherent, accidental, or consequential differences found between people do not obstruct the lives of people. Recognition of the differences for the creation of special provisions, hence, seems necessary.[64] For this, the state may provide quality education, nutrition, and access to social resources so as to bridge the gap. The mere granting of reservation without addressing the life-long deprivations that people face in their daily lives might not be able to respond to the wants of justice. Thus, though the granting of reservation on economic grounds might not be constitutionally

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63 *Janhit Abhiyan v Union of India, 5 SCC 1, 88*, 2023.

64 Martha Albertson Fineman, "Equality and Difference – The Restrained State" (2015) 66:1 Alabama Law Review 609.

excluded, the debate regarding the viability of such reservation needs to be addressed at public forums and by the decision-makers.

C. Applicability of 50% Ceiling to EWS Reservations

The majority opinion recognized the 50% ceiling set by *Sawhney*,[65] to be limited to reservations granted under Articles 15(4), (5), and 16(4). Even there, it was found to be open to exceptions in some cases. This reading has allowed the elevated proportion of reservation enabled by the 103rd Amendment. The breach of the 50% ceiling renews debates surrounding the requirement for a ceiling to the reservation and the limit at which the ceiling should be set.[66] Reservation sans ceiling arguably compromises the balance sought between social justice and liberty. Further, it can be used for political reasons and might lead to dividing the available jobs and educational opportunities like pieces of a pie between members of various communities. It would be reminiscent of the Government Order put to challenge in *Champakam Dorairajan.*[67] Without any ceiling, reservation can transform into apportionment of opportunities. It could take away the field of open competition and would hamper the liberty of individuals to prosper through labor. While reservation is an important measure of social justice, the ceiling to reservation ensures that individuals retain their freedom to develop their personality and lives through their efforts. A reasonable claim is raised against the ceiling to the reservation on the ground that a recognized ceiling shall be against the constitutional purpose of ensuring 'adequate representation' in services under the State.[68] However, the argument does not apply to the Amendment in question because the purpose of adequate representation has not been extended to the EWS category for reservation, neither for admission nor for services under the State. We do not claim to establish any alternative ceiling for reservation and only suggest that the necessity and limits of the ceiling require an elongated and participatory public debate.

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65 *Indra Sawhey v. Union of India, Supp (3) SCC 217*, *supra* note 45.

66 Alok Prasanna Kumar, "Revisiting the Rationale for Reservations: Claims of 'Middle Castes" (2016) 51:47 Economic and Political Weekly 10.

67 *State of Madras v Champakam Dorairajan, AIR 1951 SC 226*.

68 C Basavaraju, "Reservation under the Constitution of India: Issues and Perspectives" (2009) 51:2 Journal of Indian Law Institute 267.

D. Breach of 50% Ceiling by EWS Reservation

The majority opinion holds that the 50% ceiling is only a judicial yardstick to check the limits of reservations. It is not introduced in the Constitution through amendment. This contention may, however, be contested. After the insertion of clause 4B in Article 16, Parliament has granted itself constitutional status to the 50% ceiling.[69] Even if the ceiling is established as not merely a judicial creation, the Court has cited *Sawhney* to hold that the ceiling is not sacrosanct and may be exceeded in exceptional cases. The Sawhney judgment provided for the exception in the following words:

> "While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."[70]

Tabove paragraph has devised the exception to the 50% ceiling in two ways. Firstly, one may take the exception of being limited only by the words "extraordinary situations inherent in the great diversity of this country and the people". Alternatively, one may take exception to be limited to such provisions which provide for relaxation to benefit those "in far-flung and remote areas" "on account of their being out of the mainstream of national life." The first reading provides a broad space for the policymakers to design exceptions so far as they address the extraordinary situations inherent in our national diversity. The second reading, on the other hand, limits the exception to a narrow space of measures designed to address the concerns of those who are cut off from the mainstream of national life because they reside in remote areas. Therefore, while the second reading takes the exceptional circumstances mentioned in the above paragraph to be exhaustive, the first reading considers them merely illustrative. Regarding the second reading, the apex court in *Jaishri Laxmanrao Patil,*[71] observed that

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69 *Jaishri Laxmanrao Patil v. State of Maharashtra, 8 SCC 1*, *supra* note 54, at 235-236.

70 *Indra Sawhey v. Union of India, Supp (3) SCC 217*, *supra* note 45, at 735.

71 *8 SCC 1*, *supra* note 31.

though the exception seems limited to the geographical illustration, it does have a social test attached to it – being "cut off from the mainstream of national life."

Depending on the reading one takes of the exception, two questions could be considered regarding special provisions for EWS and the breach of the 50% ceiling: a) "Whether economic deprivation constitute an "extraordinary situation inherent in the diversity of our nation?", or b) "whether economic deprivation casts one away from the mainstream of national life?". These questions are not merely associated with the interpretation of the text of the Constitution; rather, they derive their meaning from the social facts surrounding them. They require qualitative and data-backed assessment by the courts. An argument may be made that economic deprivation is a global issue and not derived from the diversity in India; rather, it contributes to and creates that diversity on the economic plane. Hence, economic deprivation could not be read as an extraordinary situation inherent in Indian diversity.[72]

The second question might seem to suggest the commonly agreed notion that economic deprivation can cut off access to basic resources, and by extension, may also remove one from a dignified living. However, it ought to be considered whether 'dignified living' and 'mainstream living' may be so equated. In a country where the masses live in squalor and are unable to access the minimum needs of life, the mainstream of national life reflects that deprivation. In such a condition, being in economic deprivation is the mainstream, and hence no exception shall be afforded.

There is another way to resolve the second question. We may consider the idea of minimum core content of rights to assess the mainstream of national life. The idea of minimum core content of rights understands any right to be guaranteed only if certain basic minimum content is afforded to all people in all contexts.[73] In this regard, the idea of mainstream national life can be designed by envisioning the minimum core of economic rights, and those who are deprived of any aspect

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[72] Basudatta Sarkar, "Patterns of Socio-Economic Deprivation and its Impact on Quality of Life" (2014) 1:4 Athens Journal of Health 271.

[73] David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 South African Journal on Human Rights at 1.

of the minimum content shall be eligible for exceptional treatment. Here, the issue would be that the Amendment has not set any baseline for economic deprivation and has left it to be set by the State. Therefore, the terms of amendment alone are not sufficient to satisfy the question with any answer, and hence, arguably, an exception to the ceiling shall not be granted. We submit that it is for the Court to consider and answer such questions before deciding the ceiling breach.

VII. CONCLUSION

In *Janhit Abhiyan,* the majority and minority rulings differed on the constitutionality of the exclusionary treatment of the SCs, STs, and OBCs by the 103rd Amendment in the creation of the EWS category for grant of reservation. While the majority opinion read the exclusion to be necessary for fulfilling the principle of equality, the minority opinion found it to be a violation of the equality code. The judgment provides a considered discussion of the various arguments put forward by either side.

State action is required to alleviate the quotidian issues faced by people living in economic deprivation. Throughout the history of independent India, our governments have made many efforts. The 103rd Amendment is one such step taken by Parliament to ensure that economic disadvantages do not stand in the way of citizens pursuing their dreams. The Amendment survived the constitutional challenges before the Supreme Court. The legal validity of the Amendment does not sanctify all policies made by the State by using the provisions added by the Amendment. Even the most prudent principles can be vitiated in case of any oversight or mistake in their application. In our context, the standards of identifying the economically deprived shall be one of the sources of such troubles.[74] This problem needs closer assessment as the Constitution, under Explanation to Clause (6) of Article 15, has provided only minimum guidance in identifying the EWS. We have been facing debates surrounding the recognition of the creamy layer for some time. We should be careful lest such

[74] Wankhede, *supra* note 3.

troubles extend to the newly incorporated provisions. The Court has an opportunity to reassess the matter and reconsider its determinations.[75]

The challenges in applying the EWS reservations and the social impact thereof shall be available for study in due course. Yet, the government and the citizens must ensure that such policy steps are thoroughly debated and discussed in all public forums. This measure will ensure that the policy measures are not appreciated merely at face value. It will also encourage the citizens to participate in the significant issues surrounding their lives. The presence of courts and the existence of mechanisms of judicial review shall not encourage lethargy among the public at large.

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COMPETING INTEREST

The authors declared that they have no competing interests.

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[75] Singh, *supra* note 4.

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