

**AFFIRMATIVE ACTION AND THE QUESTION OF  
GENERAL CATEGORY IN INDIA: JUDICIAL  
TREATMENT OF CONSTITUTIONAL,  
LEGISLATIVE, AND EXECUTIVE  
INTERVENTIONS IN DETERMINING  
BACKWARDNESS AND INTRA-CLASSIFICATION  
CHALLENGES**



**ASANG WANKHEDE**

**WOLFSON COLLEGE**

**UNIVERSITY OF OXFORD**

**SUPERVISED BY DR. BARBARA HAVELKOVA**

This thesis is submitted to the Faculty of Law,  
University of Oxford, in partial fulfilment of the  
requirements for the degree of Master of Philosophy  
Trinity Term, 2021

# **ABSTRACT**

## **AFFIRMATIVE ACTION AND THE QUESTION OF GENERAL CATEGORY IN INDIA: JUDICIAL TREATMENT OF CONSTITUTIONAL, LEGISLATIVE, AND EXECUTIVE INTERVENTIONS IN DETERMINING BACKWARDNESS AND INTRA-CLASSIFICATION CHALLENGES.**

**ASANG WANKHEDE, WOLFSON COLLEGE**

**TRINITY TERM, 2021**

**MASTER OF PHILOSOPHY IN LAW,**

The proliferation of reservations based on persistent demands of upper-castes or advantaged groups has given rise to a complex set of recurrent legislative interventions in India. 2019-Amendment provision of quota benefits to EWS or socially advantaged sections based on economic disadvantage marks a crucial shift in the constitutional policy of reservations. This thesis critically engages with the constitutional and state legislative reservations policies, and their judicial treatment, for EWS and upper-castes in Maharashtra, Gujarat, and Haryana. The thesis is divided into three chapters. The first chapter undertakes an analysis of the legislative and judicial history of Indian interventions and outlines the political economy behind them. The second chapter critically analyses the judgements challenging the constitutionality of the 2019-Amendment and state measures. Chapter 3 carries out an analysis of major problems and themes inductively identified and evaluates how discrimination law theory best explains the implications of the post-2019 regime on Indian affirmative action and multi-dimensional substantive equality. It is argued that reservations for upper-castes are not affirmative action measures and substantive equality. They amount to collateral discrimination as they burden cognate groups with quotas not meant for reducing relative group disadvantage. They are also discriminatory towards existing status groups. The de facto nature of EWS is of 'upper-caste Hindu men' which misses addressing intersectional poverty discrimination. As a key implication, the commitment of the Constitution towards substantive equality stands diluted and symbolised by enabling advantaged groups access to quotas historically devised for protected groups. The distinction between historical discrimination-based reservations and general poverty alleviation measures has collapsed giving rise to accommodating all positions of injustices under reservations. In the long-term, such developments may lead to withering-down and may displace historical discrimination-foundation for reservation policy to a general system of communal quotas for all castes and classes based on income poverty ground.

Word count: 29,964 (Including Footnotes and Appendix)

## **ACKNOWLEDGEMENTS**

This thesis would not have been possible without support from my Supervisor Dr. Barbara Havelkova, whose constant push towards improving numerous drafts ensured that this thesis takes the present form. Undertaking the MPhil course would have been impossible without funding from the donors. I am indebted to the Graduate Scholarships Committee of the Faculty of Law for granting me a Non-Full-Funding bursary award. I am thankful to the Ministry of Social Justice and Special Assistance, Government of Maharashtra for covering the rest of the scholarship amount by awarding the Rajashri Shahu Maharaj Scholarship, 2020.

I am particularly thankful to Sean Veitch, Anupreeta Kumar, Ruth Collins and Jonathan Totman for their excellent and invaluable counselling throughout my time at Oxford and especially for entrusting me with the power to continue during times when I wanted to give up. Their support helped me hold on and has inspired me to strive. A special thank you to Titiksha Mohanty, who has been a dear friend and greatly supportive of my academic endeavours at the University.

Journey to Oxford would not have been possible without constant support towards my well-being and encouragement of Prof. Sushrut Jadhav, Prof. David Mosse, Barrister Susan Wright, Arundhati Roy and Pratap Tambe. I am grateful for their support.

Thanks to my dear friends, Shiladitya, Saumya, Suraj, Neerja, Anais, Madhu, Richie, Koichi, Tejaswini and Halloum for sharing laughter and happy moments. Last but not the least, I would like to thank my mother for her constant support and all her sacrifices. My lovely twin sister also has a large role to play in my well-being.

# TABLE OF CONTENTS

AFFIRMATIVE ACTION AND THE QUESTION OF GENERAL CATEGORY IN INDIA: JUDICIAL TREATMENT OF CONSTITUTIONAL, LEGISLATIVE, AND EXECUTIVE INTERVENTIONS IN DETERMINING BACKWARDNESS AND INTRA-Classification CHALLENGES. ....	1
INTRODUCTION .....	1
Structure, chapterisation and research questions-----	3
Methodology-----	5
Statement of the Thesis-----	6
CHAPTER 1 RESERVATION FOR EWS AND UPPER-CASTES IN INDIA: AN INTRODUCTION .....	7
Introduction .....	7
1.1 Constitutional Scope of reservations in India-----	8
1.2 Taxonomy of beneficiary classes and concepts in Indian affirmative action debate .....	10
1.3 103 <sup>rd</sup> Constitutional Amendment 2019 .....	20
1.4 State legislations and executive actions providing reservation for EWS and upper-castes. ....	24
1.4.1 The Maratha Reservation Debate in Maharashtra— .....	25
1.4.2 Reservation for Patidar community in Gujarat— .....	27
1.4.3 Reservation for Jat community in Haryana— .....	28
1.5 Jurisprudence of HCs and SCI-----	30
1.6 The Political context-----	31
Conclusion-----	38
CHAPTER 2 JUDICIAL TREATMENT OF RESERVATION FOR ECONOMICALLY WEAKER SECTIONS (EWS) AND UPPER-CASTES IN INDIA .....	39
Introduction .....	39
2.1 SCI and Reservation for Economically Weaker Sections (EWS) ----	40
2.2 Judicial treatment of state interventions in reservations for EWS and upper-castes in the states of Maharashtra, Gujarat, and Haryana— .....	43
2.2.1 Demarcation of beneficiary classes and determination of backwardness .....	44
2.2.2 Extent of quota and extra-ordinary circumstances .....	61
2.2.3 Reasonable Classification .....	66
Conclusion-----	68
CHAPTER 3 THE POST-2019 REGIME, STATE INTERVENTIONS, AND DISCRIMINATION LAW THEORY .....	73
Introduction .....	73
3.1 Aims, role and characteristics of substantive equality and affirmative action .....	75
3.1.1 Substantive equality doctrine in India .....	77
3.1.2-Substantive Equality in the general theory .....	81
3.1.3 Affirmative action in India and the general theory: Definition, scope, and objectives .....	94

3.2 Protected grounds, protected groups, and demarcation of beneficiary classes -----	100
3.3 The extent of quota limit-----	114
3.4 Treatment of socio-economic/pure-economic disadvantages in discrimination law-----	116
3.5 Sociological meaning of class-----	124
Conclusion-----	126
CONCLUSION .....	131

## TABLE OF ABBREVIATIONS

<b>Abbreviation</b>	<b>Meaning</b>
art	Article
BC	Backward classes
BCC	Backward Classes Commission
BHC	Bombay High Court
COI	Constitution of India
EBC	Economically Backward Classes
ESBC	Educationally and Socially Backward Classes
EWS	Economically Weaker Section
GHC	Gujarat High Court
HBC	Haryana Backward Classes
HBCC	Haryana Backward Classes Commission
HCs	High Courts
ICSSR	Indian Council of Social Sciences Research
MSBCC	Maharashtra State Backward Classes Commission
NCBC	National Commission for Backward Classes
OBCs	Other Backward Classes
PHHC	Punjab and Haryana High Court

SBC	Specially Backward Classes
SBCC	State Backward Classes Commissions
SCI	Supreme Court of India
SCs	Scheduled Castes
SEBC	Socially and Educationally Backward Classes
STs	Scheduled Tribes
UIO	Union of India
UK	United Kingdom
US	United States

## TABLE OF CASES

Sr no	Case name	Citation	Page no
1	B.K. Pavitra v Union of India	(2017) 4 SCC 620	46
2	B.K. Pavitra v Union of India (II)	(2019) 16 SCC 129	78
3	Dayaram Khemkaran Verma v State of Gujarat	2016 SCC OnLine Guj 1821	27
4	Dr. Jaishri Laxmanrao Patil v The Chief Minister	2021 SCC OnLine SC 362	51
5	Dr. Jishri Laxmanrao Patil v Chief Minister	2021 SCC OnLine SC 362	26
6	E.V. Chinnaiah v State of Andhra Pradesh	(2005) 1 SCC 394	53
7	Gosselin v Quebec	2002 SCC 84	81
8	Indra Sawhney v Union of India	1992 Supp (3) SCC 217 (SCI)	10
9	Jaishri Laxmanrao Patil v Chief Minister 2020	SCC OnLine SC 727 (SCI)	64
10	Janhit Abhiyan v Union of India	(2019) 10 SCC 27	24
11	Jishri Laxmanrao Patil v Chief Minister	2019 SCC OnLine Bom 1107	26
12	Joseph Shine v Union of India	AIR 2018 SC 4898	78

13	Law v Canada	[1999] 1 S.C.R. 497	81
14	M. Nagaraj v Union of India	AIR 2007 SC 71	60
15	Murai Lal Gupta v State of Haryana	2017 SCC OnLine P&H 2621	29
16	National Legal Services Authority v Union of India	(2014) 5 SCC 438	54
17	President of the Republic of South Africa v Hugo	[1997] Z.A.C.C.4	81
18	Rajeev Kumar Gupta v Union of India	2016 SCC OnLine SC 651	54
19	Rajesh Kumar Daria v Rajasthan Public Service Commission and Ors.	(2007) 8 SCC 785	54
20	Ram Singh v Union of India	(2015) 4 SCC 697 (SCI)	55
21	Rohtas Bhankhar v Union of India	(2014) 8 SCC 872	62
22	S.V. Joshi v State of Karnataka	(2012) 7 SCC 41	60
23	Sanjeet Shukla v State of Maharashtra	2014 SCC OnLine Bom 1672	15
24	Sanjeet Shukla v State of Maharashtra	2015 SCC Online Bom 5376	26

25	Satvir Singh Saini and Anr. v The State of Haryana and Ors.	Civil Appeal 2261/2018	29
26	Saurav Yadav v State of Uttar Pradesh	2020 SCC OnLine SC 1034	13
27	Senior Divisional Commercial Manager v SCR Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association	2016 [3] SCC 582	122
28	Society for Un-aided Private Schools of Rajasthan v Union of India	(2012) 6 SCC 1	43
29	State of Kerala v N.M. Thomas	(1976) 2 SCC 310	77
30	State of Maharashtra v Indian Hotel and Restaurants Association	AIR 2013 SC 2582	121
31	Union of India v National Federation of Blind	(2013) 10 SCC 772	54
32	Ved Prakash v State of Haryana	CPW 9132 of 2015	28

## TABLE OF STATUTES

<b>Sr no</b>	<b>Statutes</b>	<b>Page no</b>
1	Constitution of India (COI) 1950	5
2	Government of India Act, 1935	11
3	Maharashtra State Reservation (of seats for admission in educational institutions in the State) for Educationally and Socially Backward Category (ESBC) Act, 2014	15
4	Maharashtra State Reservation for Seats for admission in educational institutions in the State for Socially and Educationally Backward Classes Act, 2018	16
5	Right of Children to Free and Compulsory Education Act 2009	43
6	The Constitution (One Hundred and Third Amendment) Act 2019	2
7	The Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016	17
8	The Haryana Backward Classes Commission Act, 2016	59
9	The Uttarakhand Public Services (Reservation for Economically Weaker Sections) Act, 2019	22

## TABLES OF OTHER PRIMARY LEGAL SOURCES

<b>Sr No</b>	<b>Other Primary Legal sources</b>	<b>Page no</b>
1	Cabinet Decision no. 1, (Meeting No.49), Maharashtra dated 23.12.2020	112
2	Cabinet Decision No. 210, Maharashtra dated 04.02.2019	24
3	Census of India Report, 2011	35
4	Constituent Assembly Debates, India	1
5	Discussion on the motion for consideration of the Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019, Parliament of India	36
6	Gazette Notification F.No. 20012/129/2009-BC-II dated 04.03.2014.	28
7	Gujarat Unreserved Economically Weaker Sections (Reservation of seats in Educational Institutions in the State and of appointments and posts in services under the state) Ordinance, 2016	27
8	Indian Council of Social Science Research Report, 2014	56
9	Justice M.G. Gaikwad Commission Report, 2018	26
10	Maharashtra Ordinance No. XIII of 2014	25
11	Ministry of Social Justice and Empowerment, Government of India annual report 2010-2011	41

12	<i>Narayan Rane Committee Report, 2014</i>	15
13	National Commission for Backward Classes advise no. 38 (Haryana) dated 26.02.2014	29
14	National Commission for Backward Classes reports dated 28.11.1997, 25.11.2010 and 20.06.2011	28
15	Notification No. 59 SW(1)-2013 dated 24.01.2013	16
16	Office Memorandum No. 36012/31/90-Estt. (SCT) dated 25.09.1991	13
17	Office Memorandum of Ministry of Social Justice and Empowerment 20013/01/2018-BC-II	14
18	Report of the Backward Classes Commission (Mandal Commission), 1980	12
19	Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 1951	12
20	S.R. Sinho, The Commission for Economically Backward Classes Report, 2010	41
21	Supreme Court Rules, 2013	24
22	The Constitution (Scheduled Castes) Order, 1950	11

## TABLE OF DIAGRAMS AND TABLES

<b>Sr no</b>	<b>Diagrams</b>	<b>Page no</b>
1	Fig 1- Relationship between different typologies of reservations in India using pre- and post-2019 terminology	19
2	Fig 2- Representation of fluid group characteristics	106
3	Fig 3- Post-2019 regime and state interventions primarily benefit upper-caste groups	111
4	Diagram 1- Maratha reservation history in Maharashtra and Patel-Patidar reservation history in Gujarat	30
5	Diagram 2- Jat reservation history in Haryana	31

### **Tables**

6	Table 1- Taxonomy of beneficiary classes and concepts Indian affirmative action policy	10
7	Table 2- Other terminologies of reservations	17
8	Table 3- Judicial treatment of state interventions in reservations for EWS and upper-castes in the states of Maharashtra, Gujarat, and Haryana	68

## INTRODUCTION

*‘The seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10(equality of opportunity), must be confined to a minority of seats.’— Dr B.R. Ambedkar<sup>1</sup>*

India, famous for its reservations or affirmative action policies focusing on caste disadvantage, has recently opened this system of benefits to advantaged groups. This has put in doubt the earlier constitutional commitment to addressing deeply entrenched marginalisation emanating from the traditional social hierarchy. Such proliferation of affirmative action is deeply contrasted with the limited share of opportunities in public employment and available seats in educational institutions. The indefinite character of demands of upper-caste groups for backwardness recognition is fuelled by a vicious cycle of economic distress due to falling agricultural incomes and a lack of quality educational opportunities.<sup>2</sup>

The central issue in affirmative action measures in the form of group preferences is the normative indeterminacy in contemplating ‘backwardness’ and the objective limits of such policies. Protected groups of Scheduled Castes (‘SCs’)<sup>3</sup>, Scheduled Tribes(‘STs’)<sup>4</sup> combined, and Other Backward Classes (‘OBCs’)<sup>5</sup> are envisaged through a varying degree of marginalisation and different ‘objective

---

1 Draft Article 10 Constituent Assembly Debates (30th November 1948) <<http://loksabhaph.nic.in/Debates/cadebatefiles/C30111948.html>> accessed 22 March 2021.

2 See section 1.6.

3 See section 1.2.

4 *ibid.*

5 *ibid.*

criteria.’<sup>6</sup> The *103<sup>rd</sup> Constitutional Amendment*<sup>7</sup>(‘2019-Amendment’) introduced purely income and asset ownership-based new constitutional standard for determining backwardness.<sup>8</sup> To the exclusion of existing status groups, it is an exclusive quota for the non-reservation beneficiaries or unreserved sections.<sup>9</sup> This underlines a policy and a normative shift in Indian equality law and discrimination law.

This thesis primarily engages with the constitutional and state legislative developments and judicial treatment, both at the federal and state level, of reservation policy in the form of quotas/reservations in educational institutions and public employment for Economically Weaker Sections (‘EWS’) in India. It further focuses on state legislations of Maharashtra, Gujarat, and Haryana providing quotas for the otherwise politically, socially and economically well-off upper-castes Hindus through a mixed logic of both social and educational backwardness within the existing constitutional framework, and economic backwardness. The choice of these three states for the present study is based on history and the political context—which points towards largescale public agitations, with threats of political backlash by three socially dominant and politically influential communities, all directed from the demands of backwardness recognition.<sup>10</sup> It, therefore, becomes crucial to undertake the present study to assess the theoretical and empirical challenges such developments pose to the principle of substantive equality and affirmative action policies.

---

6        *ibid.*

7        The Constitution (One Hundred and Third Amendment) Act 2019.

8        *ibid.*

9        Sub-clause (6) arts 16 and 15 Constitution of India (COI) 1950.

10       See section 1.6.

## **Structure, chapterisation and research questions—**

This thesis aims to address six research questions: First, why were affirmative action measures in form of 2019-Amendment and state interventions promulgated, and in what political context? Second, what is the judicial treatment of affirmative action measures in form of 2019-Amendment and state interventions pre-dating and post-dating it? Third, how do such measures change the constitutional policy of extending affirmative action benefits only to SEBCs based on historical injustices? Fourth, what effects do such measures have on the theoretical understanding of substantive equality and affirmative action? Fifth, what are the intra-classification challenges and limitations of such affirmative action policies? Sixth, how do these measures redress intersectional disadvantage and emerging forms of backwardness?

These research questions are addressed in three chapters. The first chapter, ‘Reservation for EWS and Upper-Castes in India: An Introduction’, provides an account of the constitutional scope of reservations in India. It offers a taxonomy of various terminologies and concepts in the Indian reservation debate and provides an overview of the 2019-Amendment reservation. It also looks at the states and presents a legislative history of reservations provided to Maratha, Patel, Jats in the state of Maharashtra, Gujarat, and Haryana respectively. It then provides a brief account of judicial treatment of these interventions. Finally, it introduces the political context in which reservations were extended to upper-castes. This chapter answers questions one and partially question six.

The second chapter, ‘Judicial treatment of Reservation for EWS and Upper-Castes in India’, critically analyses the judgements challenging the constitutionality of 2019-Amendment and state interventions. For the latter the focus is on three cross-

cutting themes: 1) how group beneficiaries are identified; 2) the limit on the extent of quotas; 3) the reasonable classification test. This chapter will answer questions two and three and will set the foundation for the following chapter.

The third chapter, ‘The Post-2019 Regime, State Interventions, and Discrimination Law Theory’, carries out an analysis of problems and themes inductively identified in chapters 1-2. It critically evaluates how theory best explains Indian affirmative action and substantive equality in both pre-2019 and post-2019 regimes by mapping them onto the general theory. Implications of such interventions will also be explored. Identified themes are discussed in dedicated sub-sections, to justify the main argument of the thesis and further build upon answers to question three to six from previous chapters.

The answer to the first question is that Indian interventions were enacted to predominantly benefit dominant upper-caste groups in lieu of the strong political demands towards backwardness recognition and to gain political leverage and avoid political sabotage right before crucial elections. Demands of the community are only based on economic disadvantage rooted in agrarian distress and lack of job prospects in a knowledge sector-driven economy.

For the second question, the judiciary has resisted such developments in a fragmented manner. State High Courts largely show erroneous judicial understanding on the issue of the extent of quotas and delineation of backward classes. Similarly, legislature and backward classes commissions have incorrectly interpreted empirical evidence and the settled position of law on these issues to extend disadvantage status to advantaged groups. Supreme Court of India’s position, on the other hand, has been more critical and all the cases which have had an SCI decision have led to a finding of unconstitutionality.

For the third question, the distinction in the constitutional scheme has collapsed and has given rise to policies to accommodate all positions of unfairness in the society under the frame of affirmative action at par with the previously historical discrimination-based scheme.

To address the fourth question—reservations that benefit dominant upper-castes are paradigmatically discriminatory and amount to collateral discrimination. This is determinative of a move from the existing Indian regime of multidimensional substantive equality to a much narrower and problematic singular conception. It is an indirect way of dismantling the doctrinal basis of the pre-existing reservation imperceptibly. Furthermore, the commitment of the Constitution of India towards substantive equality stands diluted and symbolised by enabling advantaged groups to access quotas meant for protected groups.

In terms of intra-classification challenges, addressing question five, the high income and property threshold provides de facto exclusive access to ‘upper-caste Hindu men’ to the EWS quota. Such conception of economic disadvantage is narrow—upper-caste, income and property fixated and misses addressing intersectional poverty disadvantage. These interventions do not address intersectional disadvantage, as the basis of reservation, therefore, the EWS category has an implicit caste, religion, and gender exclusionary dimension. Indian parliamentary and legislative interventions misunderstand the intersectional nature of poverty in constitutional policy and SCI’s jurisprudence.

## **Methodology—**

The thesis adopts doctrinal legal method and legal theory as the primary methods to address these questions. Furthermore, both primary materials in form of

legislations, executive ordinances, etc, judgements, and secondary materials in form of academic writings on the subject will be assessed to better explain the developments and then critically evaluate them.

### **Statement of the Thesis—**

The recent extension of affirmative action, both at the federal and state levels, in India are not affirmative action measures rooted in substantive equality but amount to collateral discrimination as they burden non-status groups with quotas not meant for reducing relative disadvantage. They violate the principle of substantive equality and are against the core aims of traditional Indian affirmative action policy. The distinction between historical discrimination-based reservations and general poverty alleviation measures has collapsed and has given rise to policies to accommodate all positions of unfairness in the society under the frame of affirmative action. In the long-term, such developments may lead to withering down and even displacement of the core foundation of reservation policy to a general system of communal quotas and group allotments for all castes and classes in India based on a singular ground-based principle identified solely based on income poverty.

# CHAPTER 1 RESERVATION FOR EWS AND UPPER-CASTES IN INDIA: AN

## INTRODUCTION

### **Introduction**

This chapter provides a detailed overview of the 2019-Amendment, along with a separate issue of attempts by the state (provincial) governments to denote affluent upper-castes in India as backward classes. It maps the constitutional, legislative, and executive history of interventions in India to provide an answer to the first and sixth research questions.

The thesis has to start with a descriptive analysis to clarify the complex developments, where the central government (UIO), state governments, and their respective executives have promulgated new legal policy in varying degrees and characters. Thus, the chapter attempts to set foundational clarity to amass all relevant developments in these two categories of classification, setting the background for future analysis, which is also the main contribution of this chapter.

Sections 1.1 and 1.2 provide a broad overview of reservation in Indian constitutional law and taxonomy of various group beneficiaries and core concepts. Sections 1.3 and 1.4 analyse the scope of methods adopted by parliament, state legislatures, and the executive to identify new beneficiary groups. With respect to the judicial treatment of such interventions, in section 1.5 a brief overview of all the existing judgements of the state High Courts (HCs) and Supreme Court of India (SCI) that discuss the constitutional validity of the interventions is provided through diagrams. Section 1.6 provides a granular assessment of the political context in which

such interventions have been made to enable a rounded assessment of legislative intention behind extending quotas.

It is argued that Indian developments are not focused on poverty discrimination, as argued for by the government<sup>11</sup> and the policy commitment has been to address political demands and avoid political backlash from affluent upper-castes groups, as against addressing core underlying questions of poverty discrimination. These interventions miss capturing intersectional disadvantage due to their discriminatory and exclusive nature.

### **1.1 Constitutional Scope of reservations in India-**

The Constitution of India (COI) provides for affirmative action policy in form of quotas in educational institutions, public employment, and the parliament-state legislature. This thesis analyses only the first two.

Art. 15 sub-clauses (4)(5)(6) provide for reservations in educational institutions (both public and private) ‘for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes’ and ‘Economically Weaker Sections.’<sup>12</sup>

Art. 15, also provides the parliament and states the power to enact a range of non-quota measures for groups identified based on social and educational backwardness and EWS. The 2019-Amendment, an extraordinary legislative exercise of parliament, identifies EWS based on family income and other indicators of economic disadvantage (‘post-2019 regime’).<sup>13</sup> It places pure-economic disadvantage within the

---

<sup>11</sup> *ibid.*

<sup>12</sup> Constitution of India 1950.

<sup>13</sup> ‘sections of citizens other than the classes mentioned in clauses (4) and (5)’ 2019-Amendment (n 7)

scope of substantive equality. Therefore, ascertaining the object and scope of the constitutional amendment from the intention of the parliament becomes indispensable to clarify such developments.

Art. 16 under sub-clauses (4), (4A), (4B) provides for ‘reservation of appointments or posts’ in favour of backward classes of citizens with the additional requirement of lack of adequate representation in public employment which is empirically founded.<sup>14</sup> In contrast provisions the amended Art. 16(6) extends reservations in favour of EWS citizens other than the backward class of citizens.<sup>15</sup> The nuances and differences between the two regimes will be detailed in section 1.3.

Importantly, backwardness criteria under art 16(4) when compared to art 15(4) is different. There is no requirement of inadequacy in representation in art 15(4),<sup>16</sup> where the measure of backwardness is social and educational. Furthermore, the pre-2019-Amendment reservation scheme is based on the rationale to remedy disadvantages generating from low social and ritual standing in the caste hierarchy along with other socio-educational and economic parameters of backwardness.<sup>17</sup> SCs/STs were designated as beneficiaries of affirmative action policies based on their low social standing in the Hindu social order of the caste system.<sup>18</sup> For the demarcation of OBCs, it was understood that castes can be one indicator of group disadvantage<sup>19</sup>

---

<sup>14</sup> ‘Explanation’ art 16(6) *COI* (n 12).

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> Marc Galanter and Rajeev Dhavan, *Law and Society in Modern India* (OUP 1989); Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (OUP 1991).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

when associated with other factors of disadvantages, for example, education and socio-economic backwardness.<sup>20</sup>

In the history of affirmative action debate, quotas were never administered purely based on economic disadvantages, as the lower caste status plus other factors of marginalization were considered to be the backwardness identifying test.<sup>21</sup> Therefore, the 2019-Amendment marks a crucial shift in the constitutional policy of affirmative action in India, the question of its legitimacy remains contested.

## 1.2 Taxonomy of beneficiary classes and concepts in Indian affirmative action debate

Indian discrimination law and equality law have a complex set of concepts, often loosely defined, overlapping and incoherent. This section explains the meaning of these different conceptions to provide clarity to readers on different types of terminologies and concepts.

**Table 1**

Beneficiaries	Overview and demarcation provisions	Group demarcation criteria	Benefits
Scheduled Castes	<i>Dalits</i> or 'untouchables' <sup>22</sup> , the lowest ranking Hindu castes, were identified	Historical discrimination and social exclusion	Reservation in educational institutions, public employment and

<sup>20</sup> *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 (SCI).

<sup>21</sup> *ibid.*

<sup>22</sup> Untouchability denotes practice of ritual and social impurity of untouchable castes, where even the shadow of untouchables is considered polluting.

	<p>as a legal category for extending safeguards in the 'schedule' in the Government of India Act 1935. The terminology was adopted in COI post-independence where under art 341 the President of India has the power to specify any groups as scheduled castes which enable communities within the list to access benefits of reservation and other affirmative action measures.<sup>23</sup></p>	<p>based on low caste status are the main markers.<sup>24</sup></p>	<p>parliament and state legislations. Also, benefits in form of other affirmative action programmes. (All)</p>
<p>Scheduled Tribes</p>	<p>Scheduled Tribes or Tribal communities were identified and provided legal safeguards under the</p>	<p>Tribal origin, primitive way of life, remote habitation, and general</p>	<p>All</p>

<sup>23</sup> Government of India Act 1935; The Constitution (Scheduled Castes) Order 1950.

<sup>24</sup> *Indra Sawhney* (n 20) [85].

	GOI 1935 based on their excluded status from the society to enable assimilation in the general social order. <sup>25</sup>	backwardness in all respects. <sup>26</sup>	
Socially and educationally backward classes	The terminology used under Art. 15(4) to identify groups that may be the beneficiary of the reservations and affirmative action programmes and was inserted through the First Amendment 1951.	It contemplates both forms of social and educational backwardness identified based on 11 indicators grouped under the heads: Social, Educational and Economic. The highest weightage is given to social indicators and the lowest to economic. <sup>27</sup>	All
Other Backward Classes	Other Backward Classes are group beneficiaries of reservation policy as recommended by the Mandal commission which identified	Thus, OBC groups are identified based on three broad indicators for SEBCs. Furthermore, creamy layer or socially forward sections within	All, excluding political reservations.

<sup>25</sup> Government of India Act 1935.

<sup>26</sup> Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 1951.

<sup>27</sup> Report of the Backward Classes Commission (Mandal Commission), 1980.

	sections of the society deserving of the benefits of the affirmative action policies apart from SC/ST groups. <sup>28</sup>	OBCs are excluded, sub-classification based on artificial family household income line. <sup>29</sup>	
Unreserved Category or General Category	The non-beneficiaries of reservation policies under the pre-2019 regime.	SCI has categorically held that the Unreserved category is not a class in itself and do not have <i>de facto</i> access to unreserved seats. <sup>30</sup> The 2019-Amendment changed this position and treats Unreserved Category as a class in itself.	10 per cent reservation in educational institutions and public employment.
Backward Class of Citizens	Article 16(4) establishes 'backward class of citizens' which includes SC/ST/OBCs and SEBCs. It applies to a much larger class of citizens compared to art	Key determinant test is that of social backwardness, which is focused on exclusion based on caste status. Even non-Hindus based on their historical	All. Creamy layer is applied to only OBCs and not SC/ST groups, except in promotions.

<sup>28</sup> Office Memorandum dated 25.09.1991.

<sup>29</sup> Mandal (n 27).

<sup>30</sup> *Saurav Yadav v State of Uttar Pradesh* 2020 SCC OnLine SC 1034 (SCI).

	15(4), mainly based on social backwardness. <sup>31</sup>	exclusion occupational groups, sects and denominations are considered socially backward. Relies on the Social backwardness criteria developed by Mandal commission. <sup>32</sup>	
Economically Weaker Sections	Introduced through the 2019-Amendment, EWS is identified based on income and economic backwardness indicators within unreserved category groups that are not part of the existing reservation policy.	Uses a mix of family household income ceiling of Rs.8.00 Lakhs and four property ownership markers, as the group identification criteria. <sup>33</sup>	All, 10 percent, but not political reservations. <sup>34</sup>
Socially Advanced Persons or	For excluding 'creamy layer' within the OBCs and SEBCs, an	Economic criterion of family household income ceiling of Rs.8.00 Lakhs	N.A.

<sup>31</sup> *Indra Sawhney* (n 20).

<sup>32</sup> *Mandal* (n 27).

<sup>33</sup> Office Memorandum No.20013/01/2018-BC-II.

<sup>34</sup> *ibid.*

Creamy Layer	economic criterion is adopted as an indicator of social advancement. <sup>35</sup>	is the 'Means Test' used for creamy layer identification. <sup>36</sup>	
Unreserved Economically Weaker Sections (Gujarat)	Conceptualised in the Gujarat 2016 ordinance, they are non-SC/ST/OBC groups in unreserved category. <sup>37</sup>	Groups are identified solely using family household income of Rs.6.00 Lakhs. <sup>38</sup>	All,10 percent, excluding political reservations.
Educationally and Socially Backward Category (ESBC) (Maharashtra )	ESBC was another way of identifying Marathas as a backward class in the ESBC 2014 apart from SEBC.	Marathas were identified as the sole ESBC group in the 2014 Act, identified based on 'economically' and 'educationally' backwardness by the Rane Committee, expressly recognising lack of social backwardness. <sup>39</sup>	All,16 percent, but no political reservations.

<sup>35</sup> *Indra Sawhney* (n 20).

<sup>36</sup> O.M.No. 36033/1/2013-Estt. (Res.) dated 13.09.2017

<sup>37</sup> Gujarat Unreserved Economically Weaker Sections (Reservation of seats in Educational Institutions in the State and of appointments and posts in services under the state) Ordinance 2016 (2016 Ordinance).

<sup>38</sup> *ibid.*

<sup>39</sup> *Sanjeet Shukla v State of Maharashtra* 2014 SCC OnLine Bom 1672 (BHC).

<p>Socially and Educationally Backward Classes (Maharashtra )</p>	<p>Maharashtra State Reservation for Seats for admission in educational institutions in the State for Socially and Educationally Backward Classes Act, 2018 ('SEBC 2018'), based on Gaikwad commission's report, established a new SEBC group exclusively for Marathas.<sup>40</sup></p>	<p>Using three indicators Social Backwardness (28 parameters); ii. Educational Backwardness (2 parameters); iii. Economic Backwardness (10 parameters).<sup>41</sup></p>	<p>All, 16 percent, but no political reservations.</p>
<p>Specially Backward Classes (Haryana)</p>	<p>Jat community was categorised as Specially Backward Classes vide notification dated 24.01.2013. It was a different terminology to include Jats within the framework of OBCs.<sup>42</sup></p>	<p>Identification criterion is similar to that of OBCs.<sup>43</sup></p>	<p>All, 10 percent, but no political reservations.</p>

<sup>40</sup> Maharashtra Act LXII of 2018.

<sup>41</sup> *Sanjeet Shuka* (n 39).

<sup>42</sup> Notification No. 59 SW(1)-2013.

<sup>43</sup> *ibid.*

Backward Class (Haryana 2016)	HBC Act, 2016 again extended reservations to Jats by classifying them as a 'backward class' <sup>44</sup>	Identification criterion is similar to that of OBCs.	All, 10 percent, no political reservations.
-------------------------------	---	--	---

**Table 2**

<b>Other terminologies in reservations</b>	<b>Explanation</b>	<b>Comments</b>
Economic Criterion	See creamy layer. Arguments in favour of communal quotas for all beneficiary groups to be identified exclusively based on economic criterion. <sup>45</sup>	In <i>Indra Sawhney</i> , court ruled impermissibility of using only economic criterion for backward class demarcation.
Socio-economic criteria	Another variation used by the courts in India to denote the creamy layer <sup>46</sup>	See creamy layer.
Economic disadvantage	The 2019-Amendment mentions 'other indicators of economic disadvantage' to identify EWS.	See EWS

<sup>44</sup> The Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act 2016 (HBC Act 2016).

<sup>45</sup> 'Caste or Economic Status: What Should We Base Reservations On?' (EPW, 16 January 2019) <[https://www.epw.in/engage/article/caste-or-economic-status-what-should-we?0=ip\\_login\\_no\\_cache%3D251b6b7f7468f0a576e67f2b9f80b2a1](https://www.epw.in/engage/article/caste-or-economic-status-what-should-we?0=ip_login_no_cache%3D251b6b7f7468f0a576e67f2b9f80b2a1)> accessed 26 December 2020.

<sup>46</sup> *Indra Sawhney* (n 20).

Political and Substantive equality understanding in No established legal  
cultural Indian jurisprudence seeks to eliminate meaning per se.  
participation systemic discrimination which  
excludes disadvantaged groups from  
political and cultural spheres of the  
society. Thus, reservation enables  
participation as a central aim of  
substantive equality.

To provide further clarity, the following Venn diagram best explains the co-relation  
between these concepts:

SC- Scheduled Castes; ST- Scheduled Tribes; SEBC- Socially and educationally backward classes; BCC- Backward classes of citizens; OBC- Other Backward Classes; ESBC- Educationally and Socially backward classes (Maharashtra), SEBC- Socially and Educationally Backward Classes (Maharashtra), SBC- Specially backward classes (Haryana), Backward Classes (Haryana)

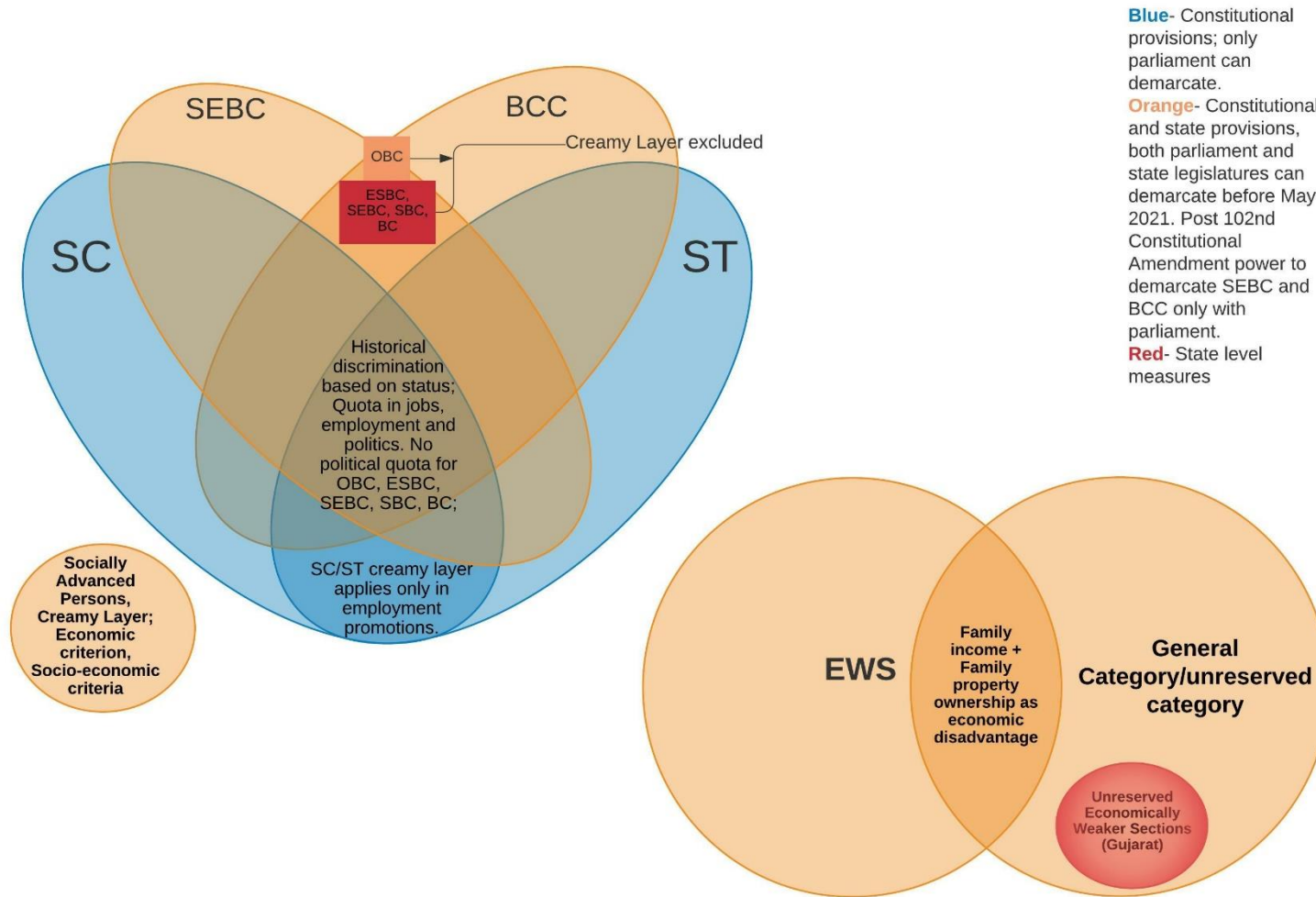


Fig 1 Relationship between different typologies of reservations in India using pre- and post-2019 terminology

The above diagram displays the overlap between these concepts. EWS as can be seen is exclusive and detached from pre-2019 quotas.<sup>47</sup> The discussion now turns to a more in-depth analysis of the 2019-Amendment to ascertain the intention of the parliament and the underlying objectives of an extraordinary constitutional intervention.

### **1.3 103<sup>rd</sup> Constitutional Amendment 2019**

This section explains the 2019-Amendment whereby ten percent quotas was provided in educational institutions and public employment to the newly devised category of EWS.<sup>48</sup> The constitutional makeup of the new policy intervention largely differs from the previously existing quota regime (pre-2019 regime), even though it may have some convergences.

Art. 15(6) makes a categorical distinction in group classification by excluding existing status groups from the purview of EWS. Thus, the wordings ‘the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5)’ are indicative of excluding economically weaker sections within the SCs, STs, OBCs, and SEBCs.<sup>49</sup>

The policy shift, it is argued, carries out *de-facto* classification and creates two separate reservation classes with reserved categories on one hand,<sup>50</sup> and the EWS within the unreserved category on the other. The 103<sup>rd</sup> Amendment establishes reservation and special assistance schemes exclusively for EWS citizens within the general category. The EWS category in its literal interpretation is a misnomer, for the

---

<sup>47</sup> Dr. Jaishri Laxmanrao Patil 2021 SCI majority ruled 102<sup>nd</sup> Constitutional Amendment abrogates power of states to determine SEBCs n 80.

<sup>48</sup> Sub-clauses (6), Amendment (n 7).

<sup>49</sup> Text to n 13.

<sup>50</sup> Office Memorandum (n 33).

reason that it fails to include all economically backward sections in the Indian society, irrespective of their castes or their socially and educationally backward status or their present reservation beneficiary status. Stated differently, the existing provisions of Art. 15 providing for reservation and special assistance schemes do not exclude the general category from its ambit due to their group membership. The exclusion is because the classes within the general category do not fulfil the backwardness criteria for group classification that otherwise qualifies status groups for reservation benefits.<sup>51</sup> The key implication of this policy is the total reimagination of reservations in India, where previously upper-castes were excluded from a beneficiary class not based on their status, but empirically founded disadvantage parameters.<sup>52</sup>

EWS must then correctly be construed as—*Economically Weaker Sections in general category* or *EWS minus SCs/STs/OBCs and other SEBCs*. This nuanced understanding is crucial to later assess the policy implications of the amendment, as it creates an exclusive class of citizens within the constitutional frame through exclusionary means i.e. based on pre-existing status group membership.

Art. 15(6)(b) is symmetrical to Art. 15(5) as it relates to the provision of reservation in private educational institutions. Significantly, the differentiation and which is also the unique character of the amendment is the maximum quota ceiling of ten percent beyond the existing reservations. Both Art. 15 and 16 do not provide for such quota ceiling and leave the question of the percent of quotas to the parliament and respective States. SCI has time and again reiterated that such reservation shall not

---

<sup>51</sup> Galanter, *Competing Equalities* (n 17).

<sup>52</sup> *ibid.*

exceed 50 percent of the total seats except in extraordinary circumstances, EWS quota breaches it.<sup>53</sup>

With respect to the identification of the EWS, the explanation to Art. 15(6) entails a dual criterion of economic disadvantage.<sup>54</sup> The office memorandum dated 17.01.2019 provides the EWS classification criteria<sup>55</sup> based on two indicators—First, gross annual family income below Rs.8.00 Lakhs and family property ownership.<sup>56</sup> For the former, the income definition is broad and includes income from salary, agriculture, business, profession, etc.<sup>57</sup> Family land ownership entails a high land-asset ownership threshold—

- i. 5 acres of Agricultural Land and above;
- ii. Residential flat of 1000 sq. ft. and above;
- iii. Residential plot of 100 sq. yards and above in notified municipalities;
- iv. Residential plot of 200 sq. yards and above in areas other than the notified municipalities.<sup>58</sup>

The practice of the states has been to rely on the Office Memorandum in its totality as reflected in multiple office orders by respective states.<sup>59</sup>

Art 16 sub-clause (6) also entails reservation of seats in public employment in form of a ten percent quota by excluding the existing beneficiaries of reservation policy, which like art 15(6) excludes existing status groups.<sup>60</sup> It is crucial to point out that sub-clause (6) of art 16 differs from sub-clauses (4)-(4B) on two key issues—first,

---

<sup>53</sup> *Indra Sawhney* (n 20).

<sup>54</sup> ‘Explanation’ to sub-clause (6) art 15, Amendment (n 7).

<sup>55</sup> Office Memorandum (n 33).

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> The Uttarakhand Public Services (Reservation for Economically Weaker Sections) Act 2019.

<sup>60</sup> art 16(6) COI.

it denotes the absence of the requirement of adequate representation in state services in sub-clause (6).<sup>61</sup> Importantly, sub-clause (6) also misses mentioning the reservation in state services or public employment where it only states ‘in addition to the existing reservation’ which could mean reservations in public employment, and only judicial interpretation can clarify its true scope. Furthermore, when compared to sub-clauses (4A) and (4B) there is no separate provision for reservation in matters of promotions with consequential seniority.

To summarise, the 2019-Amendment introduces a new regime of quotas for *Economically Weaker Sections in General Category* identified by household income backwardness and property ownership. It is an exclusive quota for the general category to the exclusion of the existing status groups. Furthermore, the amendment provides for an upper-limit of quotas that cannot exceed ten percent and is not provided for matters of promotions.

It is Important to flag a distinction between income backwardness and economic disadvantage, central and state government’s practice has been to inculcate both these criteria.<sup>62</sup> The fault lines that run through the amendment is due to the official policy that gives effect to the amendment and limits ‘other indicators of economic disadvantage’ to land-asset ownership only.<sup>63</sup> The methodology so used for group identification is limited and fails to cater to the existing literature and theoretical contributions in the field that identify a vast range of indicators describing economic

---

<sup>61</sup> *ibid.*

<sup>62</sup> Office Memorandum (n 33).

<sup>63</sup> *ibid.*

disadvantage through a robust understanding of economic disadvantage and intersectionality.<sup>64</sup>

The constitutional validity of the 2019-Amendment is challenged in *Janhit Abhiyan v Union of India*<sup>65</sup> where the SCI referred the case to a larger constitutional bench for consideration as the case involves a substantial question of law to the interpretation of the constitution. The case is *sub judice* before the SCI.<sup>66</sup>

#### **1.4 State legislations and executive actions providing reservation for EWS and upper-castes.**

There is a conceptual distinction in interventions of state legislature providing reservations. First, relates to addressing the demands of upper-castes groups for backwardness recognition under the pre-2019 regime. Second, are the separate state legislations that implement the 2019-Amendment. The distinction is important as this section only analyses the legislative interventions which relied on the pre-2019 constitutional framework to address upper-castes demands.

For the latter, only three states, Andhra Pradesh, Bihar and Uttarakhand, have enacted implementing legislations.<sup>67</sup> Other executive actions in form of cabinet decisions have also been used for example in Maharashtra.<sup>68</sup>

A commonality under the pre-2019 regime states of Gujarat, Maharashtra and Haryana have repeatedly engaged in enacting legislations under the pre-2019

---

<sup>64</sup> Shreya Atrey, The Intersectional Case of Poverty in Discrimination Law, 18 HRLR 411; Text to n 196.

<sup>65</sup> 2020 SCC OnLine SC 624.

<sup>66</sup> art 145(3) COI; Order XXXVIII Rule 1(1) SCI Rules 2013; Section 2.1.

<sup>67</sup> For example, Uttarakhand (n 59).

<sup>68</sup> Cabinet Decision 210 dated 04.02.2019.

constitutional framework, to be ruled unconstitutional by the HCs and SCI. All three states have unsuccessfully confronted with reconciling socially advantaged positions of upper-castes with questions constitutional scheme.

#### **1.4.1 The Maratha Reservation Debate in Maharashtra—**

Maratha community in Maharashtra is politically influential and socially forward in terms of their status in the caste hierarchy and has the greatest number of Legislative Assembly members in the state legislature and the majority of the chief ministers to date have belonged from the community.<sup>69</sup> In terms of other indicators of economic advantaged position, the community yields considerable influence in the private education sector and co-operative sugar industrial setups.<sup>70</sup> The demand for reservation and recognition as a backward class has been prominent among the community members and only in the last decade, it paced to the extent of massive public protests. This is despite historically such demands have only been rejected. The Backward Class Commission Report (‘Mandal commission report’) recognised and provided for a comprehensive list of backward classes, which was adopted by the Central government to identify OBCs, denoted Marathas as ‘Forward Hindu Castes and Communities.’<sup>71</sup>

The recent development in providing reservation benefits to Marathas has been through the 2014 ordinance.<sup>72</sup> The said ordinance created a new class of ‘Educationally

---

<sup>69</sup> *Sanjeet Shuka* (n 39).

<sup>70</sup> *ibid* [40].

<sup>71</sup> *ibid*; Mandal (n 27).

<sup>72</sup> Maharashtra Ordinance XIII of 2014.

and Socially Backward Category' (ESBC), and provided sixteen percent reservation exclusively for Marathas.<sup>73</sup>

The operation of the said ordinance was stayed in *Sanjeet Shukla v State of Maharashtra*<sup>74</sup> at the interim stage. Thereafter, the government enacted Maharashtra State Reservation (of seats for admission in educational institutions in the State) for Educationally and Socially Backward Category (ESBC) Act, 2014.<sup>75</sup> The provisions of the ordinance and the legislation being similar, ESBC Act 2014 was stayed in another interim order of the High Court of Bombay ('BHC').<sup>76</sup>

Thereafter, during the pendency of *Sanjeet Shukla*, the state passed yet another legislation SEBC 2018. Provision of this enactment being similar to earlier legislations, it differed in terms of relying on new empirical evidence of backwardness provided by Justice Gaikwad commission.<sup>77</sup> In *Jishri Laxmanrao Patil v Chief Minister*,<sup>78</sup> BHC upheld the validity of the 2018 Act but reduced the quota percentage to twelve percent instead of the sixteen percent as provided under the Act.<sup>79</sup>

The said judgement was overruled in *Dr. Jishri Laxmanrao Patil v Chief Minister 2021*<sup>80</sup> by the five-judge constitutional bench of the SCI, unanimously ruling the SEBC Act, 2018 unconstitutional.<sup>81</sup>

---

<sup>73</sup> ibid Section 4.

<sup>74</sup> *Sanjeet Shukla* (n 39).

<sup>75</sup> Maharashtra Act 1 of 2015.

<sup>76</sup> 2015 SCC OnLine Bom 5376 (BHC).

<sup>77</sup> Justice M.G. Gaikwad commission Report dated 15.11.2018.

<sup>78</sup> 2019 SCC OnLine Bom 1107 (BHC).

<sup>79</sup> ibid [300].

<sup>80</sup> Civil Appeal No.3123 of 2020.

<sup>81</sup> ibid [306].

### 1.4.2 Reservation for Patidar community in Gujarat—

The Gujarat government issued the Gujarat ordinance 2016<sup>82</sup> to address the persistent demand of Patidars for reservations, a major landowning community in Gujarat.<sup>83</sup> The state extended ten percent reservation benefits by creating a new class of ‘Unreserved Economically Weaker Sections.’

Based on over 200 representations from civil society organizations and communities, a high-level committee constituted by the Govt. of Gujarat recommended extending reservations based on income criteria.<sup>84</sup> The committee’s recommendation was based on its finding that unreserved category individuals face economic injustices despite being socially advantaged, especially because of a general lack of educational opportunities.<sup>85</sup>

The Gujarat HC (GHC) in *Dayaram Khemkaran Verma v State of Gujarat*<sup>86</sup> ruled the 2016 ordinance unconstitutional on the ground that reservation based on an economic criterion is illegal per *Indra Sawhney*.<sup>87</sup> The second ground for the unconstitutionality ruling pertained to the powerlessness of the state under the constitutional scheme to enact laws ‘exclusively for economically weaker sections of

---

<sup>82</sup> Gujarat Ordinance 2016 (n 37).

<sup>83</sup> Saif Khalid, ‘Q&A: Demanding affirmative action in India’s Gujarat’ (Aljazeera, 19 September 2015) <<https://www.aljazeera.com/economy/2015/9/19/qa-demanding-affirmative-action-in-indias-gujarat>> accessed 23 December 2020.

<sup>84</sup> *ibid.*

<sup>85</sup> *Dayaram Khemkaran Verma v State of Gujarat* 2016 SCC OnLine Guj 1821 (GHC).

<sup>86</sup> *ibid.*

<sup>87</sup> *Indra Sawhney* (n 20).

the unreserved category.’<sup>88</sup> The appeal against the 04.08.2016 order is pending in the SCI in the case of *State of Gujarat v Ms. Dulari Mahesh Basagre*.<sup>89</sup>

### 1.4.3 Reservation for Jat community in Haryana—

Jats are upper-castes in Haryana engaged in the agrarian occupation, and both socially advantaged and politically influential. According to Jodhka ‘Even though the two states have several other caste communities also owning agricultural land, none has the numbers and economic power to compete with Jats at the regional level.’<sup>90</sup> Despite the influential status, there has been a demand from Jats for inclusion in the OBC list since the 1990s. It was only in the last decade that legislative attempts, both at the central and state level, denoted Jats as backward classes.

The National Commission for Backward Classes (‘NCBC’) has time and again rejected the demands of the Jats community for inclusion in the OBC list.<sup>91</sup> In 2013, the Govt. of Haryana issued a notification providing ten percent reservation to five ‘Special Backward Classes,’ including Jat and Jat Sikh.<sup>92</sup> The notification was stayed by the Punjab and Haryana High Court (PHHC).<sup>93</sup>

Thereafter, the Central Government vide its official notification dated 04.03.2014 included Jats in the Central List of OBC in ten states including Haryana.<sup>94</sup>

---

<sup>88</sup> *Dayaram Khemkaran Verma* (n 85).

<sup>89</sup> Special Leave to Appeal (C) No(s) 23544-23547/2016.

<sup>90</sup> Surinder Jodhka, ‘Caste and Power in the Lands of Agri-Culture Revisiting Rural North-West India’ [https://sas-space.sas.ac.uk/5649/1/AHRC\\_1\\_Jodhka\\_Northwest\\_Caste\\_and\\_Rural\\_Power\\_Shimla.pdf](https://sas-space.sas.ac.uk/5649/1/AHRC_1_Jodhka_Northwest_Caste_and_Rural_Power_Shimla.pdf) accessed 23 December 2020.

<sup>91</sup> NCBC reports dated 28.11.1997, 25.11.2010 and 20.06.2011.

<sup>92</sup> Notification (n 42).

<sup>93</sup> *Ved Prakash v State of Haryana* CPW 9132 of 2015, order dated 25.07.2015.

<sup>94</sup> Gazette Notification No. 20012/129/2009-BC-II.

This inclusion was despite NCBC's recommendation against the inclusion, as 'merely belonging to an agricultural community cannot confer backward status.'<sup>95</sup> NCBC held that the Jats were not socially and educationally backward and refuted the claims of inadequate representation in public employment.<sup>96</sup> In *Ram Singh v Union of India*,<sup>97</sup> the SCI held the said inclusion unconstitutional.

Thereafter, the Haryana passed yet another legislation, HBC Act 2016, whereby the backward classes were sub-categorised. Jats were included in 'Backward Class Block 'C'' and provided ten percent reservation for Class III and Class IV posts; six percent for Class I and II posts in public employment and ten percent in educational institutions.<sup>98</sup> This inclusion was further challenged in *Murai Lal Gupta v State of Haryana*,<sup>99</sup> where PHHC upheld the act on the ground that backwardness recognition exercise of Jats though not undertaken by Haryana could commence even after denoting a community as a backward class.<sup>100</sup> The judgement was challenged in *Satvir Singh Saini and Anr. v The State of Haryana and Ors.*<sup>101</sup> before SCI, and is still *sub judice*.

---

<sup>95</sup> NCBC Advise no. 38 (Haryana) (26 February 2014)  
<<http://www.ncbc.nic.in/Writereaddata/JAT%202014635568274253868064.pdf>> accessed 23 December 2020.

<sup>96</sup> *Ram Singh v Union of India* (2015) 4 SCC 697 (SCI).

<sup>97</sup> *ibid.*

<sup>98</sup> HBC (n 44).

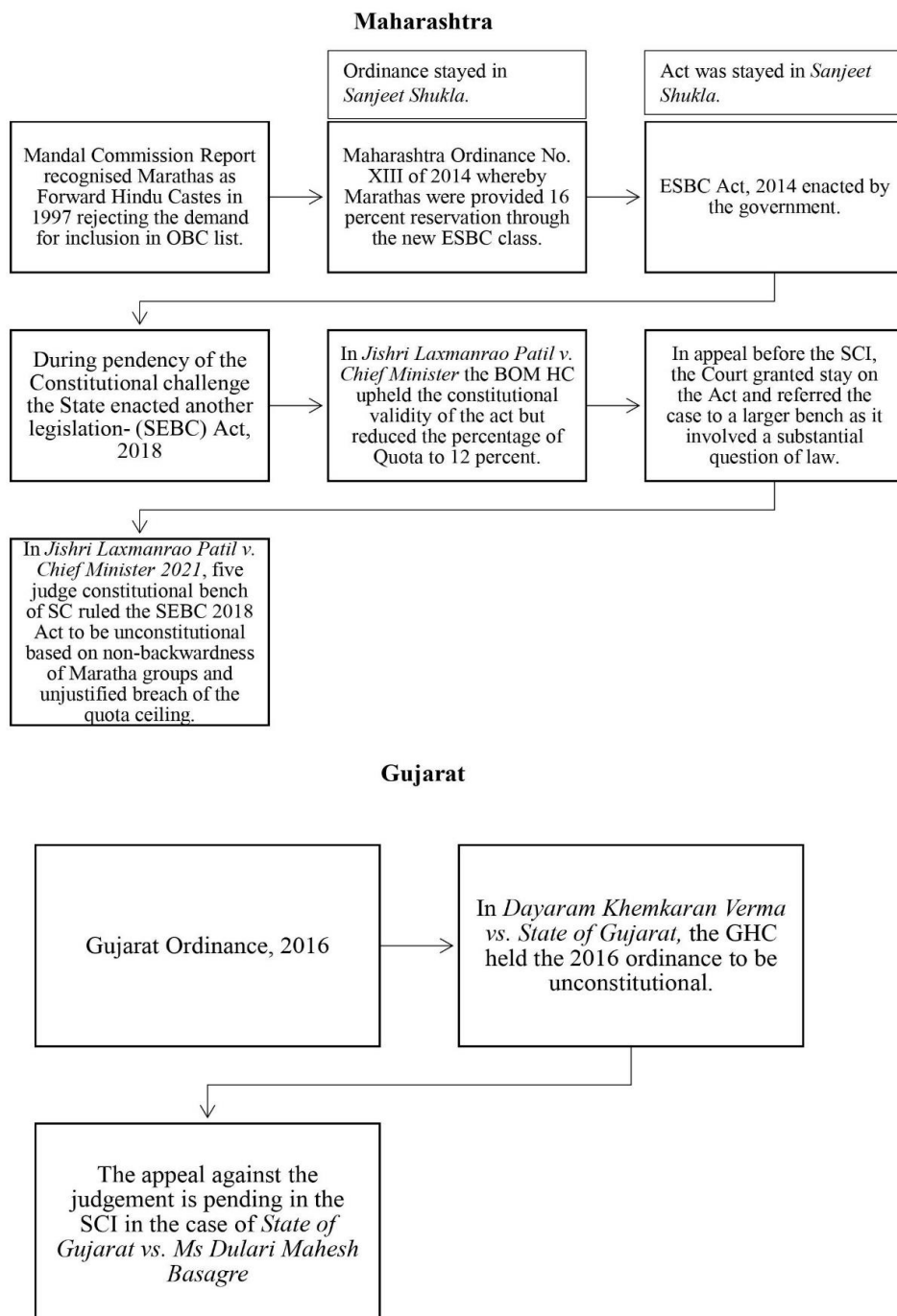
<sup>99</sup> 2017 SCC OnLine P&H 2621.

<sup>100</sup> *ibid* [48].

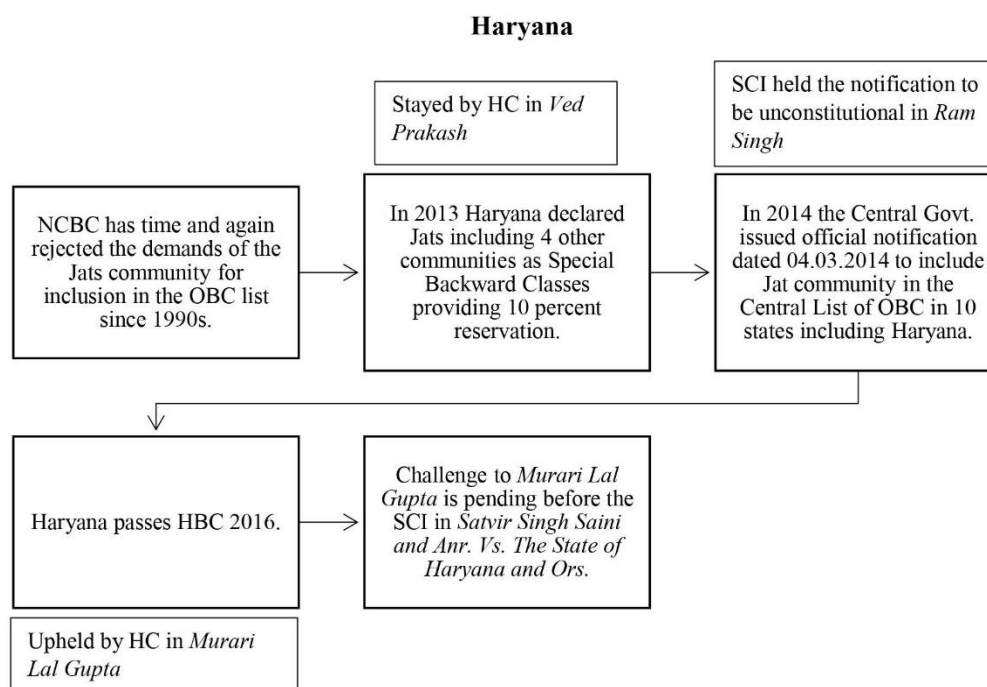
<sup>101</sup> Order dated 26.03.2018 in Civil Appeal 2261/2018.

## 1.5 Jurisprudence of HCs and SCI—

The diverse range of interventions by legislature and executive has given rise to a complex jurisprudence on this issue, where the judicial treatment has been varied due to different issues involved in the challenges to the interventions. To further clarify these developments, a tabular representation will help map the entire jurisprudence of the HCs and SCI and state legislative interventions, **Diagram 1:**



**Diagram 2**



The above analysis shows that states have had little success in their attempts to recognise advantaged groups as backward classes. There is a resistance by the courts relying on pre-2019 constitutional policy to rule such measures as unconstitutional. It has however not precluded states from re-intervening using their legislative and executive power.

## **1.6 The Political context**

The preceding sections indicate demands for backwardness recognition had only a partial success: for example, HBC 2016 and SEBC 2018 were upheld by HCs. The political context in which such demands are made is too significant to be ignored and becomes a crucial point to understand the legislative intention behind the interventions. I argue in this section that such interventions are not to predominantly address disadvantage, but to gain political leverage and avoid political backlash by dominant upper-caste groups.

The academic literature determines the political economy of the protests demanding reservations, reactionary moves by the government, and also the nature of political power exercised by the central and state governments in the following ways.

First, constitutional amendments, legislations, ordinances, notifications are enacted right before crucial parliamentary and state legislative elections to pacify the violent protests and threats of political repercussion by the dominant castes.<sup>102</sup>

Second, despite the demands of the upper-caste communities being rejected time and again by the Backward Classes Commissions (BCC), governments have continued making references for backwardness recognition.<sup>103</sup>

Third, demands have been rooted in the changing economic conditions due to stagnation in agricultural income, reduction in agricultural yield.<sup>104</sup> Also due to the considerable focus of the neo-liberal capitalist Indian economy on encouraging job creation in 'knowledge-based sector' jobs, whereas the majority of upper-castes are engaged predominantly in an agricultural occupation.<sup>105</sup>

Fourth, the political objective 2019-Amendment reservation scheme is to exclusively benefit upper-castes.<sup>106</sup>

---

<sup>102</sup> Ashwini Deshpande and Rajesh Ramachandran, 'Dominant or Backward? Political Economy of The Demand For Quotas By Jats, Patels And Marathas' EPW 2017 Vol 52 (19).

<sup>103</sup> Alok Prasanna Kumar, 'Revisiting the Rationale for Reservations Claims of 'Middle Castes'' EPW 2016 Vol 47 10.

<sup>104</sup> *ibid.*

<sup>105</sup> Radhika Kumar, 'Stooping to Conquer Jats and Reservations in Haryana' EPW 2016 Vol 16 15; Mridul Kumar, 'Reservations for Marathas in Maharashtra' EPW 2009 Vol 14 10; Maanvender Singh, 'Reservation amidst the Din of 'Development'' EPW 2016 Vol 38 65.

<sup>106</sup> Satish Deshpande, 'Reservation and the Republic: One Constitution, Two Amendments and Seven Decades' *Social Change* 2019 49(3) 512 516; Ashwini Deshpande and Rajesh Ramachandran, 'The 10% Quota Is Caste Still an Indicator of Backwardness?' EPW 2019 Vol. 54(13).

Considering the first point, the fact of these interventions being politically motivated is understood from the timing of the decisions. The decision to extend benefits of reservations and backwardness recognition of Marathas and Jats was taken on the eve of—state legislative elections in 2014; and central elections, for inclusion of Jats in the central list, in 2014; for the 2019-Amendment, before 2019 central elections. Gujarat 2016 ordinance was in response to a political turmoil due to mass agitations by the Patidar community in Gujarat.<sup>107</sup>

BHC's *obiter* in *Sanjeet Shukla* on the ordinance being politically motivated in the background of the then approaching state elections is a crucial trend, observed by the judiciary, and points towards the larger political gimmick behind fulfilling upper-castes' demands.<sup>108</sup>

The role of appeasement politics was also to pacify the stern and often violent agitations which reflect roots of such interventions in politics of pacification rather than primarily addressing disadvantage. The violent character of the protests along with threats of political resentment, damage to the political vote bank saw governments surrendering to political pressures.<sup>109</sup> The picture is complicated by the fact that dominant upper-castes who were previously engaged in violent agitations against the pre-2019 regime reservations argued them to be anti-merit and discriminatory.<sup>110</sup> This raises the question of why such demands are made by affluent groups in first place?<sup>111</sup>

---

<sup>107</sup> Satish Kumar, 'On the Question of Backwardness' EPW 2016 Vol 1 18.

<sup>108</sup> *Sanjeet Shukla* (n 39) [57].

<sup>109</sup> Ashwini Deshpande and Rajesh Ramachandran, 'Jats, Marathas, and Patels Want Quotas, But Do They Need Them?' (EPW) <<https://www.epw.in/engage/article/jats-patels-and-marathas-want-quotas-but-do-they-deserve-them>> accessed 06 January 2021.

<sup>110</sup> Kumar, 'Stooping to Conquer Jats' (n 105).

<sup>111</sup> Deshpande (n 102).

Agrarian distress in form of falling agricultural income, profitability and lack of employment avenues for upper-castes youth because of their unsuitability for the private sector jobs due to poor nature of government-run educational facilities—when coupled with the lucrative nature of government employment in form of tenure security and other social benefits have fuelled the demands of the communities for reservations.<sup>112</sup> The community-wide demand is also understood to be associated with taking advantage of the ‘knowledge economy in the post-globalisation era’<sup>113</sup> where paradoxically the share of public employment in the Indian economy is shrinking due to liberalisation and globalisation.<sup>114</sup>

Based on some anecdotal accounts a crucial understanding of the anxiousness of the communities has been discerned.<sup>115</sup> There is a presumption of lack of access to government jobs compared to protected groups of SC/ST/OBCs, which empirically is unfounded.<sup>116</sup> Rather, the percentage of public sector jobs that these three communities hold are far more than disadvantaged groups, at par with other upper-castes groups.<sup>117</sup>

Academic literature also identifies the political objective of the EWS quota as ‘effectively’ a reservation policy for upper-caste Hindus based on two primary reasons—1) The high-income ceiling of Rs.8.00 Lakhs ensures inclusion of 98 per cent of the Indian population which has a household income below such artificial income line; 2) based on ‘undisputed common knowledge’, EWS is a circumlocution for upper-

---

<sup>112</sup> *ibid.*

<sup>113</sup> Kumar, ‘Reservations for Marathas’ (n 105).

<sup>114</sup> Singh (n 105); Siwan Anderson, et al, ‘Distress in Marathaland’ EPW 2016 Vol 51.

<sup>115</sup> Deshpande (n 102).

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

caste Hindus.<sup>118</sup> Though I find myself in agreement with the argument of *de facto* nature of EWS being reservation for upper-castes, I don't agree with the reasoning of the argument.

Let's consider the high-income ceiling first. Ramachandran and Deshpande argue that the EWS quota is misunderstood as reservations for the poor as the high annual household income ceiling line ensures 'about 98.26% of Brahmin, 97.93% of UC and 99.75% of SC families report incomes less than the EWS limit.'<sup>119</sup> The central problem with this argument is that it only considers income ceiling as the identification criteria, whereas EWS also involves a threshold of family property ownership. A counter-argument to refute their claims could be—due to the property ownership ceiling the majority of advantaged upper-castes Hindus may be excluded invariably owing to their significant landownership in comparison to other religious minorities. Furthermore, the remainder of the members of the unreserved category, predominantly Muslims and Christian religious groups<sup>120</sup> may also have affluent members monopolising the access to quotas due to their relatively advantageous position compared to others. They may also be excluded due to the possibility of higher land ownership.

The question which is pivotal to this discussion is how non-upper-castes' access to reservation is hindered, which I submit is key to answering the *de facto* upper-castes nature of the 2019-Amendment. To answer this question, the parliamentary debates on the 2019-Amendment specify the primary intention in enacting it—to *provide access to reservation benefits to general category/ unreserved category persons who are*

---

<sup>118</sup> Deshpande, 'Reservation and the Republic' (n 106) 516.

<sup>119</sup> *ibid.*

<sup>120</sup> Census of India, 2011.

*poor, at parity with SC/ST groups, without disturbing the existing framework of quotas.*<sup>121</sup>

Parliamentary debate on the 2019-Amendment Bill outlines the objectives to be only limited to addressing economic disadvantage within unreserved category persons irrespective of their religion.<sup>122</sup> It is crucial to note that apart from caste, the religion dynamic is also central. All religion groups that are non-SC/ST/OBC, and outside the existing scheme of reservation are *de-jure* beneficiaries.

The intra-group dynamic within EWS becomes relevant for arguing it as *de facto* upper-caste quota, I submit, for two underlying reasons. First, the variation in populations that constitute unreserved category varies drastically in its intra-group composition. Hindus constitute the largest community within the unreserved category due to their demographically dominant position in India. The distribution of the population by religion indicates 80.5% Hindus, 13.4% Muslims, 2.3% Christians and 1.9% Sikhs.<sup>123</sup> Such domination also entails that even if EWS quotas included SC/ST/OBC groups within its fold, Hindus would still overtly burden and hegemonize the group. Meaning it is not so much that the relatively affluent non-Hindu groups may not be able to benefit from such quotas. The sheer dominance of the upper-castes-Hindus in general category eclipses the access of other religious minorities which are the *de jure* beneficiaries, and yet remain largely excluded from the quota.

---

<sup>121</sup> Lok Sabha, ‘Discussion on the motion for consideration of the Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019’ (8 January 2019) <[https://eparlib.nic.in/handle/123456789/808314?view\\_type=search](https://eparlib.nic.in/handle/123456789/808314?view_type=search)> accessed 20 January 2021.

<sup>122</sup> *ibid.*

<sup>123</sup> Census (n 120).

Second, the upper-caste character of the EWS quota specifically culls out from what I term as the ‘intra-Hindu group’ dynamic. Since the SC/ST/OBC groups consisting predominantly of lower Hindu castes are excluded from the EWS quota, it *de facto* leaves upper-caste Hindus as the intra-Hindu dominant group and primary beneficiaries within Hindus.

The term ‘upper-castes quota’, however, requires further problematisation. As argued above, an intersectional analysis based on religion helps in outlining fault lines with the upper-caste Hindu character of the 2019-Amendment. The disadvantaged position of women in Indian society brings out another intersectional angle of gender in relevance. I argue that the EWS quota is for *upper-caste Hindu men*. This is because, within the primary beneficiaries of upper-caste Hindus, men would predominantly access these quotas due to pre-existing gender-based discrimination faced by upper-caste Hindu women.<sup>124</sup> They are relatively more disadvantaged than upper-caste Hindu men. The design of EWS, therefore, not only benefits upper-castes Hindus over lower caste Hindus and other minority religions but also benefit men more than women.

Academic writings disregard the fact that the 2019-Amendment is *de facto* for upper-caste Hindus not only because of their income but primarily due to the ‘intra-group’ dynamic within EWS and the ‘intra-Hindu group’ dynamic.

Another issue that reflects the possibility of perpetuity in demands for gaining affirmative action benefits by upper-castes is in the limited number of opportunities available through reservations. As rightly pointed out by the chief minister of Maharashtra, reservation benefits to *Marathas* ‘would make only 900 additional seats available in engineering colleges, and 7,500 government jobs’ whereas the aspirants’

---

<sup>124</sup> Satish Deshpande and Yogendra Yadav, ‘Redesigning Affirmative Action: Castes and Benefits in Higher Education’ EPW 2006 vol. 41(24), 2419–2424.

range in millions.<sup>125</sup> 10 percent quota for such a large unreserved category does not have any empirical basis, and at the max is an arbitrary percentage.

## Conclusion

Determination of backwardness has been a complex issue to legislate upon. The primary and secondary sources analysed in this chapter answer the first and sixth questions. In answer to the first question: The nature of demands for backwardness recognition are rooted in agrarian distress and lack of job prospects in a knowledge sector-driven economy and not social disadvantage. Interventions in three states are not to predominantly address economic disadvantage but to gain political leverage and tackle social unrest, political pressures, and appeasing political vote bank of dominant upper-castes groups. Such measures were enacted before crucial elections, despite such interventions being ruled unconstitutional time and again.

Partially answering the sixth question: EWS and state measures are designed to predominantly benefit upper-castes Hindu men and not economically disadvantaged groups. The intra-group dynamic within EWS characterises it as a *de facto upper-caste men quota*.

Furthermore, the 2019-Amendment and pre-2019 state measures are regressive and problematic in their outlook due to their exclusionary, discriminatory, and political make-up. Both EWS and the special legislative attempts for upper-castes reservation describe the persistence of the states to open reservation benefits for affluent sections in the society, despite a clear constitutional impermissibility, as confirmed by the SCI.

<sup>125</sup>

---

Siwan Anderson (n 114).

## **CHAPTER 2 JUDICIAL TREATMENT OF RESERVATION FOR ECONOMICALLY WEAKER SECTIONS (EWS) AND UPPER-CASTES IN INDIA**

### **Introduction**

The diverse and repetitive range of legislature and executive interventions of the central and state governments have given rise to a complex jurisprudence in Indian courts, where the judicial treatment has been varied and often against the precedent of SCI. It is largely due to the range of issues involved in the legal challenges and different interpretations by the respective HCs.

This chapter aims to provide critical analysis of the judicial treatment of the interventions where constitutionality was under challenge. This chapter addresses research question two and partially question three, by undertaking granular analysis of primary materials in form of judgements of HCs and SCI. It sets the foundation of analysing the adverse impact of Indian interventions on substantive equality principle and foundations of reservations in India in chapter 3. There are two parts to the present chapter—2.1 SCI and Reservation for EWS discusses *Janhit Abhiyan*; 2.2 critically analyses the judicial treatment of key themes generating in judicial review of state measures: 2.2.1 demarcation of beneficiaries; 2.2.2 extent of quotas; and 2.2.3 reasonable classification.

The analysis in this chapter points out: in section 2.1 that state policy for the 2019-Amendment has always been in favour of conceptualising economic disadvantage only among open-category groups and expressly deploying prior group membership as an exclusionary criterion. Section 2.1 discusses how state legislatures' attempts to

accommodate demands of dominant upper-castes have met with resistance from the judiciary. It critically probes how the judicial position of HCs on the issues have largely remained erroneous. Similarly, legislature and backward classes commissions have misinterpreted the settled position of law on these issues to extend disadvantage status to advantaged groups. SCI's critique and overruling of both HCs judgements and legislations point towards a lack of general jurisprudential understanding.

The central argument of this chapter is that the intent of state policies has always been directed at conceptualising economic disadvantage only among open-category groups leaving the question of intersectional disadvantage faced by status groups to be addressed using the pre-2019-Amendment regime. It delegitimises the claims of SC/ST/OBC groups and erodes the core foundation of substantive equality and affirmative action. This chapter identifies key problems in the judicial treatment of Indian interventions and roles played by courts in proliferating and restricting reservation measures: 1) Erroneous reliance by BHC and PHHC on the backwardness determination jurisprudence of the SCI, for example, PHHC approves Jats as backward classes without the mandated backwardness determination exercise. 2) HCs misconstrue criteria for extending reservations with the 'twin test' of extraordinary circumstances essential for breaching the 50% quota ceiling. 3) SCI's obiter that reservations based on addressing historical injustices amount to under protection undermines the legitimate claims of SC/ST/OBCs.

## **2.1 SCI and Reservation for Economically Weaker Sections (EWS) —**

The judicial review of the 2019-Amendment is pending in *Janhit Abhiyan* which this section critically analyses. The petitions evoke the basic structure challenge, where the

2019-Amendment affects the ‘width’ and ‘identity’ of COI’s equality scheme as the demarcation of status groups cannot be solely defined based on economic indicators.<sup>1</sup>

According to UOI the objective of the amendment was to do justice to groups ‘who are not covered within the existing schemes of reservation’<sup>2</sup> by enabling quota-based access to both educational institutions seats and public employment. The basis of the amendment is the recommendation in the report of the Commission for Economically Backward Classes or Sinho Commission 2006-2010, established to develop Economically Backward Classes (EBC) demarcation criteria to enable extending reservation measures for their upliftment.<sup>3</sup>

The mandate of the Sinho commission was to identify EBC within existing non-beneficiaries of reservations to the exclusion of SCs/STs/OBCs, which is its foundational basis.<sup>4</sup> Thus, as observed in the previous chapter the foundational fault lines envisage a *de-facto* constitutional vision of new group identification based not only on economic backwardness but also prior group membership. A prior group membership excludes a group in totality, even if the members of a prior reservation beneficiary group may suffice the economic backwardness criteria, an option that is unavailable in the post-2019 regime. Therefore, the true nature of EWS reservations, on one hand, precludes existing beneficiary classes of reservation based on their group membership and on the other hand considers the general category as a class in itself.

---

<sup>1</sup> *Janhit Abhiyan* (n 65) [3].

<sup>2</sup> *ibid* [4].

<sup>3</sup> S.R. Sinho, *The Commission for Economically Backward Classes* 2010.

<sup>4</sup> Ministry of Social Justice and Empowerment Annual Report 2010-2011, 24, 116.

The jurisprudence of the SCI reiterates the non-existence of a *de-facto* reservation in terms of open category seats in favour of non-reservation beneficiaries.<sup>5</sup> 2019-Amendment envisages access to benefits of EWS only within the open category by treating it as a class of its own. While leaving the important question of intersectional discrimination faced by existing reservation beneficiaries, based on class, caste, religion and gender outside its scope. It is not to discount the policy measures adopted for the economic upliftment of SC/ST/OBC groups under pre-2019 umbrella. The point of this analysis is to clarify the intent of the state policy, which has been only and always in favour of conceptualising economic disadvantage only among open-category groups, letting the intersectional disadvantage be addressed through the pre-2019 reservation provisions—where group identification is based on social and educational backwardness.

A perusal of the report clarifies that the suggestion and recommendation for enabling reservation for EWS is not correctly founded and lacks accuracy. As it envisages reservation as the only social justice strategy by recommending that ‘there is a need to make provisions similar to the backward classes for the economically weaker sections.’<sup>6</sup> The dubious logic of deploying similar measures adopted for SC/ST/OBCs is just transposing the existing constitutional framework of reservations to suit the aims of addressing economic disadvantage.

Relying on the constitutional scheme, UOI has argued that it has powers to classify unreserved category into EWS without violating the basic structure of the constitution. It relied on the three-judge bench decision in *Society for Unaided Private*

---

<sup>5</sup> *Saurav Yadav* (n 30).

<sup>6</sup> Affidavit, UOI in *Janhit Abhiyan* (n 65).

*Schools of Rajasthan v Union of India*<sup>7</sup>, where the SCI upheld the Right of Children to Free and Compulsory Education Act, 2009 ('RTE Act') provisions that extended quotas and educational benefits to children based on economic backwardness classification.<sup>8</sup> However, such reliance is erroneous, I submit, as it ignores the fact that the 2009 Act does not exclude economically backward children based on their status as SC/ST/OBCs and applies to all classes.

In the preliminary arguments on merits, there is no mention of an argument that challenges the discriminatory nature EWS as a violation of the basic structure of COI. It has to be seen if it takes the central stage before the five-judge bench, as mentioned by one of the petitioner organisations, Youth for Equality.<sup>9</sup> One other important argument on merits was the effect of EWS quotas on *ratio legis* of the right to equality—The new regime destroys the foundation of affirmative action guarantee envisaged in the constitution, it is argued.<sup>10</sup>

## **2.2 Judicial treatment of state interventions in reservations for EWS and upper-castes in the states of Maharashtra, Gujarat, and Haryana—**

The complexity in the courts' jurisprudence on state reservation interventions is due to a diverse range of logic and parameters adopted by the three states in their legislative exercise. The discussion in this part will critically analyse the judicial treatment of the cross-cutting themes in the HCs and SCI judgements that highlights the emerging legal

---

<sup>7</sup> (2012) 6 SCC 1.

<sup>8</sup> Affidavit, UOI in *Janhit Abhiyan* (n 65).

<sup>9</sup> W.P.(C) 55 of 2019.

<sup>10</sup> *Janhit Abhiyan* (n 65) [8].

position on the subject. The three-key cross-cutting themes are—2.2.1. Demarcation of beneficiary classes and determination of backwardness; 2.2.2. Extent of quota limit and exceptional circumstances; 2.2.3. Reasonable classification test.

## **2.2.1 Demarcation of beneficiary classes and determination of backwardness**

The key constitutional hurdle for the state legislatures has been to accommodate the demands of upper-castes groups within the constitutional methods of backwardness determination in the pre-2019 regime. This section explores this theme in-depth to answer the third research question.

### ***2.2.1.1 Backwardness of Maratha community in Maharashtra***

The issue of the backwardness of Marathas has been an oscillating one. This section critically evaluates the judicial treatment of backwardness determination of Marathas, where BHC first ruled the *Marathas* were a ‘forward Hindu caste’ at the interim stage, which was changed to ‘backward class’ status in the final judgement, and only to be recently changed as ‘forward Hindu caste’ by SCI.

The previous chapter details how six central and state BCCs have rejected the demands of Marathas for recognition as OBC.<sup>11</sup> The Court at the interim stage agreed with the findings of these commissions to *prima facie* reject the argument of the socially disadvantaged status of Marathas. They were considered socially, economically, and politically advanced.<sup>12</sup> In particular, emphasis was laid on the NCBC 2000 report, where NCBC undertook a historical analysis of the social position of the Maratha

---

<sup>11</sup> Text to n 71.

<sup>12</sup> *Sanjeet Shukla* (n 39) [41]-[51].

community, emphasising social elitism and a ruling caste (*Kshatriya*) status and presence of considerable wealth and political power.<sup>13</sup> There was a categorical finding by the court as to what constitutes social backwardness. Agreeing that past discrimination cannot be the sole criteria for designating backwardness within the constitutional frame, however, it cannot be altogether irrelevant.<sup>14</sup> The dominant position of the community and the absence of experiences of historical discrimination becomes a relevant factor for determining if castes are socially backward.<sup>15</sup>

Court's critique of the legislative approach, especially of the attempts by the Maharashtra government by first constituting a non-statutory committee of politicians, *Rane committee*, and then relying on its recommendations to extend reservations to Marathas is significant.<sup>16</sup> Such an exercise was undertaken after the statutory body rejected the demands of Marathas for inclusion in the state list of OBC.<sup>17</sup> Court's critique of *Rane committee* report importantly outlines a range of flaws. First, the omission in analysing the legal requirement of providing evidence of the existence of extraordinary circumstances as per *Indra Sawhney*.<sup>18</sup> Second, the failure to assess reports of the past committees that rejected community's claims and concluded that the community is socially and educationally affluent.<sup>19</sup> Third, admission by the Rane committee of the difficulty in classifying Marathas as socially backward. The committee's recommendation for carving out a separate class called 'Economically and

---

13        *ibid* [43].

14        *ibid* [43]-[44].

15        *ibid* [44].

16        *ibid* [49]-[55].

17        *ibid* [57].

18        *ibid* [55].

19        *ibid*.

Educationally backward Class’ was ignored by the legislature and contradictorily Marathas were recognised as socially backward.<sup>20</sup>

One may recall that the developments post-interim order saw the government constituting the MSBCC in 2017 (Justice Gaikwad commission) to ‘determine the contemporary criteria and parameters’ for identifying the backwardness of Marathas.<sup>21</sup> The analysis of the recommendation of the Gaikwad commission, methodology, and prudence of the findings of the commission forms the basis of the Court’s final judgement on the backwardness of Marathas.<sup>22</sup>

BHC, at the outset, held in the final judgement that the scope of judicial review of the reports of the SBCC is limited to situations where it considers irrelevant material by omitting available relevant material.<sup>23</sup> Such understanding of the BHC fails to capture the jurisprudence of the SCI in my understanding. BHC rightly identifies *B.K. Pavitra v Union of India*<sup>24</sup> as the judgement relevant to the question of scope of judicial review while scrutinising quantifiable data and adequacy of representation.<sup>25</sup> In *B.K. Pavitra*, the SCI held that the judicial review must determine if the committee’s report ‘considered material which was irrelevant or extraneous or had drawn a conclusion which no reasonable body of persons could have adopted.’<sup>26</sup> The HC fails to abide by this ratio to conclude Marathas as a backward class. BHC ruled there was no illegality in the commission’s report and the same relies on sound methodology and logic.<sup>27</sup>

---

<sup>20</sup> *ibid.*

<sup>21</sup> *Dr. Jaishri Laxmanrao Patil* (n 78).

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* [165].

<sup>24</sup> (2017) 4 SCC 620.

<sup>25</sup> *Dr. Jaishri Laxmanrao Patil* (n 78) [158].

<sup>26</sup> *ibid* [95].

<sup>27</sup> *ibid* [166].

It is beyond the scope of this chapter to engage in a thorough analysis of the entire Gaikwad commission report, however, a summary of the key findings and recommendation of the commission is warranted to better critique the judicial approach.

The commission adopted a mixed methodology to ascertain the backwardness of Marathas through the collection of quantifiable and contemporary evidence. It engaged in various data collection exercise in form of interviews, surveys and literature review of academic materials on the plight of Marathas.<sup>28</sup> The data was then analysed as per a list of parameters categorised in three heads—i. Social Backwardness (28 parameters); ii. Educational Backwardness (2 parameters); iii. Economic Backwardness (10 parameters).<sup>29</sup>

The key findings in the parameters form the basis of the commission's recommendation, which include the following key conclusions: first, 76.86% of Marathas are engaged in agriculture activities, with a total of 92% owning agricultural land.<sup>30</sup> They are also involved in 'low labour activities' and are socio-economically disadvantaged.<sup>31</sup> Second, 53.28% of Marathas perceived their traditional occupation as agriculturalists as inferior.<sup>32</sup> Third, 39% of families live in slums and poor habitats when compared to other caste groups.<sup>33</sup> Fourth, there is low level of literacy in higher education.<sup>34</sup> Fifth, 37% of the families fall below the poverty identification line, 85.65% of families rely on borrowings to support agricultural activities.<sup>35</sup>

---

28      *ibid* [161]-[162].

29      *ibid* [125]-[134].

30      *ibid*.

31      *ibid* [74].

32      *ibid* [74],[134].

33      *ibid*.

34      *Dr. Jaishri Laxmanrao Patil* (n 78).

35      *ibid*.

The commission then engaged in marking each of these parameters, and provided high marks for social backwardness, denoting Marathas as low castes groups.<sup>36</sup> By relying on educational data from primary to university level and percentage of families living below the artificial poverty line, Marathas were considered worthy of reservation benefits and extended backward class status.<sup>37</sup>

BHC's refusal to intervene in the findings of the Gaikwad commission report, I submit, was erroneous as the BHC failed to consider the patent flaws in the data analysis and conclusions in the report. When tested from the lens of the ratio in *B.K. Pavitra* backwardness claim of Marathas is unfounded.

First, the absence of analysis of whether Marathas have suffered from experiences of social discrimination, especially when the interim order of the BHC emphasized social exclusion as an important factor in determining social backwardness, is relevant material kept out of the report. Interestingly, the BHC concedes that 'the reservation when looked as an affirmative action and provides a remedy for historical discrimination and its continuing ill-effects...the eradication of such discrimination is the constitutional mandate.'<sup>38</sup> It is the admission of the parties that Marathas have no experiences of social discrimination based on their caste status.<sup>39</sup> This is a relevant fact having a key bearing on the commission's decision.

Second, the failure of the BHC to problematise the commission's denoting of Marathas as Shudra or low caste community. The sociological study conducted by the commission concluded that the caste system in Indian society was divided into only

---

<sup>36</sup> *ibid* [136].

<sup>37</sup> *ibid* [138]-[141].

<sup>38</sup> *ibid*.

<sup>39</sup> *Sanjeet Shukla* (n 39).

two categories, *Brahmins* and *Shudras*, higher castes and lower castes respectively.<sup>40</sup> This erroneous understanding conflicts with the sociologically and the historically sound fact of caste system comprising of four castes- *Brahmins* (priest caste), *Kshatriya* (warrior caste), *Vaishya* (Merchant caste), *Shudra* (Menial labour caste) and outside the fold of caste system, *Dalits* or *untouchable* castes ('Scheduled Castes').<sup>41</sup>

*Upanayana Sanskar* is a sacred thread ceremony in Hinduism, which according to the commission is not performed in Shudra or low caste community, thus making Marathas Shudra or low-caste community.<sup>42</sup> Through this logic, that the court accepts, the commission has tried to identify a high caste as a *low-caste* and hence one of the reasons to be socially backward.<sup>43</sup> A basic perusal of the interim order of the HC and the three commission reports rejecting demands of the Maratha community clarifies the fact that not all Shudra castes are considered OBCs, and that Marathas have always been perceived as high caste Hindus enjoying socially privileged status.<sup>44</sup> I submit this conclusion cannot be adopted by any 'reasonable body of persons'.

Third, ruling that Marathas' engagement in the agricultural activity is paramount to their social backwardness neglects the fact that in the Indian economy agriculture predominantly employs 41% of the population or 54.6% of the total workforce.<sup>45</sup> The economic difficulties faced by persons engaged in agricultural activities cannot be equated to social backwardness, as these are economic questions

---

<sup>40</sup> *Dr. Jaishri Laxmanrao Patil* (n 78) [126].

<sup>41</sup> M.N. Srinivas, 'Caste in Modern India' JAS (1957)16(4), 529–548.

<sup>42</sup> *Dr. Jaishri Laxmanrao Patil* (n 21) [126].

<sup>43</sup> *ibid* [160], [275].

<sup>44</sup> *Sanjeet Shukla* (n 39).

<sup>45</sup> World Bank, 'Employment in agriculture (% of total employment)' <<https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>> accessed 16 March 2021; Annual Report 2018-19 <[https://agricoop.nic.in/sites/default/files/AR\\_2018-19\\_Final\\_for\\_Print.pdf](https://agricoop.nic.in/sites/default/files/AR_2018-19_Final_for_Print.pdf)> accessed 16 March 2021.

rooted in economic and agriculture policy. Interestingly, the court misses the opportunity to point out how 92% of Marathas own agricultural land, an important marker of socio-economic influential status.<sup>46</sup> Thus, if BHC's logic is accepted agriculturists facing economic issues can be classified as socially backward, opening flood gates for claims of backwardness recognition.

Finally, BHC confuses the question of subjective judgement of the state to determine inadequacy of representation in employment with that of court's power of judicial review of commission's report detailing the quantifiable data and adequacy of representation. It is a settled position of law, as BHC highlights in its discussion, that the courts must not substitute their view while judicially reviewing policy decisions. This does not preclude, however, the scope of judicial review as highlighted by the HC itself in its discussion of ratio in *B.K. Pavitra*.<sup>47</sup> Therefore, the HC's judgement fails to critique major lacunas within the report and test the veracity of the quantifiable data and problematic conclusions.

To conclude, the above analysis describes problems in BHC's approach in judicial review of the report. The court fails to problematise conclusions 'no reasonable body of persons could have adopted' and skips articulating gravity of the report's omission in identifying and understanding social discrimination, if any, suffered by Marathas.

The challenge to the BHC final judgement was recently decided by the five-judge constitutional bench of SCI in *Dr. Jaishri Laxmanrao Patil v The Chief Minister*

---

<sup>46</sup> *Dr. Jaishri Laxmanrao Patil* (n 78) [134].

<sup>47</sup> *ibid* [158].

2021.<sup>48</sup> SCI unanimously struck down the SEBC 2018 Act for it being ultra vires to COI.

On the first and second issue of inadequacy of representation in public employment and socio-educational backwardness of Marathas, Ashok Bhushan, J., the author of the majority judgement undertook scrutiny of the provisions of the SEBC 2018 act and Gaikwad commission's report.<sup>49</sup> The Gaikwad commission report erroneously interpreted the public employment and education data to recommend Marathas as socially and educationally backward classes, it was held.<sup>50</sup>

Furthermore, the commission wrongly interpreted art 16(4) 'adequate representation' as 'proportionate representation.'<sup>51</sup> In SCI's calculation, the percentage of Marathas' share in public employment, the correct method was to ascertain community's share out of the total open category posts as against commission's approach of including SC/ST/OBC group quota while quantifying representation percentage.<sup>52</sup> Meaning, the commission ignored the relative character of available seats, where Marathas are only eligible to compete within the unreserved category, which in Maharashtra is 48%.<sup>53</sup> The bench found that if the commission's data is correctly analysed then Marathas' representation in various grades of public employment is:

Grade A- 33.23%, Grade B- 29.03%, Grade C- 37.06%, Grade D- 36.53%. Furthermore, in prestigious central civil services, Marathas have a share of 15.25% in Indian Administrative services; 27.95% in Indian Police Services; 17.97% in Indian Foreign Services; and state

---

<sup>48</sup> 2021 SCC OnLine SC 362.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid* [295].

<sup>51</sup> *ibid* [281]-[309].

<sup>52</sup> *ibid* [295].

<sup>53</sup> *ibid* [295]-[296].

civil services or *Mantralaya* cadres: Grade A - 37.5% Grade B-52.33%  
Grade C-52.1% Grade D- 55.55% posts.<sup>54</sup>

Thus, in SCI's ruling 'one community bagging such number of posts in public services is a matter of pride for the community and its representation in no manner can be said to not adequate in public services' and erroneous consideration of data was the basis of commission's untenable recommendation.<sup>55</sup>

Court further undertakes an in-depth analysis of over six backward classes commissions' reports, to point out that the status of Marathas has been historically considered as 'forward Hindu caste' or upper-castes, by various commissions over 60 years.<sup>56</sup> Maratha students have succeeded in educational institutions competing in open category seats.<sup>57</sup> Social, educational, political dominance of Marathas in Maharashtra could be ascertained through commission's data and formed the central basis to reject Marathas' backwardness claims.<sup>58</sup> Court's obiter 'that when more people aspire for backwardness instead of forwardness'<sup>59</sup> the constitutional objectives of equality is vitiated, strikes at the very core of the present discussion.

#### ***2.2.1.2 Patel-Patidar as Unreserved Economically Weaker Section in Gujarat***

This section analyses *Dayaram Khemkaran Verma v State of Gujarat*<sup>60</sup> which ruled the Gujarat Ordinance No. 1 of 2016 providing reservation to 'unreserved category' Economically Weaker Sections as unconstitutional.

---

<sup>54</sup> ibid [205]-[307].

<sup>55</sup> ibid [297].

<sup>56</sup> ibid [310]-[332].

<sup>57</sup> ibid.

<sup>58</sup> ibid [320].

<sup>59</sup> ibid [332].

<sup>60</sup> n 85.

At the outset government refused to accept 10% quotas as reservations and rather construed them as reasonable classification.<sup>61</sup> The central premise of the argument relies on deploying the permissible reasonable classification, as the tool, to differentiate system of quotas in favour of EWS category from reservations, where the former does not limit state power in terms of reasonably classifying a class of citizens compared to reservations which can only be based on social and educational backwardness.<sup>62</sup>

GHC rejected this absence of legal ingenuity and lack of understanding of settled law to rule that economically weaker sections among unreserved category cannot constitute a homogeneous group essential for the benefits of reservation.<sup>63</sup> The definition of homogenous group as provided in *E.V. Chinnaiah v State of A.P.*<sup>64</sup> indicates ‘the expression “class” means a homogeneous section of the people grouped together because of certain likenesses or common traits...status, rank, occupation, residence in a locality, race, religion and the like.’<sup>65</sup>

This classification was held to violate *twin test* scrutiny as it constitutes groups based on economic criteria which are not homogenous but fluctuating in character, making it untenable for reservation.<sup>66</sup> Furthermore, in absence of an amendment recognising economic criteria as the basis of reservation, in the teeth of the binding

---

<sup>61</sup> ibid [7.4], [8].

<sup>62</sup> ibid [28.2].

<sup>63</sup> ibid [22], [29.3].

<sup>64</sup> (2005) 1 SCC 394 cites *Tirloki Nath v State of Jammu & Kashmir* (1969) 1 SCR 103.

<sup>65</sup> ibid [99].

<sup>66</sup> *Dayaram Khemkaran Verma* (n 85) [29.3].

precedent of the court in *Indra Sawhney*, group classification solely on economic backwardness could not be upheld.<sup>67</sup>

The state relied on the ratios of SCI's *Union of India v National Federation of Blind*,<sup>68</sup> *National Legal Services Authority v Union of India*,<sup>69</sup> and *Rajeev Kumar Gupta v Union of India*<sup>70</sup> to justify reservation—based on the permissibility of other forms of classifications in form of reservations outside the scope of arts 16(4) and 15(4). It was argued that affirmative action can be devised under Art. 16(1) exclusively.<sup>71</sup>

GHC's ruling on this issue stems from the differentiation between vertical and horizontal reservation. Art 16(1) provides for Horizontal reservation whereas the attempt by the Gujarat govt. is to provide vertical reservation.<sup>72</sup> In *Indra Sawhney*, SCI held that the backwardness determination under Art. 16(4) cannot be done solely based on economic criteria, in turn prohibiting a homogenous class based on income backwardness.<sup>73</sup>

Vertical or so-called social reservation under Art. 16(4) have to be contrasted with horizontal reservations under art 16(1), the former extends quotas for SC/ST/OBCs and the latter benefits women and disabled persons cross-cutting vertical reservations.<sup>74</sup> In *Rajesh Kumar Daria v Rajasthan Public Service Commission and Ors.*<sup>75</sup> SCI clarified the legal position that *Indra Sawhney* does not apply to preferential

---

<sup>67</sup> *ibid* [29.4].

<sup>68</sup> (2013) 10 SCC 772.

<sup>69</sup> (2014) 5 SCC 438.

<sup>70</sup> 2016 SCC OnLine SC 651.

<sup>71</sup> *Dayaram Khemkaran Verma* (n 85) [21].

<sup>72</sup> *ibid* [19.10] [29.17].

<sup>73</sup> *ibid* [29.23] [29.24]

<sup>74</sup> *ibid* [19.10] [29.17].

<sup>75</sup> (2007) 8 SCC 785.

treatment under Art.16(1), which enables the state to provide horizontal preferential treatment but not only based on grounds of ‘religion, race, caste’ etc., provided the make-up is horizontal.<sup>76</sup>

Therefore, HC’s ruling on the non-applicability of such judgements to the present case is correct, as the ordinance provides reservations to an unreserved category based on income backwardness.<sup>77</sup> EWS is not a homogenous group for reservation, as per the express prohibition on group identification solely on economic criteria in *Indra Sawhney*.

As an eccentric attempt to voice the economic concerns of upper-castes, the legislative intervention failed the constitutional test due to the absence of relevant constitutional provisions regarding economic backwardness. Interestingly, the exclusionary design of the 2016 ordinance was not challenged.

### ***2.2.1.3 Backwardness determination of Jats in Central List of OBC list and Haryana***

As seen in the previous chapter, the legislative history catering to the demands of the Jat community for inclusion in OBC class is a muddled one. Unlike limited state interventions in the case of Maharashtra and Gujarat, the demands of Jats have seen positive executive intervention also from UOI.

In *Ram Singh*, SCI undertook a critical analysis of backwardness determination of Jats. The discussion on the history of the inclusion of Jats in the central OBC list indicates repeated rejections by NCBC of the claims for inclusion in the OBC list.<sup>78</sup> In its reports of 1997, 2010, and 2014, NCBC categorically rejected the demands of Jats

---

<sup>76</sup> *ibid* [7]-[9].

<sup>77</sup> *Dayaram Khemkaran Verma* (n 85) [28.9].

<sup>78</sup> (2015) 4 SCC 697, 706-708.

for inclusion as OBCs in all states except for Rajasthan.<sup>79</sup> The 2014 notification to include Jats of nine states as OBCs was despite NCBC'S recommendation to the contrary as Jats couldn't fulfil the backwardness criteria to be eligible for backwardness classification,<sup>80</sup> as agricultural communities do not automatically qualify as backward classes.<sup>81</sup>

Only one question of law was addressed by SCI—whether NCBC's recommendation is binding on the central government.<sup>82</sup> A summary analysis of the key findings of the NCBC report and ICSSR, an organisation entrusted with the task to review relevant literature and material, indicated a commonality across states of Jats as a landowning community primarily engaged in agriculture.<sup>83</sup> They are well represented in public employment, but not in various educational levels.<sup>84</sup>

NCBC undertook a review of state commission reports of all the nine States, and in the context of Haryana, SBCC relied on public health statistics to denote social backwardness, whereas social backwardness has to be identified based on a range of empirical parameters.<sup>85</sup> NCBC further rejected SBCC's observation that despite the politically influential position and large-scale landownership the community remains socio-economically and educationally backward.<sup>86</sup>

---

79        *ibid.*

80        *ibid* 709.

81        *ibid.*

82        *ibid* 713.

83        *ibid* 713-720.

84        *Ram Singh* (n 96) 720.

85        *ibid* 719-720.

86        *ibid.*

SCI upheld the decision of NCBC as the report undertook a detailed analysis of all the relevant material and the conclusion was supported by sound reasoning.<sup>87</sup> Thus, a mere difference of opinion between NCBC and the central government was not a valid ground for refusing a binding recommendation and only ‘an impossible or perverse view would justify the exclusion of the advice.’<sup>88</sup> Albeit, Art.16(4) exclusively gives power to the state to provide reservations by classifying backward classes, the same cannot be exercised through bypassing the binding statutory provisions.<sup>89</sup> The 2014 notification omits, therefore, considering social backwardness as the central test for group demarcation, and instead erroneously relies on health data and educational backwardness.<sup>90</sup>

The obiter of the bench on the need to move away from historical prejudice and discrimination-centric affirmative action to a more contemporary one requires critical assessment.<sup>91</sup> The court observed that due to the history of caste discrimination the identification of a social backward class has been predominantly based on low-caste status.<sup>92</sup> The conception of social groups, however, must be evolving to facilitate the inclusion of the ‘most deserving’ persons as beneficiaries of affirmative action.<sup>93</sup> The obiter dictates the institutional discomfort with existing reservations that ‘enable groups of citizens to recover “lost ground” in claiming preference and benefits based on historical prejudice.’<sup>94</sup> It demands the development and recognition of new

---

<sup>87</sup> *ibid* 725-726.

<sup>88</sup> *ibid* 726-728.

<sup>89</sup> *ibid* 728.

<sup>90</sup> *ibid*.

<sup>91</sup> *ibid* 730.

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid* 728.

<sup>94</sup> *ibid*.

disadvantaged groups by deploying new group demarcation methods by a complete replacement of historical discrimination based reservations.<sup>95</sup>

The assertion of the court that ‘an affirmative action policy that keeps in mind only historical injustice would certainly result in under the protection of the most deserving backward class of citizens’<sup>96</sup> challenges core foundations of the reservations. Especially, the outright call for the concentration of constitutional mandate towards the identification of new emerging groups by severing reliance with historical discrimination being an unfounded claim.<sup>97</sup>

SCI’s observation of discovering new emerging groups and forms of backwardness, without providing any assistance on the modes to identify such groups is an unsuitable exercise for a constitutional court to undertake. The firm opposition of ‘caste’ based reservation policy in Indian civil society stems to rely on a similar logic—where it calls for dispensation of the existing form of reservation based on historical discrimination under the guise of providing the benefits to the most deserving sections.<sup>98</sup>

The obiter vehemently and yet in a concealed way critiques the existing form of reservations not benefiting the most deserving backward classes. The court fails to indicate whether SC/ST/OBCs are not the most deserving backward classes, or that the most deserving within SC/ST/OBCs are excluded from the benefits of reservations.<sup>99</sup> This obiter, I submit, damages the legitimate claims of SC/ST/OBCs who still face

---

<sup>95</sup>       ibid 729.

<sup>96</sup>       ibid 729.

<sup>97</sup>       ibid.

<sup>98</sup>       ibid.

<sup>99</sup>       ibid 720 [54].

discrimination based on their low-caste status, without providing clarity as to which of the existing backward classes are undeserving or less deserving. Furthermore, it fails to discuss emerging forms of backwardness within SC/ST/OBCs, which can be attributed to their deteriorating social, political, and economic positions.<sup>100</sup>

Though I agree with the ratio of the court where it rejects the inclusion of Jats as such reasoning comes at its own cost. Court's obiter is generalised and makes adverse observations on the existing forms of reservation based on social backwardness without an empirically or doctrinally founded claim. It assumes that the existing system excludes the most deserving, without explaining how it does so, and without proposing identification criteria for backwardness recognition of new emerging classes without undermining the old. No doubt, as a constitutional court SCI has a paramount duty to critically examine the existing forms of reservation, however, such assessment must be based on empirical data and sound logic that does not delegitimise claims and lived experiences of SC/ST/OBCs.

These developments, however, did not hinder attempts of the state of Haryana in using the state legislative and executive apparatus to keep extending reservation to Jats, where in 2016 HBC Act was enacted providing reservations to Jats.

Constitutionality of Schedule-III of HBC Act 2016, was challenged in *Murari Lal Gupta*. The PHHC observed that the exercise for backwardness recognition was not undertaken by the state while identifying Jats as a backward class and was rather based on Justice K.C. Gupta commission's report whose recommendations were not accepted by the SCI in *Ram Singh*.<sup>101</sup> Thus, despite the Haryana State enacting the HBCC Act,

---

<sup>100</sup> *ibid.*

<sup>101</sup> *Murari Lal Gupta* (n 99) [25].

2016 that re-established the SBCC for examining representation for inclusion by various groups, such exercise was not undertaken.<sup>102</sup> Hence, backwardness recognition of Jats was not founded on quantifiable data.<sup>103</sup>

Despite these observations, the court refused to rule the 2016 Act as unconstitutional, as the state's obligation to collect quantifiable data per *M. Nagaraj v Union of India*<sup>104</sup> to satisfy ceiling limit of 50%, creamy layer, and compelling reasons could be undertaken even after demarcating a community as a backward class.<sup>105</sup> The reasoning of the PHHC relies on *S.V. Joshi v State of Karnataka*<sup>106</sup> where the SCI directed Tamil Nadu to provide the quantifiable data to SBCC, as such an exercise was not undertaken by the state.<sup>107</sup>

PHHC, I submit, erroneously considered the ratio of *S.V. Joshi*, as it ignores that SCI in *S.V. Joshi* withheld its judgement on the issue of the constitutionality of the 1993 Act.<sup>108</sup> Tamil Nadu was directed to undertake the exercise of assessment of quantifiable data during the pendency of the interim stay on the 1993 Act.<sup>109</sup>

PHHC in *Murari Lal Gupta* on the contrary upheld the 2016 Act<sup>110</sup> and further directed the HBCC to carry out the exercise of collecting and assessing quantifiable data.<sup>111</sup> Then the court went on to stay the operation of the 2016 Act until such exercise

---

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid* [25]-[27].

<sup>104</sup> AIR 2007 SC 71.

<sup>105</sup> *ibid* [47]-[50].

<sup>106</sup> (2012) 7 SCC 41.

<sup>107</sup> *ibid* [4].

<sup>108</sup> *ibid* [7].

<sup>109</sup> *Murari Lal Gupta* (n 99) [49].

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

was completed. According to PHHC's logic, its decision on the constitutionality of the 2016 Act is against the ratio of the 5-Judge Bench in *M. Nagaraj* where backwardness determination exercise must be done 'before making provision for reservation.'<sup>112</sup> Therefore, HC could not have upheld the 2016 Act as constitutionally valid, stayed the legislation and directed HBCC to undertake the exercise of collecting quantifiable data.

## **2.2.2 Extent of quota and extra-ordinary circumstances**

This section unveils the conflicting jurisprudence of HCs with regards to the central question of the extent of quotas. In *Indra Sawhney* and *Dr Jaishri Laxmanrao Patil 2021*, it was held that quota limit has to be reasonable to achieve the objective of equality guarantee.<sup>113</sup> Restricting it to 50% is a reasonable balancing act between reservations and the principle of equality.<sup>114</sup> The breach of this 'strict rule' is only permissible in *extra-ordinary circumstances*, and therefore the extent of quota and extra-ordinary circumstances are interrelated issues.

### **2.2.2.1 Maharashtra**

Judicial treatment of reservation ceiling changes with different judgements and courts, and this section critically assess BHC's and SCI's jurisprudence on the issue. The interim order, one that stayed the functioning of the 2014 legislation, makes a distinction between the ceiling of 50% under arts 15(4) and 16(4). For the former, the court ruled that the settled position of law imposes a strict binding 50% ceiling on reservations, which can only be surpassed 'in extraordinary situations and for

---

<sup>112</sup> *M Nagaraj* (n 104) 278.

<sup>113</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48).

<sup>114</sup> *ibid.*

extraordinary reasons' subject to judicial review.<sup>115</sup> For the reservations under art 16(4), the court held that despite the compelling reasons in form of 'backwardness of the concerned class and inadequacy of representation' etc. the state cannot breach the ceiling.<sup>116</sup> BHC thus kept the 50% ceiling rule fluid for reservations in educational institutions and cemented it for public employment.

A thorough analysis of the order indicates dubious logic and a confused understanding of SCI's jurisprudence. The first problem in cementing reservation ceiling pertains to BHC's reliance on art 16(4B), where the 50% ceiling was introduced in the carry-forward rule of quotas expressly.<sup>117</sup> The court relies on the ratios of *M. Nagaraj* and *Rohtas Bhankhar v Union of India*<sup>118</sup> to rule impermissibility in exceeding 50% ceiling<sup>119</sup> This is despite the court previously ruling that the scope of the case only relates to art 16(4).<sup>120</sup> BHC tries to undertake a mutually conflicting exercise where it rightly mentions the scope of the case to be only concerned with 16(4) and not art 16(4A) and then erroneously relies on *M. Nagaraj* and *Rohtas Bhankhar*, where art 16(4A) was in consideration, to rule ceiling differentiation.

Another error in the reasoning of the court is to ignore the ratio of *Indra Sawhney* on the issue of 50% ceiling. *Indra Sawhney* did not differentiate between 15(4) and 16(4) while ruling that under extraordinary circumstances the quota ceiling can be breached.<sup>121</sup> Interestingly, the BHC cites *Indra Sawhney*, where article 16(4) was in

---

<sup>115</sup> *Sanjeet Shukla* (n 39) [32].

<sup>116</sup> *ibid* [33].

<sup>117</sup> *Sanjeet Shukla* (n 39) [20].

<sup>118</sup> (2014) 8 SCC 872.

<sup>119</sup> *Sanjeet Shukla* (n 39) [33].

<sup>120</sup> *ibid* [11].

<sup>121</sup> *Indra Sawhney* (n 20) [757], [808].

consideration and notes the majority ruled that the 50% ceiling is binding and could only be breached in certain exceptional circumstances.<sup>122</sup> Yet, the court erroneously, I submit, relies on smaller constitutional bench judgements of *M. Nagaraj* and *Rohtas Bhandkar* to instil the differentiated treatment of 50% ceiling ignoring that the ratio in *Indra Sawhney* concerning art 15(4) is also binding on art 16(4).<sup>123</sup>

BHC's interim order, on the issue of extraordinary circumstances, undertakes *prima facie* examination of whether an extraordinary situation warrants breach of reservation limit.<sup>124</sup> The court ruled that the state has not discharged the burden of proof to satisfy the condition of the extraordinary circumstances as Marathas were advantaged groups lacking experience of historical social discrimination.<sup>125</sup> The material on record, on the contrary, points at the social and political dominance of the Maratha community with no experiences of social discrimination.<sup>126</sup>

In the final judgement, BHC undertook an extensive analysis of SCI jurisprudence on the issue and based on it ruled that the state is under the duty to justify any excesses in reservation policy, as 50% ceiling is a binding rule but can be breached in extra-ordinary circumstances without fixing 'maximum percentage of reservation'.<sup>127</sup> This is, however, only a partially correct view, as the court misconstrued the scope of quantifiable data and inadequacy of representation—as factors that allow a state to exceed the 50% ceiling limit and constitute extra-ordinary

---

<sup>122</sup> *ibid* [23]-[24].

<sup>123</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48) 395.

<sup>124</sup> *Sanjeet Shukla* (n 39) [59].

<sup>125</sup> *ibid* [66].

<sup>126</sup> *ibid* [60] [62] [66]

<sup>127</sup> *Dr. Jaishri Laxmanrao Patil BHC* (n 78) [257].

circumstances per *Indra Sawhney*.<sup>128</sup> The erroneous historical exclusion of Marathas from the list of backward class was in itself an extraordinary situation, according to BHC, given it ‘contributes as one of the extra-ordinary circumstances.’<sup>129</sup>

This position was critiqued in SCI’s interim order, where the above judgement was challenged.<sup>130</sup> While the SCI upheld the 50% reservation ceiling, relaxation of the strict rule of 50% was held to be permissible only in extraordinary circumstances.<sup>131</sup> It held that Maharashtra has not shown the existence of an extraordinary situation for providing reservations to Marathas in breach of the 50% ceiling.<sup>132</sup> Furthermore, since Marathas comprise 30% of Maharashtra’s population, are a dominant group, cannot be compared to the illustrations of disadvantage in *Indra Sawhney* based on social exclusion.<sup>133</sup> SCI further held that essential factors for extending reservations in COI cannot be considered extraordinary circumstances and hence BHC erred in its ruling.<sup>134</sup> SCI’s analysis provides clarity on the reasoning of BHC, which has been problematic especially on the central issue of backwardness recognition, as argued above.

This position remained unchanged in the final judgement of the SCI.<sup>135</sup> The issue of breaching the strict rule of 50% ceiling of reservation was unanimously decided to be unconstitutional, as Gaikwad commission failed to build a case for extraordinary circumstances of Marathas.<sup>136</sup> *Indra Sawhney* had laid out the dual tests for the 50%

---

<sup>128</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48) 395.

<sup>129</sup> *Dr. Jaishri Laxmanrao Patil* (n 78) [270].

<sup>130</sup> *Jaishri Laxmanrao Patil v Chief Minister 2020 SCC OnLine SC 727* (SCI).

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid* [16].

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid* [17].

<sup>135</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48) [249].

<sup>136</sup> *ibid.*

quota ceiling—of geographical exclusion and social exclusion of population from ‘main stream of national life’ as an exception to the strict ceiling rule.<sup>137</sup> Based on the overall dominant status as upper-castes in Maharashtra, Marathas were considered ineligible for the same.<sup>138</sup>

Gaikwad commission and Maharashtra legislature identified an extraordinary situation as 85% of the total population of the state being backward after including 30% Maratha population.<sup>139</sup> SCI ratio rejects the argument by identifying dual test as the sole method to breach 50% reservation and thus, the said act was ruled to violate equality clauses of art 14 and 16 and unconstitutional.<sup>140</sup>

#### **2.2.2.2 Gujarat**

The Gujarat HC relying on *Indra Sawhney* held that the arguments of the government regarding the existence of extraordinary circumstances to breach the 50% quota ceiling exists in favour of the Patel-Patidars community were untenable.<sup>141</sup> According to the court, the exceptions to the strict rule of 50% ceiling were illustrated in *Indra Sawhney* to include only certain extraordinary situations, and no extraordinary circumstances were in favour of the unreserved EWS to be extended with the reservation benefits.<sup>142</sup>

#### **2.2.2.3 Haryana**

As analysed in section 2.1.3 the question of the extent of quota and extraordinary circumstances was in consideration only in the case of *Murari Lal Gupta*. Like the

---

<sup>137</sup> ibid [237]-[239].

<sup>138</sup> ibid [242].

<sup>139</sup> ibid [245].

<sup>140</sup> ibid [249-261].

<sup>141</sup> *Dayaram Khemkaran Verma* (n 85).

<sup>142</sup> ibid [29.9]-[29.10]

BHC, PPHC also committed an error in understanding the issue of the exceptional circumstances, where it misconstrued quantifiable data as the permissible factor for breaching the 50% ceiling.<sup>143</sup> As held in *Dr Jaishri Laxmanrao Patil 2021* that it is a clear misreading of *M. Nagaraj* to construe that for a state to breach the reservations ceiling, the decision must be based on quantifiable data.<sup>144</sup>

The critique of *Murari Lal Gupta* in section 2.1.3 also applies to the issue of the extent of reservation. 50% rule can be breached in presence of exceptional circumstances—the twin test in *Indra Sawhney* as clarified in *Dr Jaishri Laxmanrao Patil 2021* is the actual basis, and not the collection of quantifiable data, to permit such an exception.

### **2.2.3 Reasonable Classification**

Reasonable classification test under art 14 permits classification of individuals and groups if such classification is based on intelligible differentia and such differentia has a rational nexus to the object the legislation aims to achieve, without violating the equality clause.<sup>145</sup>

#### **2.2.3.1 Marathas, Reasonable classification and SEBC**

The BHC in *Dr. Jaishri Laxmanrao Patil*, after analysis of SCI's jurisprudence, held that during a challenge to the validity of legislation that makes classification under art 14, a reasonable classification test must be satisfied.<sup>146</sup>

---

<sup>143</sup> *Murari Lal* (n 99).

<sup>144</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48) [151].

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid* [179].

Since the court ruled in affirmation on the question of backwardness of Marathas, the classification of Marathas as socially and educationally backward was found to be reasonable. There was rational nexus between the classification and the object of legislation—to provide just access to Marathas to public employment and educational institutions.<sup>147</sup> Furthermore, there existed intelligible differentia between the open category and Marathas, as the latter were founded to be backward and disadvantaged groups.<sup>148</sup> Thus the BHC ruled that the object of reservation was to enable them to attain social justice concomitantly failing to highlight the existence of any instances of social injustice faced by Marathas.<sup>149</sup>

In *Dr. Jaishri Laxmanrao Patil 2021*, as seen in section 2.1.1., SCI rejected the argument of existence of any backwardness in *Marathas* and hence overruled the above decision as classification did not satisfy reasonable classification test.<sup>150</sup> Interestingly, the court analysed the issue of reasonable classification in the context of the 50% ceiling, where it ruled that considering reservations are not an exception to the general equality principle but are its facet, the cap on the extent of reservation has to be construed accordingly.<sup>151</sup>

### **2.2.3.2 10% quota in Gujarat: reservation or reasonable classification?**

Gujarat government in *Dayaram Khemkaran Verma*, as seen in section 2.1.2, unsuccessfully argued that the said ordinance is only a classification under Art.14 and not *stricto sensu* reservation as understood in sub-clause (4) of Arts. 15 and 16.

---

<sup>147</sup> *ibid* [202].

<sup>148</sup> *ibid* [208].

<sup>149</sup> *ibid* [208], [269], [301].

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid* [157]-[166].

The GHC rejected the above argument based on an unambiguous legislative intent to extend reservations as per the ordinance and the committee report.<sup>152</sup> The said finding of the Court plays into the flawed argument of the State, as it fails to consider the understanding of classifications and reservations as understood in the constitutional schema. A better way for the GHC to approach the question, I submit, would have been to engage more deeply on how the twin test under Art. 14 is essential to identify if the classification of a group as a beneficiary of reservation policy stands the test of constitutionality. On the contrary, the HC only engages in a one-line analysis ruling that the government only has powers to identify and provide reservations under Art. 15(4) and Art. 16(4) for SEBCs.<sup>153</sup>

## Conclusion

Analysis of the primary material indicates judicial treatment of the themes of backwardness determination and extent of quotas in reservation policy remains problematic across HCs. The following table summarises the complex judicial discourse:

**Table 3**

Issues	States	HCs		SCI	
		Interim stage	Final Stage	Interim stage	Final Stage
1	Maharashtra	Considered Marathas as a forward Hindu	Approved as a state's Hindu characterisation	No finding	Recognised Marathas as a forward Hindu

<sup>152</sup> *Dayaram Khemkaran Verma* (n 85) [28.2].

<sup>153</sup> *ibid* [29.3].

		caste. ( <i>Sanjeet Shukla</i> )	of Marathas as SEBC. ( <i>Jaishri Patil</i> )		community and critiques HC and state government's assessment of data. ( <i>Jaishri Patil 2021</i> )
	Gujarat	N.A.	Ruled that state does not have the power to categorise economically weaker sections among the unreserved category	pending	pending
	Haryana	Stayed the 2013 ordinance in <i>Ved Prakash</i> .	<i>Murari Lal Gupta</i> erroneously upheld the HBC Act 2016; wrongly directed the	N.A.	1. In <i>Ram Singh</i> SCI held central OBC list inclusion as unconstitutional based on NCBCs

			state to collect quantifiable after backwardness determination.		repeated findings of Jats not as SEBCs. 2. Challenge to <i>Murari Lal Gupta</i> is pending.
2	Maharashtra	<i>Sanjeet Shukla</i>	In <i>Jaishri Patil</i> misconstrued the scope of quantifiable data and inadequacy of representation as extra-ordinary circumstances per <i>Indra Sawhney</i> .	Ruled that Maharashtra has failed in showing the existence of extraordinary circumstances. Critiqued the treatment of quantifiable data as extraordinary circumstances erroneous.	Upheld interim order analysis.

	Gujarat	N.A.	Held, Gujarat failed to prove exceptional circumstances, therefore a breach of 50% quota ceiling was unconstitutional	Pending	Pending
	Haryana	N.A.	<i>Murari Lal Gupta</i> erroneously construed the scope of quantifiable data as exceptional circumstances like <i>Jaishri Patil</i> .	Pending	Pending
3	Maharashtra	N.A.	Court erroneously found the 2018 act to satisfy	N.A.	SCI overruled the HC decision as classification did not satisfy

			reasonable classification test		the twin test of reasonableness.
	Gujarat	N.A.	GHC ruled the 2016 ordinance as unconstitutional as it fails the reasonable classification test	Pending	Pending
	Haryana	N.A.	N.A.	N.A.	N.A.

The table indicates that all HCs cases which have had an SCI decision have led to a finding of unconstitutionality. Interestingly, among HCs only GHC has held the act unconstitutional, where BHC and PHHC had held state measures to be constitutional only to be overruled by SCI. It has the effect of delegitimising the underlying basis for providing reservations—to redress historical injustices based on status disadvantages.

## **CHAPTER 3 THE POST-2019 REGIME, STATE INTERVENTIONS, AND DISCRIMINATION LAW THEORY**

### **Introduction**

The preceding inductive analysis of the legal materials throws up several theoretical questions and premises. First, what are the aims, roles, and characteristics of substantive equality and affirmative action and how are protected grounds and group beneficiaries demarcated? What is the extent of quota limit and how are socio-economic and pure-economic disadvantages treated in discrimination law? What is meant by class sociologically? These common questions arise from legislative make-up and judicial treatment of 2019-regime and state measures because of extending affirmative action benefits to advantage groups.

These questions also resonate with some core doctrinally challenging and contested issues in discrimination law and equality law theory. To address the research questions 3-6 and problems concretely arising from preceding debates this chapter critically evaluates how theory best explains Indian affirmative action and substantive equality both in pre-2019 and post-2019 regimes by mapping Indian interventions onto the general theory.

To do so this chapter adopts a taxonomy where each of the above-identified central questions will be analysed and critiqued in dedicated five sub-sections. Section 3.1 explores the implications of Indian interventions on the aims and scope of substantive equality principle and affirmative action measures as they seem to transgress from the conditions of group disadvantage and historical injustices.

Section 3.2 explores how beneficiaries of discrimination law are demarcated, what qualifies a ground as a protected ground and its relation to protected characteristics, to discern if Indian interventions are based on sound theoretical logic and in return critique them. Both these sections will help in making the central argument of the thesis, namely that the Indian developments are not affirmative action measures rooted in substantive equality and rather aggregate to collateral discrimination. They violate the principle of substantive equality and are against the core aims and role of affirmative action policy as understood in discrimination law theory, and hence illegitimate.

Section 3.3 explores the debate on tensions between the extent of quotas and the equality principle and supports the limitation of quotas to a minority of seats strikes a crucial balance between these principles. To ignore such ‘non-immersive rule’ gives rise to possibilities of eroding the main principle of equality of opportunity.

Section 3.4 highlights the possibilities of capturing purely economic disadvantage in discrimination law, which is central to the reservation demands of upper-caste groups. It summarises a multidimensional understanding of poverty in Indian and general discrimination law theory and how post-2019 regime and state measures fall short of exploiting the potential of this progressive approach.

Lastly, sociological understanding of class, in section 3.5, supplements the above discussion to argue that class must not be classified merely as ‘income-groupings.’ Land-assets ownership criteria for class identification must preferentially target landless poor, instead of deploying a high-property ownership threshold.

The key contribution of this chapter to the overall thesis is that it answers key research questions and helps improve understanding of Indian substantive equality and affirmative action, where status disadvantage resists collapsing in socio-economic disadvantage. Furthermore, new reservations are examples of pure-collectivities primarily designed to address redistributive injustices and general welfare schemes are better suited for addressing them. Harmonising socio-economic disadvantage within the discrimination law framework demands adding recognition dimension to poverty discrimination. Indian discrimination law recognises the intersectional nature of poverty discrimination, which the legislative policy ignores and, is guided by, on the contrary, establishes protected groups without corresponding protected ground, leading to norm indeterminacy.

### **3.1 Aims, role and characteristics of substantive equality and affirmative action**

To describe different approaches to anti-discrimination law, theorists, and to lesser extent courts, have developed the notions of formal and substantive equality. Formal equality or equal treatment or equality as consistency, in the Aristotelian sense, requires ‘treating likes alike.’<sup>1</sup> Based on the foundation of consistent treatment of individuals, as long as individuals have a status of equality before the law and everyone is treated according to their merits the goal of achieving equality is considered to be achieved.<sup>2</sup>

The focus of the analysis in this section is on the characteristics of multidimensional understanding of substantive equality rather than its formal conception or singular justifications of substantive equality. This is because of a clear

---

<sup>1</sup> Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) ch 1, 8.

<sup>2</sup> *ibid* 8-14.

consensus in the interpretation of the equality scheme in COI as substantive equality, in a multi-dimensional way. It is based on the constitutional history and SCI's interpretation of the principle that recognised that mere formal equality of opportunity under art 16(1) won't suitably address the exclusion of disadvantaged classes in Indian society.<sup>3</sup> Therefore, reservation policy rooted in substantive equality was conceptualised to balance formal equality and social exclusion.<sup>4</sup>

This part thus does not undertake a thorough analysis of the development of the concept of substantive equality as a literature review of these different accounts would be beyond the scope of the thesis. Such an exercise has already been undertaken by others.<sup>5</sup> It rather focuses on the implications of the 2019-Amendment and state measures on substantive equality and affirmative action.

A critical analysis of the aims, characteristics, and role played by the principle and measures will help theorise the key implication of removing affirmative action measures from the domain of discrimination law and placing it in the realm of universal welfare measures addressing only distributive injustices. It will assist in making an argument that 2019-Amendment and state measures are not affirmative action measures nor do they advance achieving substantive equality.

---

<sup>3</sup> *Indra Sawhney* (n 20).

<sup>4</sup> Section 3.4.

<sup>5</sup> Sandra Fredman, 'Substantive equality revisited' (2016) 14 *IJCL* 712; Catherine Albertyn and Sandra Fredman and Judy Fudge, 'Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective' (2007) 23 *S Afr J on Hum Rts* 209; Catherine Albertyn and Sandra Fredman and Judy Fudge, 'Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective' (2007) 23 *S Afr J on Hum Rts* 209; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Mod L Rev* 16; Hugh Collins, 'Social Inclusion: A Better Approach to Equality Issues' (2005) 14 *Transnat'l L & Contemp Probs* 897; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Mod L Rev* 16; Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 *Minn L Rev* 1; Catherine Barnard and Bob Hepple, 'Substantive Equality' 59 *Cam Law J* 562.

### 3.1.1 Substantive equality doctrine in India

The conception of equality has been substantively understood in constitutional standard, post *State of Kerala v N.M. Thomas*.<sup>6</sup> The scope of Art. 15(4) and 16(4) recognises it as ‘clauses...to insure state power to pursue substantive equality vis-à-vis certain historic formations in Indian society.’<sup>7</sup> This also outlines the basis of affirmative action policy— ‘a vertical perspective for a transition from a past inequality to the desired future of substantive equality.’<sup>8</sup> Thus, ‘the purpose of compensatory discrimination is to promote equalization of offsetting historically accumulated inequalities’<sup>9</sup> where the historical subjugation due to caste discrimination has rendered *Dalits* and tribal socially, educationally, and economically disadvantaged.<sup>10</sup>

The analysis and critique of formal equality focus on the major jurisprudential shift in the understanding of affirmative action policy after *N.M. Thomas* where reservations were held to be a facet that further the aim of substantive equality.<sup>11</sup> This according to Galanter enlarges state power and detracts from the constitutional priority accorded to SC/ST/OBC and elevates the disadvantages of the forward castes at parity with disparities associated with the traditional social hierarchy.<sup>12</sup> Thus, it ‘opens Pandora’s box: compensatory classification is available—perhaps incumbent—to succor all the disadvantaged.’<sup>13</sup>

---

<sup>6</sup> (1976) 2 SCC 310.

<sup>7</sup> Galanter, *Competing Equalities* (n 17) 379.

<sup>8</sup> *ibid* 380.

<sup>9</sup> *ibid*.

<sup>10</sup> *ibid*.

<sup>11</sup> *Thomas* (n 6).

<sup>12</sup> Galanter, *Competing Equalities* (n 17) 390.

<sup>13</sup> *ibid* 393.

To problematise this, a deeper analysis of the Indian substantive equality debate as recently re-elucidated in *B.K. Pavitra v Union of India (II)*<sup>14</sup> and *Joseph Shine v Union of India*<sup>15</sup> reveals a different understanding.

Substantive equality, as held in *Joseph Shine*, targets ‘at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society.’<sup>16</sup> Therefore, through recognition of social realities the test for determining violation of substantive equality is to articulate ‘whether the provision contributes to the subordination of a disadvantaged group of individuals.’<sup>17</sup> SCI further held that the equality clause is hollow if understood without its substantive contents.<sup>18</sup> Thus, the focus is on the social impact of law considering equality substantively rather than its formal conception, and closely resembles Fredman’s multidimensional approach.<sup>19</sup> *Joseph Shine* decision expressly recognises the following dimensions—disadvantaged due to sex discrimination; stereotyping based on entrenched patriarchal positing of women and use of substantive content of equality to overhaul social structures that perpetuate discrimination.

In *B.K. Pavitra (II)*, in the context of reservation policy, SCI undertook an analysis of ‘formal vs substantive equality’ summarising the jurisprudential and the constituent assembly’s position in conceiving the equality principle.<sup>20</sup> Accepting *N.M.*

---

<sup>14</sup> (2019) 16 SCC 129.

<sup>15</sup> AIR 2018 SC 4898.

<sup>16</sup> *ibid* [124], [116], [122]-[124].

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid* [151].

<sup>19</sup> Text to n 72.

<sup>20</sup> *B.K. Pavitra (II)* (n 14) [106]-[110].

*Thomas*'s conception of substantive equality, SCI ruled reservations as 'one particular facet of the rule of substantive equality.'<sup>21</sup>

This analysis was derived from the historical overview of substantive equality as the general equality of opportunity principle in the constituent assembly debates.<sup>22</sup> Two salient points can be discerned about the equality clause in the Indian Constitution—Firstly, reservations for SC/ST and backward classes were deemed crucial to overcome well-recognised structural inequalities due to discrimination and prejudice emanating from the caste system.<sup>23</sup>

Secondly, the insufficiency of formal equality of opportunity in addressing social realities of exclusion and disadvantage based on caste structure was recognised by the COI's Drafting Committee and reservations were to address the overall exclusion of low-castes from mainstreams of the society.<sup>24</sup>

Furthermore, this express recognition of social inequalities and attempts to address it through the grammar of affirmative action is located in the idea of the Constitution as a 'transformative document.'<sup>25</sup> The evolving constitutional jurisprudence in India has exploited the transformative potential by understanding equality substantively, rather than the slender formal conception.<sup>26</sup>

Through the discussion on the landmark cases of *N.M. Thomas*, *Indra Sawhney*, and *Nagaraj*, SCI in *B.K.Pavitra II* recognised the equal opportunity to entail substantive conception that recognises 'social, economic, political, and cultural'

---

<sup>21</sup> *ibid* [107].

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid* [107].

<sup>24</sup> *ibid*.

<sup>25</sup> *ibid* [111].

<sup>26</sup> *ibid*.

disadvantages suffered by backward classes.<sup>27</sup> Substantive equality and reservation as one of its facets were never conceptualised, therefore, to address economic disadvantage claims of advantage groups in India.

SCI's jurisprudence on poverty discrimination also helps discern, in Atrey's leading account of the analysis of the court's approach, poverty within the multidimensional substantive equality framework.<sup>28</sup> SCI's approach touches upon 'redistribution, recognition, transformation and participation' concerning recognising poverty discrimination as a violation of Art. 14 equality guarantee.<sup>29</sup> A more detailed discussion of the works of Fredman and Atrey is undertaken in sections 3.1.2 and 3.4. Thus, at this juncture, it suffices to work with the understanding that substantive equality as understood in India is multidimensional.

Thus, based on a multidimensional approach, it is clear that the objective of substantive equality in India is not merely redistributive but also to address stigma, humiliation, and disadvantage arising out of status. *N.M. Thomas* is a suitable justification contrary to Galanter's insights, therefore, as it does not construe equality of opportunity in a formal sense. Rather than conceiving it substantively, the equality principle's scope recognises the social realities of marginalised sections. Furthermore, the substantive equality principle excludes groups that lack experiences of historical discrimination and only suffer socio-economic disadvantages.

The Indian substantive equality jurisprudence, as can be seen from above is progressive in terms of its emphasis on recognising the social realities of discrimination and prejudice. The express acknowledgement of social exclusion, systemic

---

<sup>27</sup> *ibid* [113]-[115].

<sup>28</sup> Atrey (n 64) 436.

<sup>29</sup> *ibid*.

inequalities, and historical disadvantage leading to stereotyping, stigma, and prejudice based on protected characteristics makes the equality of opportunity provision rounded. My analysis concurs with Atrey's account of the Indian doctrinal setting. Drawing from this analysis, the developments in form of the post-2019 regime and state interventions seem to violate the substantive conception of equality as understood in Indian equality law.

The discussion now turns to the analysis of the general theory to elaborate and fill in the COI multi-dimensional standard of substantive equality. Such an exercise will help answer key issues identified inductively and in turn critically assess the doctrinal implications of the post-2019 regime and state interventions.

### **3.1.2-Substantive Equality in the general theory**

The move away from the formal conception of equality towards a substantive approach could be conceptualised in five underlying aims and principles of substantive equality, where different authors present these as constitutive principles—equality of result,<sup>30</sup> equality of opportunity,<sup>31</sup> dignity,<sup>32</sup> social exclusion,<sup>33</sup> and social hierarchy.<sup>34</sup> Further, the multidimensional approach identifies recognition, redistribution, participation, and transformation, as the core aims of substantive equality.<sup>35</sup>

---

<sup>30</sup> Fredman, *Discrimination Law* (n 1) 2.

<sup>31</sup> Fredman, 'Substantive equality revisited' (n 5) 723-724.

<sup>32</sup> *ibid* 724-727. *President of the Republic of South Africa v Hugo* [1997] Z.A.C.C.4; *Law v Canada* [1999] 1 S.C.R. 497; *Gosselin v Quebec* 2002 SCC 84 in *Fredman* (n 1) 725.

<sup>33</sup> Collins (n 5).

<sup>34</sup> MacKinnon (n 5); Barnard and Hepple (n 5).

<sup>35</sup> Text to n 52.

The substantive nature of the understanding of equality of opportunity in COI is explained in 3.1.1.<sup>36</sup> Equality of opportunity, in theory, has been an important justification for achieving substantive equality. The underlying aim is to facilitate access to opportunities to status groups either through removing obstacles or by taking positive measures, substantively, in form of education, training, etc., to enable genuine possibilities of accessing social good deepens understanding of the principle as understood in COI.<sup>37</sup> Upper-caste groups don't lack access to such opportunities due to historical injustices, correspondingly the question of facilitating their access does not arise.

Indian courts have identified social hierarchy as a key 'identifying principle' of historical disadvantages.<sup>38</sup> The historical injustices that status groups suffer predominantly arise from caste discrimination. Caste itself is a form of social stratification that is rooted in the idea of graded inequality in a hierarchical sense.<sup>39</sup> Social hierarchy, in theory, aims to find the core inequality problem through the lens of how power operates in society.<sup>40</sup> Any ground becomes a prohibited ground of discrimination based on the assessment of unequal treatment of groups in hierarchical or 'caste-like arrangements.'<sup>41</sup> Furthermore, in MacKinnon's conception, disadvantages and inequality are rooted in comparative hierarchy, the task is to ascertain if 'a disparity is the impact or effect of a pre-existing substantive hierarchy.'<sup>42</sup>

---

<sup>36</sup> art 16 COI.

<sup>37</sup> Fredman, 'Substantive equality revisited' (n 5) 723.

<sup>38</sup> *Indra Sawhney* (n 20).

<sup>39</sup> Dr. B.R. Ambedkar, 'The Hindu Social Order: Its Essential Principles' <[https://www.mea.gov.in/Images/attach/amb/Volume\\_03.pdf](https://www.mea.gov.in/Images/attach/amb/Volume_03.pdf)> accessed 4 April 2021.

<sup>40</sup> MacKinnon (n 5).

<sup>41</sup> MacKinnon (n 5) 11. Catherine MacKinnon, 'Substantive equality revisited: A reply to Sandra Fredman' 14 *IJCL* 739 745.

<sup>42</sup> *ibid* 742.

This analysis, however, is prone to supporting the claims of upper-castes in India, as the notion of graded inequality<sup>43</sup> and the characteristics of the caste system makes every caste below *Brahmins* relatively disadvantaged, a major limitation of this principle in understanding the Indian substantive equality principle.

The critique of MacKinnon's single hierarchy-based categorisation of substantive inequality is prominent from Fredman's analysis of intra-hierarchical manifestations of inequality within the vertical hierarchy.<sup>44</sup> She notes that it fails to understand the multifaceted manifestations of inequality, as the hierarchy-based conception essentially understands power as only vertical.<sup>45</sup> On the contrary, 'they are diagonal, horizontal, and layered' and vertical hierarchy does not capture such complex directionality of power in the society, with which I find myself in agreement.<sup>46</sup>

The centrality of the principle of social inclusion as a justifying aim of affirmative action in India is prominent. In theory an emphasis on the advancement of the welfare of the disadvantaged groups, according to Collins, social inclusion forms the underlying aim of substantive equality and anti-discrimination law.<sup>47</sup> Some barriers that hinder the participation of socially excluded groups are—'poverty, lack of access to education, identity-based groups that suffer discrimination.'<sup>48</sup>

The lack of immutability in the group identification in this account of social exclusion, however, makes any group that does not enjoy material and non-material

---

<sup>43</sup> Mackinnon (n 5) 11-12.

<sup>44</sup> Sandra Fredman, 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' 2016 14 IJCL 747

<sup>45</sup> *ibid.*

<sup>46</sup> For Fredman-Mackinnon debate also see Catherine MacKinnon, 'Substantive equality revisited: A rejoinder to Sandra Fredman' 2016 15 IJCL 1174.

<sup>47</sup> Collins, 'Discrimination' (n 5)16-17, 20.

<sup>48</sup> *ibid.*

benefits socially excluded.<sup>49</sup> A social inclusion-based justification of substantive equality would require group identification based solely on lack of benefits irrespective of experiences of historical injustices and discrimination.<sup>50</sup>

On the face of it acts as a strong justification for EWS in India due to their exclusion based on economic disadvantage. The overly broad definition that excludes the immutability criteria in group classification challenges the core theoretical foundations of discrimination law, which I submit is the major limitation of this principle making it unsuitable for furthering Indian understanding.<sup>51</sup>

The above analysis indicates the unsuitability of these justifications in fostering the understanding of substantive equality in the Indian context. Understanding multiple types of disadvantage/injustices cross-cutting each other provides a more convincing understanding of the aims of substantive equality,<sup>52</sup> to which the discussion now turns.

Gender and race as a bivalent mode of collectivity, that calls for changes to both the political economy and culture are crucial to explain Indian developments.<sup>53</sup> Fraser's work on harmonising the conceptual fault lines between cultural disadvantages ('recognition') and economic disadvantage ('redistribution') recognises the elemental need for accepting politics of both the disadvantages as furthering the justice project.<sup>54</sup> 'Representation' or political participation is the third dimension of justice which is

---

<sup>49</sup> Collins, 'Social Inclusion' (n 5) 913, 914.

<sup>50</sup> *ibid.*

<sup>51</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2016) ch 3.

<sup>52</sup> Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age' in Nancy Fraser and Kevin Olson, *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (Verso 2008); Fredman, 'Substantive equality revisited' (n 5).

<sup>53</sup> Fraser, 'From Redistribution to Recognition' (n 52).

<sup>54</sup> *ibid.*

always present in recognition and redistribution.<sup>55</sup> This account depicts the importance of the socio-economic and cultural dichotomy in the project of social transformation and redressal of injustices faced by disadvantaged groups.<sup>56</sup> The types of injustice, cultural, socio-economic, and political, are cross-cutting and simultaneous.<sup>57</sup> Fraser draws abstract analytical distinctions between these concepts to enable their integration for solving the ‘recognition-redistribution dilemma’ in addressing injustices.<sup>58</sup>

The complex ‘crosscutting axes’ of disadvantage signify considerable overlap of recognition and redistribution claims, thus, systematically disadvantaged groups suffer both relative recognition and redistribution harms in an intertwined manner.<sup>59</sup> Fraser argues that cultural disadvantages involve elements of material and political-economic disadvantage and socio-economic disadvantages carry cultural dimension in form of exclusion from participation and voice in mainstream society which leads to a ‘vicious circle of cultural and economic subordination.’<sup>60</sup> This conception is based on the underlying assumption that Fraser makes about the ‘real world’ injustices which include both recognition and redistribution injustices.<sup>61</sup>

The spectrum of injustices, where recognition and redistributive injustices are at the two polar ends of the spectrum considers that pragmatically injustices have a make-up constituting both types of disadvantages.<sup>62</sup> Fraser at the same time doubts the

---

55     ibid.

56     ibid.

57     It is beyond the scope of the thesis to discuss the third dimension of justice. For a detailed analysis see Fraser, ‘Reframing Justice in a globalising world’ in Fraser (n 52).

58     Fraser (n 52) 13-14.

59     ibid.

60     ibid 16.

61     ibid 18-19.

62     ibid 20.

existence of these polar ‘pure collectivities’ and does not consider instances where socio-economic disadvantage does not entail any cultural disadvantage.<sup>63</sup> The primary experience of the upper-castes towards backwardness recognition, where they do not suffer from cultural injustices and arguably only socio-economic injustices is possibly one such instance of ‘pure collectivities.’<sup>64</sup> EWS is nothing but a ‘political-economic differentiation’ requiring only redistributive remedies to tackle the problem.<sup>65</sup>

The 2019-Amendment has recognised pure redistributive injustice through implicitly acknowledging economic backwardness as a protected characteristic/ground. It challenges the theoretical foundations of the recognition-redistribution dilemma based on ‘bivalent collectivities.’ The question becomes central to understand if the conception of justice, in theory, should also address such instances of pure collectivities rooted in the issue of redistribution.

Another tension in Fraser’s analysis is revealed by the instance of state legislatures wrongly identifying upper-castes groups as socio-culturally backward despite the lack of historical discrimination. Bivalent collectivities are not reflected in upper-castes who get the benefit of the same group classification without suffering any socio-cultural injustices. This is a paradigmatic approach, as analysed in chapter 2, of the legislature to adhere to the backwardness recognition demands of politically influential upper-castes by twisting the fact of their historically advantaged position.

Since it is a given that cultural and socio-economic disadvantages are always intertwined, without any substantive inquiry into how beneficiaries of the remedial programmes are demarcated, the same tools that recognise ‘recognition’ and

---

<sup>63</sup> ibid 22-23.

<sup>64</sup> ibid 18-21.

<sup>65</sup> ibid 23.

‘redistribution’ injustices can be deployed indiscriminately to benefit affluent sections of the society, upper-castes in our case. Such measures can even be judicially justified.<sup>66</sup> It leads to a dangerous proposition by turning the bivalent collectivities as tools for making an argument for cultural disadvantage recognition of advantaged groups.

Furthermore, the analysis of differences between ‘Affirmation’ and ‘Transformation’ brings out the limits of affirmative action policy programmes.<sup>67</sup> In trying to reconcile the questions of redistribution and recognition—the transformative approach or the deconstruction project is best suited for restructuring the causes of disadvantages using recognition and redistribution remedies.<sup>68</sup>

The Indian state could be seen trying to address the political demands of upper-castes without first justly assessing the existence of disadvantage and then indiscriminately deploying affirmative action without addressing the underlying framework that generates injustices.<sup>69</sup> Importantly, Fraser does recognise that ‘people who are subordinate along one axis of social division may well be dominant along with another’ and thus calls for ‘finessing the redistribution-recognition dilemma’ which is suitable for intersecting injustices.<sup>70</sup>

Drawing from these insights, the state quotas for upper-castes groups and the 2019-Amendment provide exclusive access to the upper-castes by recognising them as backward classes. Fraser’s work, thus, is helpful to engage with the Indian interventions

---

<sup>66</sup> Sections 2.2.1.1 and 2.2.1.3.

<sup>67</sup> Fraser (n 52).

<sup>68</sup> *ibid* 35-38.

<sup>69</sup> *ibid* 28-36.

<sup>70</sup> *ibid* 40.

where groups that don't suffer from cultural injustice and arguably suffer only socio-economic injustices must be extended with benefits of redistributive remedies in form of universalist measures and not affirmative action.<sup>71</sup> Group demands towards social backwardness recognition based on their perception of suffering cultural injustices is a blatant misuse and abuse of the political dominant position. It is the fundamental idea that group subordination must exist for having any validity in claims for recognition-based injustices. When anyone and everyone is given access to the recognition injustices, I submit, the very foundation of justice and substantive equality and affirmative action measures is not only shaken but decimated and de-legitimized.

The four-dimensional analytical approach to substantive equality provides a more rounded understanding of the concept, where it recognises the core aims of substantive equality as to 'redress disadvantage; address stigma, prejudice, and violence; enable participation, and achieve structural change.'<sup>72</sup> In Fredman's leading account, a multidimensional understanding of substantive equality is developed in terms of an analytical framework to intersectionally address status-ground based injustices and to further evaluate 'laws, policies, practices, or social structures' through an interactive way, which will be done in the following analysis.<sup>73</sup>

The first dimension of redressing disadvantage focuses on disadvantaged groups which due to the 'detrimental consequences attached to the status' face social exclusion and poverty at more severity.<sup>74</sup> An important contribution of this dimension is that it puts at the core of anti-discrimination the aim of targeting

---

<sup>71</sup> *ibid* 23.

<sup>72</sup> Fredman, 'Substantive Equality Revisited' (n 5).

<sup>73</sup> *ibid* 716, 750.

<sup>74</sup> *ibid* 728.

disadvantage which acts as a sound justification for providing affirmative action or positive action in favour of the disadvantaged group.

This dimension also carries important challenges—where Fredman rightly argues that the nature of disadvantage cannot be limited to the maldistribution of resources, rooted in socio-economic disadvantage, and should be susceptible to address disadvantages status groups face due to existing power structures in the society.<sup>75</sup> For example, ‘women’s disadvantage cannot be characterized solely in terms of income poverty but is centrally related to imbalances of power within and outside the family.’<sup>76</sup> Thus, pure income poverty disadvantage does not form part of the substantive equality, as it solely encompasses maldistribution of resources.<sup>77</sup>

The second dimension of ‘redressing stigma, stereotyping, and humiliation’ is situated in the understanding of *recognition* harm, where substantive equality has a larger role to play in addressing instances of humiliation and stigma associated with status identities like race, caste, gender, etc.<sup>78</sup> While recognition understands persons as social constructs based on social norms, substantive equality through this dimension can address social implications of stigma, stereotyping, and humiliation associated with status identity.<sup>79</sup>

The second dimension is useful in critiquing pure income-based reservation in India—especially when the largest beneficiaries of such quota are the upper-castes men with no experience of ‘stigma, stereotyping, humiliation, and violence on grounds of

---

<sup>75</sup> *ibid* 729.

<sup>76</sup> *ibid*.

<sup>77</sup> *ibid*.

<sup>78</sup> *ibid*. Note Fredman’s first two dimensions overlap with Fraser’s redistribution and recognition dimensions, *Fraser* (n 52).

<sup>79</sup> *ibid* 730-31.

gender, race (caste), etc.’<sup>80</sup> They are socially and politically dominant groups, that in return are responsible for humiliation, discrimination, and subjugation of SC/STs/OBCs.<sup>81</sup> Thus, the missing element of discrimination and past injustices are key aspects to ascertain if a disadvantage falls within the scope of substantive equality.

Political and social *participation* are the two core elements of the third dimension.<sup>82</sup> The exclusionary nature of historic discrimination against status groups keeps status groups excluded from the political process and society at large and therefore a conception of substantive equality must address these exclusionary realities through enabling mechanisms of participation.<sup>83</sup> This is also the central aim of Indian affirmative action, and upper-castes groups being politically and socially dominant should rightly be excluded as beneficiaries.

The core interrelated questions of the relationship between socio-economic disadvantage and status disadvantaged, and entailing former as a separate protected ground of discrimination form the core challenges to the aims of the doctrine of substantive equality.<sup>84</sup> By conceptualising the existence of a multidimensional nature of substantive equality, Fredman argues that only in the instance where ‘disadvantage is disproportionately associated with a group which also suffers from one or all of the other factors, it should attract the attention of the right to equality.’<sup>85</sup>

---

<sup>80</sup> *ibid* 730.

<sup>81</sup> B.R. Ambedkar, *Annihilation of Caste* (BAWS 1979).

<sup>82</sup> Fredman, ‘Substantive Equality Revisited’ (n 5) 732.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid* 735.

<sup>85</sup> *ibid*.

Furthermore, Fredman answers the crucial question of socio-economic disadvantages as a ground in discrimination law through differentiating right to equality and poverty elevation policies—

Socio-economic disadvantage per se should be addressed through other legal rights and policies, such as the right to social security. The right to equality applies to socio-economic disadvantage when such disadvantage is also associated to the other dimensions, such as stigma, lack of voice, or structural factors which lock individuals and their families into a cycle of disadvantage.<sup>86</sup>

This link of socio-economic disadvantage to protected grounds in discrimination status is crucial to locate the poverty question in substantive equality and affirmative action theory, a trend followed in Indian jurisprudence. Fredman's conception rightly rejects capturing material disadvantage as recognition harm or as the sole concern of substantive equality.

The Indian substantive equality debate largely recognises these four dimensions in the interpretation of the equality guarantee. The above theoretical account supports the primacy given to the status-based disadvantages in the pre-2019 regime in India, where without experiences of historical injustices and status-based disadvantages such benefits were not extended to groups. Any such attempts to include forward sections into the fold of disadvantaged groups were held to be unconstitutional by the SCI.<sup>87</sup>

The post-2019 regime departs from the pre-existing regime and conceives quotas by amending the doctrinal understanding of substantive equality in India to include addressing only pure-economic disadvantages within non-disadvantaged groups. The general theoretical insights, as mentioned above, helps deepen the understanding of Indian substantive equality. As much as, both in Indian constitutional

---

<sup>86</sup> *ibid.*

<sup>87</sup> ch 2, Conclusion.

theory and general theory, affirmative action policies that solely encompass maldistribution of resources based on purely economic criteria of group identification find no place. More universal measures such as social security and other legal rights are better suited to tackle the instances of socio-economic disadvantage.

Such policies are not substantive equality-based affirmative action policies and the new regime policy fails to engage with a holistic conception of substantive equality. This argument is based on the substantive equality principle pre-2019 principle, where until 2019, the focus has been on both recognition and representation elements along with the multidimensional principles. While now in the post-2019 scenario, the amendments have brought an almost exclusive focus on redistribution—both in setting up aims and mechanisms and identifying the beneficiary. State interventions on the other hand, through a distorted reading of the recognition dimension, have misconceived quotas for upper-castes by identifying such groups as backward classes.

Another implication of the constitutional amendment is that it attempts at bringing pure economic disadvantage within the fold of Indian substantive equality doctrine, without any basis in pre-2019 substantive equality understanding and general theory. This implication of the doctrinal amendment by the parliament to the constitutional principle of equality, I submit, fundamentally alters the doctrine of substantive equality. The pre-2019 regime interpretation of substantive equality should resist such a change due to foundational impermissibility in adopting a narrow view.<sup>88</sup> However, the SCI's position in accepting such an alteration to the doctrine has to be seen in its future judicial discourse on the issue, which is quite unpredictable. Because the hints of the institutional position of SCI on the issue is towards accepting a pan-

---

<sup>88</sup>

Text to n 28.

India socio-economic disadvantage-based affirmative action through a complete replacement of the status disadvantage-based pre-existing quota regime.<sup>89</sup>

The tension between the pre-existing multi-dimensional understanding of substantive equality with pure-economic disadvantages has widened, it is argued, and the latter poses a conceptual challenge to the former in terms of its power in long run to subvert the multi-dimensional understanding to a singular ground-based principle identified solely based on economic disadvantage. This is determinative of a move from the existing regime of multidimensional substantive equality to a much narrower and problematic singular conception.

Furthermore, the exercise by state governments of identifying affluent upper-caste groups as backward classes/disadvantaged groups is a deceitful one with no doctrinal basis. Both the post-2019 regime and state interventions, it is argued, do not establish any links between the status and socio-economic disadvantages and other dimensions of substantive equality. Thus, it is clear that such interventions have no foundation in the doctrine of substantive equality and are not in tune with the goal of furthering of right to equality understood substantively. Nor can these interventions even remotely evoke achieving the right to equality as their underlying goal, as aims and characteristics of such policies are rooted in political demands of upper-caste groups, rather than addressing socio-economic disadvantages.

---

<sup>89</sup> Radhika Roy, “All Reservations May Go And Only EWS May Remain; But That's A Matter Of Policy”: Supreme Court In Maratha Quota Case’(25 March 2021) <<https://www.livelaw.in/top-stories/all-reservations-may-go-only-ews-may-remain-matter-policy-supreme-court-maratha-quota-case-171750>> accessed 28 April 2021.

### 3.1.3 Affirmative action in India and the general theory: Definition, scope, and objectives

Affirmative action is one of the core anti-discrimination law strategies used to overcome relative group disadvantage.<sup>90</sup> This section maps the Indian understanding of affirmative action onto discrimination law theory to better appreciate the foundations of pre and post-2019 reservation regimes. It is argued that post-2019 regime and state interventions quotas cannot be classified as affirmative action measures due to their discord with affirmative action theory, in Indian law, and in general.

Indian jurisprudence understands reservation policy as a means to further substantive equality and address historical injustices faced by status groups identified based on low caste standing in the caste hierarchy.<sup>91</sup> The aim and objectives of reservation policy are closely associated with the themes of backwardness determination and identification of protected groups. Historical discrimination suffered by status groups is the pivotal distinguishing factor between quotas and other affirmative action policies.<sup>92</sup> In *Indra Sawhney*, the SCI held that ‘Reservation is a remedial action specially addressed to the ill effects stemming from historical discrimination.’<sup>93</sup> Reservations are devised as special measures within the affirmative action framework, yet are distinguished from ‘other affirmative action measures.’ It holds a special status in the Indian constitutional scheme given its strong distributive foundations.<sup>94</sup>

---

<sup>90</sup> William Darity, et al, ‘Who Is Eligible? Should Affirmative Action be Group- or Class-Based?’ 70 AJES 238.

<sup>91</sup> Galanter, *Competing Equalities* (n 17).

<sup>92</sup> *Indra Sawhney* (n 20).

<sup>93</sup> *ibid* [294].

<sup>94</sup> *ibid*.

Reservation as a measure of furthering substantive equality in India recognises both recognition and redistribution dimensions as conjunction factors in its doctrine.<sup>95</sup> The distinction between other affirmative action programmes and reservations or quota benefits underlines the objectives and aims of reservations of that of remedying historical discrimination. While other programmes ‘are intended to redress discrimination of all kinds, whether current or historical.’<sup>96</sup> However, it is important to note that SCI’s analysis of these objectives in *Indra Sawhney* was done in the pre-2019 regime, and it may be argued that this pre-2019 regime holds little relevance in terms of applicability to the 2019-Amendment.<sup>97</sup> Constituent Assembly Debates provide more in-depth insights on the foundations of reservation policy, apart from furthering substantive equality.

The intention of the constituent assembly also recognises the distinction between communal quotas and reservations, which I submit is crucial to link the pre-2019 regime and 2019-Amendment, and limits on the powers of parliament to change equality clauses and reservations, as policy furthering substantive equality.

The emphasis on the term ‘backward’ was to categorically exclude the dominant communities and only provide access to the historically excluded communities to government employment. The logic was that employment and politics are hegemonized by upper-castes dominant groups.<sup>98</sup> The pre-2019 regime’s doctrinal position was, however, different in the draft article 10 where reservations were

---

<sup>95</sup> *ibid* [466].

<sup>96</sup> *ibid* [466(14)].

<sup>97</sup> Gautam Bhatia, ‘Is the 103rd Amendment Unconstitutional?’ (13 January 2019) <<https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/>> accessed 25 May 2021;

<sup>98</sup> *Indra Sawhney* (n 20) [509].

provided towards ‘all citizens’ or communal quotas.<sup>99</sup> This was, however, changed to adopt qualification of the ‘backward’ class of citizens through an intentionally narrow conception of disadvantage thereby rejecting communal quotas for every class of citizens.<sup>100</sup> *Indra Sawhney* therefore ruled—

what was thus consciously and deliberately given up by exercising the option in favour of only those class of citizens who could be identified as backward then reservation in favour of any other class of citizens cannot legitimately and legally be accepted as valid.<sup>101</sup>

2019-Amendment and state measures attempt to alter the foundational basis of reservations and equality doctrine in Indian COI by extending the reservation benefits to upper-castes, and constitutional jurisprudence must resist such a fundamental change. The general theory provides a deeper understanding of affirmative action to which the discussion now turns.

Affirmative action is understood as ‘a measure designed to benefit any members of one or more protected group(s) qua such membership,’ according to Khaitan.<sup>102</sup> The terms and features ‘protected group(s)’ and ‘qua such membership’ requires further explanation to discern the question of who are the beneficiaries of affirmative action policies, an exercise to be undertaken in sub-section 3.2.

Affirmative action ‘entails the deliberate use of gender, race, or other protected characteristic to benefit a disadvantaged group’<sup>103</sup> according to Fredman. The focus in this definition is also on the usage of ‘protected characteristics’ and ‘disadvantaged group’ which, similar to Khaitan’s definition, makes membership of disadvantaged

---

<sup>99</sup> *ibid* [502]; *CAD* (n 1) 684.

<sup>100</sup> *ibid* [502]-[504]. See also *Dr. Jaishri Laxmanrao Patil 2021* (n 48) [156]-[159].

<sup>101</sup> *Indra Sawhney* (n 20) [675].

<sup>102</sup> Khaitan (n 51) ch 8 216.

<sup>103</sup> Fredman, *Discrimination Law* (n 1) ch 5 232.

groups based on protected characteristics central to affirmative action measures.<sup>104</sup> As will be seen in the next section affirmative action measures only cater to disadvantaged groups identified based on a mix of status-protected characteristics such as race, caste, gender, etc., and socio-economic disadvantages.

Crucial to the understanding of the thesis is the question—what are the legitimate aims for extending affirmative action benefits? Khaitan identifies the primary aim of affirmative action measures as ‘eliminating relative group disadvantage’, where in comparison to the cognate groups the protected groups face relative disadvantage based on a combination of political, social-cultural, material factors.<sup>105</sup> The foremost aim of affirmative action is to *benefit* members of protected groups, the metric of which, though empirically difficult, is rooted in the idea of reducing and eliminating relative group disadvantage.<sup>106</sup>

There are three core aims of affirmative action measures, according to Fredman<sup>107</sup>— ‘(i) the removal of discriminatory barriers or redressing past disadvantage; (ii) participation, or the representation of the interests of the previously excluded group; and (iii) the fostering of diversity and the creation of role models.’<sup>108</sup> Furthermore, due to its consonance with the principle of substantive equality, Fredman also derives the aims of affirmative action from the aims of substantive equality outlined in the multi-dimensional approach.<sup>109</sup>

---

<sup>104</sup> section 3.2.

<sup>105</sup> Khaitan (n 51) ch 3 51.

<sup>106</sup> *ibid* ch 8 218, 220.

<sup>107</sup> Fredman, *Discrimination Law* (n 1) ch 5 259.

<sup>108</sup> *ibid*.

<sup>109</sup> Sandra Fredman, ‘Reimagining power relations: hierarchies of disadvantage and affirmative action’ 2017 *Acta Juridica*, vol 1, 124-145.

The Indian affirmative action doctrine pre-2019 seems to be guided in practice by the general theoretical understanding of the aims and scope of affirmative action. The underlying aim behind the post-2019 regime and state interventions has been to bring within the fold of constitutional doctrine and vision of reservation policy, advantaged groups without experiences of historical discrimination. Such groups were originally excluded from its scope and purview, and could only illegally be made part of the constitutional scope of reservation policy based on reoccurring political considerations.

The post-2019 regime and state interventions are also contrary to the foundation of relative group disadvantage. EWS quota benefits the upper-caste and the most forward sections within the general category, as argued previously, and thus such policies do not aim to ‘reduce abiding, pervasive, and substantial relative group disadvantage.’<sup>110</sup> The state interventions more significantly engage with affluent and upper-caste groups. Meaning state quotas provided affirmative action benefits to relatively advantaged groups by characterising them as disadvantaged groups. Without the accompaniment of the systemic goal of ‘reducing relative group disadvantage’ the aims of such interventions, at least in theory, are untenable. This may have the effect of delegitimising the aims of affirmative action in totality and also pacify the claims of SC/ST/OBC groups based on historical injustices. By envisioning benefits under such policies that are violative of the core doctrinal foundations, both in general theory and as well as Indian jurisprudence, the core character of affirmative action is defeated. Furthermore, the commitment of the COI towards substantive equality stands diluted

<sup>110</sup>

---

Khaitan (n 51) ch 8 234.

and symbolised by enabling advantaged groups to access quotas meant for protected groups.

Indian interventions could also be termed as ‘constitutional distortions.’ An overt and indiscriminate proliferation of reservation quota regime, I submit, distorts and destroys the constitutional vision of reservations. It augments the seeds of changing the whole conceptual understanding and foundational aims and objectives of affirmative action, which were categorically envisaged only to address historical discrimination for backward classes of citizens. Such measures are an indirect way of dismantling the doctrinal basis of the pre-existing reservation imperceptibly. The above academic literature looks comparatively at multiple jurisdictions and identifies key aims of eliminating relative group disadvantage among others. It distinguishes affirmative action measures from poverty alleviation, general welfare measures based on social policy. A more significant implication, therefore, is that such policies remove reservation, as a strong distributive measure, from the realm of substantive equality and discrimination law and places it within the scope of redistributive and egalitarian measures. To recall, the latter does not require experiences of historical discrimination to qualify groups with protected status.<sup>111</sup>

Such logic also fans the argument in favour of communal quotas, making reservations as ‘succour of all the disadvantages’ or for all classes of citizens irrespective of their disadvantaged backgrounds.<sup>112</sup> Therefore, these measures, I submit, signify an amendment to the conceptualisation of affirmative action and substantive equality, a corrupted one, in the Indian constitutional scheme. Being a smokescreen for politically influential group quotas, an implication of these

---

<sup>111</sup> Khaitan (n 51) ch 8.

<sup>112</sup> Galanter, *Competing Equalities* (n 17) 393.

interventions could also be that it may water down pre-existing reservations in long term.

### **3.2 Protected grounds, protected groups, and demarcation of beneficiary classes**

The permissibility of grouping individuals in a beneficiary class based on poverty is complex, in the Indian reservation debate. Galanter's pioneering work raises the question— 'May the state for purposes of its equalizing policies designate backward classes without reference to the historic social formations to which these provisions were addressed?'<sup>113</sup> Though I wholly agree with his argument that 'the state has wide powers under Articles 15(1) or 16(2) or 29(2) to use other classifications (like income, literacy, etc) instead of, or in conjunction with caste,' it is the limitations on such powers that is significant as they only permit horizontal reservations.<sup>114</sup>

In the context of 'backward classes' in India, Galanter articulates three different methods through which economic-based tests of backwardness of various forms may be used in designating group beneficiaries—i. Income and occupation-based backward classes identification criteria; ii. Creamy layer demarcation using 'Income and occupation tests' to exclude 'forward' individuals within the community from benefits of reservations; iii) 'Income and occupation may be used independently as criteria for selecting individuals who compose a backward class.'<sup>115</sup> As an independent criterion of backwardness, a purely economic test/the third method facilitates the inclusion of even advanced communities who face purely economic disadvantage.<sup>116</sup> However, the

---

<sup>113</sup> Galanter (n 17) 204.

<sup>114</sup> *ibid* 207.

<sup>115</sup> *ibid* 261. Property ownership is altogether excluded in Galanter's conception. Text to n 223.

<sup>116</sup> Galanter (n 17) 269.

shortcomings of such purely economic criteria for classification are met with a significant hurdle of the ‘lion’s share’ problem, which articulates that the most forwards or who are relatively better off among the poor take the most advantage of such policies, especially the ones of the ‘higher echelon of preferences.’<sup>117</sup>

The EWS quota fits, though in a discriminatory way, in the third method identified by Galanter. As argued in chapters 1 and 2, due to inequality in internal representation within the EWS quota most advanced sections within the group would have exclusive access to EWS. General discrimination law theory provides a finer understanding of the issue, to which the discussion now turns.

Protected groups are central to the understanding of discrimination law as they are the determinant beneficiaries of affirmative action. By definition, they are ‘groups defined by normatively irrelevant or valuable personal characteristics, whose members suffer significantly, abiding, and pervasive relative disadvantage, in comparison with members of other groups defined by the same characteristics.’<sup>118</sup> The important correlation between groups and protected grounds is defined based on personal characteristics which are the objects of protection under discrimination law.<sup>119</sup> Protected groups are based on protected grounds, defined by certain personal characteristics such as sex, gender, race, caste, etc.<sup>120</sup> This understanding is rooted in the question of determining what norms form part of discrimination law and what are excluded. Four conditions underlie the characterization of the ground as one of

---

<sup>117</sup> *ibid* 275.

<sup>118</sup> Khaitan (n 51) ch 8 217.

<sup>119</sup> *ibid* 217-18.

<sup>120</sup> *ibid*.

discrimination law: ‘personal grounds condition, the cognate groups condition, the relative disadvantage condition, and the eccentric distribution condition.’<sup>121</sup>

The two norms for identifying ‘protectorate’—one of the ‘cognate groups condition’ and the other of ‘relative disadvantage condition’ are central to identifying protected grounds and beneficiaries.<sup>122</sup> The former relates to grounds that are ‘capable of classifying persons into more than one class of persons, loosely called “groups”’<sup>123</sup> and the latter identifies a disadvantaged group as the groups that relatively ‘suffer abiding, pervasive, and substantial disadvantage.’<sup>124</sup> Group disadvantage based on status grounds being the central concept in discrimination law *Dalits, black people, women* among others, relatively suffers more disadvantage compared to *upper-castes, white people, and men* due to historical injustices.<sup>125</sup> A ground is prohibited, therefore, based on disadvantages associated with personal characteristics.

The question of expanding the beneficiaries or the list of the protected groups is neither new to India, as seen in Chapter 2, and nor restricted to the Indian reservation debate. The ‘proliferation of the protectorate’ is a task and challenge primarily faced by the legislature and judiciary across various jurisdictions.<sup>126</sup> This begs us to ask the question of whether economic disadvantage has become a protected ground under the COI with the introduction of the 2019-Amendment? The list of protected grounds

---

<sup>121</sup> *ibid* 25.

<sup>122</sup> *ibid* 39.

<sup>123</sup> *ibid* 30.

<sup>124</sup> *ibid* 31, 50.

<sup>125</sup> *ibid* ch 3 87-88.

<sup>126</sup> Owen Fiss, ‘The Fate of an Idea Whose Time has Come: Anti-Discrimination Law in the Second Decade after *Brown v Board of Education*’ (1974) 41 UCLR 742 in Khaitan (n 51) ch 3 50.

enumerated in COI, as seen in Chapter 1, is exhaustive, consisting of ‘religion, race, caste, sex, place of birth’ and also descent and residence.

The 2019-Amendment does not revise the list of grounds in COI, and it fails to include variations of—class/economic disadvantage, property ownership, material backwardness as a ground beside caste, race, religion, sex, etc.<sup>127</sup> It is thus clear that EWS is a protected group within the general category/unreserved category defined without a corresponding protected ground. The amendment is an intervention of denoting a protected group without an expressly identified protected ground. There is a thorough lack of clarity as to what is the protected ground, is it income backwardness, economic disadvantage, or lack of property ownership, or both? I argue in section 3.4 that such an implicit exercise leads to norm indeterminacy.

Upper-castes still find almost exclusive access to the EWS quota to the exclusion of relatively disadvantaged groups of SC/ST/OBCs. The focus of the parliament has been unduly on the economic backwardness within the open/unreserved category. Such an exercise leaves no scope to address, first the issue of the existing protected groups of SC/ST/OBCs within the scope of economic disadvantage, and then 2) addressing the most backward or economically backward within the economic disadvantage. The policy attention must have been on identifying intersectional deprivations and redressing them. EWS quota renders intersectional disadvantage invisible.

In absence of a corresponding protected ground-based on personal characteristics, the post-2019 regime is not per se ground sensitive. It may seem that the EWS category classifies persons into one class based on income ceiling and

---

<sup>127</sup> Sub-clause (2) of arts 15 and 16 COI.

property ownership criteria, such is not the case. This is because the suitability of the ground for protection in discrimination law is determined through two conditions test— i. classification based on groups of persons with a significant advantage gap between to be protected group and cognates; ii. the existence of immutability of characteristics or at least acquisition of such characteristics ‘must constitute a fundamental choice.’<sup>128</sup>

Furthermore, on the nature of group disadvantage, it has long been recognised in theories of equality and justice, that there are at least three dimensions or disadvantages that a group suffers—political, socio-cultural, and material disadvantage— the latter two are core to the present discussion.<sup>129</sup> These advantages are not isolated and it is well recognised that a group can suffer these disadvantages in the complex degree of overlap, quite similar to the analysis in the previous section. Importantly, courts have refused in ‘adopting a blinkered view of a disadvantage as merely economic’ and have a rather recognized overlap of various disadvantages in conceptualising the notion of relative group disadvantage.<sup>130</sup> The socio-cultural disadvantage is a fallout of prejudice and negative stereotypes against members of a group whose membership entails them to be considered less worthy and preferred against. The trait-induced prejudice and stereotypes make groups against which it is widespread, relatively more socially and culturally disadvantaged.<sup>131</sup>

On the other hand, the determination of material disadvantage indicator is based on economic disadvantage—low income and lack of assets and land ownership. It is also broadly interpreted to include broad socio-economic indicators of educational

---

<sup>128</sup> Fiss (n 126) 50.

<sup>129</sup> *ibid* 51-56; Text to n 5.

<sup>130</sup> *ibid* 51.

<sup>131</sup> *ibid* 54.

levels, quality of health, etc.<sup>132</sup> Group identification in the pre-2019 regime Indian reservation measures considers economic disadvantage as an outcome of social and educational backwardness, meaning status groups also face economic disadvantage.<sup>133</sup> Since relative disadvantage focuses on the gap between the protectorate and cognate groups, a significant gap between cognate groups and protected groups is of relative material disadvantage along with socio-cultural disadvantage, in India.<sup>134</sup> Groups that possess both characteristics are group beneficiaries.<sup>135</sup>

Drawing from this analysis it is clear that the post-2019 regime does not pragmatically consider, SEBCs are also economically disadvantaged groups and more so poverty reflects severely in status groups than advantaged groups.<sup>136</sup>

The socio-economic disadvantage, furthermore, I submit, does not fulfil the eligibility for classification as a ground due to its apparent untenability with immutability condition.<sup>137</sup> Given a sudden change in economic position, for example, in form of finding a job, good agricultural or business profits in a year, can remove an individual from the socio-economic disadvantaged group to an advantageous position. The opposite is also possible where due to retirement, unemployment, financial loss due to natural disaster or business loss can categorise a person as a beneficiary of EWS. Therefore, I submit that the EWS quota faces a central problem of indefinite group characteristics, where persons can lose or gain their group membership and disadvantaged position by way of sudden economic benefits/loss. It, therefore, creates

---

<sup>132</sup> Khaitan (n 51) 54-55.

<sup>133</sup> *ibid* 55-56.

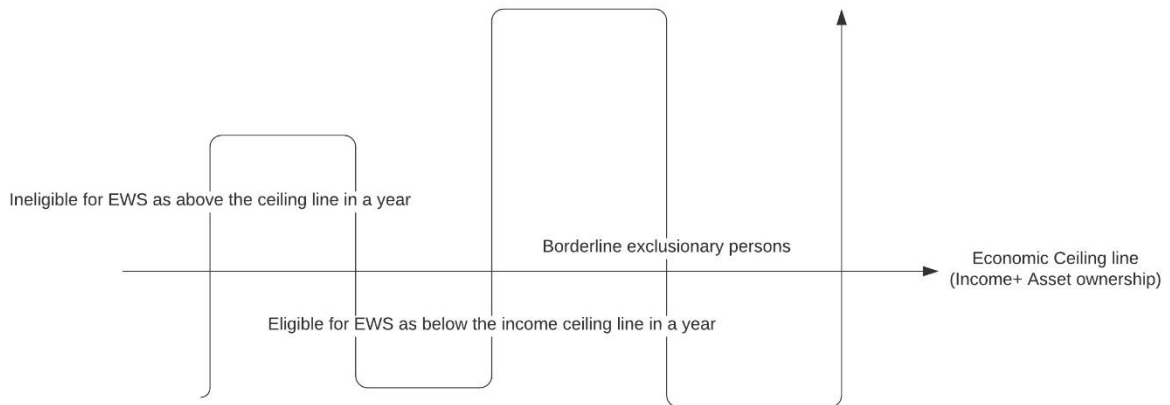
<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid*.

<sup>137</sup> *ibid* 60.

a fluid and fluctuating group identification due to the possibility of continuous oscillation, making EWS inapt as a protected characteristic, as further explained in Fig. 2 below.<sup>138</sup>



**Fig. 2 Representation of fluid group characteristics**

This obliterates the foundations of group identifications as understood in the discrimination law theory outlined above. Economic disadvantage even as a protected ground is not capable of classifying a person into one or more classes of persons. Income has a different character when used to distribute ‘non-divisible’ benefits, and the difference between inclusion and exclusion in quotas becomes a matter of a penny or rupees.<sup>139</sup> Thus, income and property ownership-based criteria establish arbitrary borderlines incapable of creating stable group identification.<sup>140</sup> Considering the issue of

<sup>138</sup> This understanding draws from Galanter’s analysis of income ceiling’s fluctuation problem. Galanter, *Competing Equalities* (n 17) 344. Madhav Khosla, ‘Modi government’s economic quota is unconstitutional’ (11 January 2019) <<https://theprint.in/opinion/modi-governments-economic-quota-is-unconstitutional/176322/>> accessed 26 May 2021.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid* 345.

advantaging the already advantaged groups, of denoting advantaged groups as beneficiaries of affirmative action policy in Khaitan's articulation implies that—

Universal welfare schemes are not affirmative action measures. Measures that exclusively or primarily **benefit dominant groups are paradigmatically discriminatory, and do not qualify for characterization as affirmative action measures...**Because the different modes of disadvantage flow into one another, whether a group is relatively disadvantaged is to be judged holistically and not in one single dimension.<sup>141</sup>

This analysis support's the argument that state legislature granting reservation benefits to upper-castes and the post-2019 regime is an untenable discriminatory exercise that does not amount to affirmative action. As noted earlier, the post-2019 regime culls out an entirely new constitutional class of beneficiaries using a mixture of creamy layer and property ownership for relatively advantaged groups. Income ceiling or creamy layer criteria is a form of intra-group prioritization.<sup>142</sup> EWS does not use it for intra-group prioritisation but as a key group classification criterion. This distinction is critical, as it narrows down the scope of understanding economic disadvantage to income backwardness and property ownership only, by using tools of classification never devised for group demarcation

A key implication of such an exercise is that it does away with the settled constitutional and jurisprudential position in India that requires statutory and constitutional institutions in form of fact-finding commissions to rely on strong sociological empirical data indicating social, educational, and economic backwardness while demarcating a group as socially and educationally backward.<sup>143</sup> Deploying group sub-classification and intra-group prioritization methods as group demarcation criteria

---

<sup>141</sup> Khaitan (n 51) 220.

<sup>142</sup> *Indra Sawhney* (20).

<sup>143</sup> *Indra Sawhney* (20); Khaitan (n 51) ch 3.

by circumventing the otherwise established comprehensive methods based on sociological empirical data is to reimagine a new constitutional regime without rigorously understood economic disadvantage.<sup>144</sup>

Indian interventions are not well-designed affirmative action policies as they diverge from identifying classes based on comprehensive empirical markers enabling representation of most backward among the identified class. Superficial parameters of income backwardness and property ownership are an insufficient basis for understanding economic backwardness, it is argued, especially without empirical backing. On the contrary, the scheme of the new regime outlines that it predominantly addresses the economic disadvantage of only upper-castes, even when economic disadvantage markedly reflects in existing status groups. The use of upper-castes here as against the general category is intentional due to the *de-facto* upper-caste character of quotas.

The state legislative interventions and the post-2019 regime, therefore I submit, amount to *collateral discrimination* against cognate groups-unreserved category members.<sup>145</sup> Collateral discrimination entails burdening of ‘cognate groups through measures that are not a necessary consequence of extending certain benefits to disadvantaged groups.’<sup>146</sup> Affirmative action is ‘prioritarian’ and a ‘disadvantage-centric approach’ as against the ‘partisan’ approach. Indian interventions, I submit, are partisan in nature.<sup>147</sup>

---

<sup>144</sup> Khaitan (n 51) ch 3 55.

<sup>145</sup> *ibid* 220.

<sup>146</sup> *ibid* 218.

<sup>147</sup> *ibid* 236.

They burden upper-castes groups and on the prioritarian scale, and even *Dalit Muslims* and women along with groups in extreme poverty who find the post-2019 regime of little use given the intra-group inequality and complete exclusion hinders their access.<sup>148</sup> Burdening upper-castes and status groups with quota measures designed primarily for benefitting advantaged groups is the crux of the post-2019 regime and state quotas.

To elaborate, a relevant analogy provided by Khaitan that foresees the exclusionary nature of the post-2019 regime states ‘a programme of conscription for men but not women amounts to collateral discrimination, but cannot be characterized as an affirmative action measure designed to benefit women.’<sup>149</sup> Corollary, reservation is provided based on economic backwardness to non-existing beneficiaries of reservation policy to the exclusion of pre-existing protected groups amounts to collateral discrimination and cannot be characterised as affirmative action measures. It is also partisan in the sense that it values the economic backwardness of non-existing beneficiaries over that of SC/ST/OBC, which is quite equivalent to providing, for example, reservation quotas to *Hindu Male* groups to the exclusion of women, or a disability quota exclusively for upper-caste disabled men.<sup>150</sup>

The exclusive quota for unreserved category and upper-castes creates two reservation classes which I denote as ‘reservation opposites’ within the affirmative action policy in India—not as mutually exclusive but an instance of linear exclusion because it is only EWS constitutional provisions that deny any possibility of including poor sections outside general category/unreserved sections. The provisions identifying

---

<sup>148</sup> Text to n 121.

<sup>149</sup> Khaitan (n 51) ch 8.

<sup>150</sup> I am grateful and indebted to Prof. Khaitan for bringing out this analogy in our discussion.

beneficiary groups based on socially and educationally backward classes can permit classes within the unreserved sections to be beneficiaries if they pass the criteria of backwardness determination. The basis of reservation, therefore, under the EWS category has an implicit caste, religion, and gender exclusionary dimension.

The partisan nature of discrimination law categorically helps to discern the true nature of affirmative action measures in question—

Discrimination law is partisan, but in favour of *whichever group happens to suffer from relative group disadvantage*. It is *not* partisan in the sense that it values the interests of black people, *dalits*, or women any more than it does those of white people, *brahmins*, or *men*.<sup>151</sup>

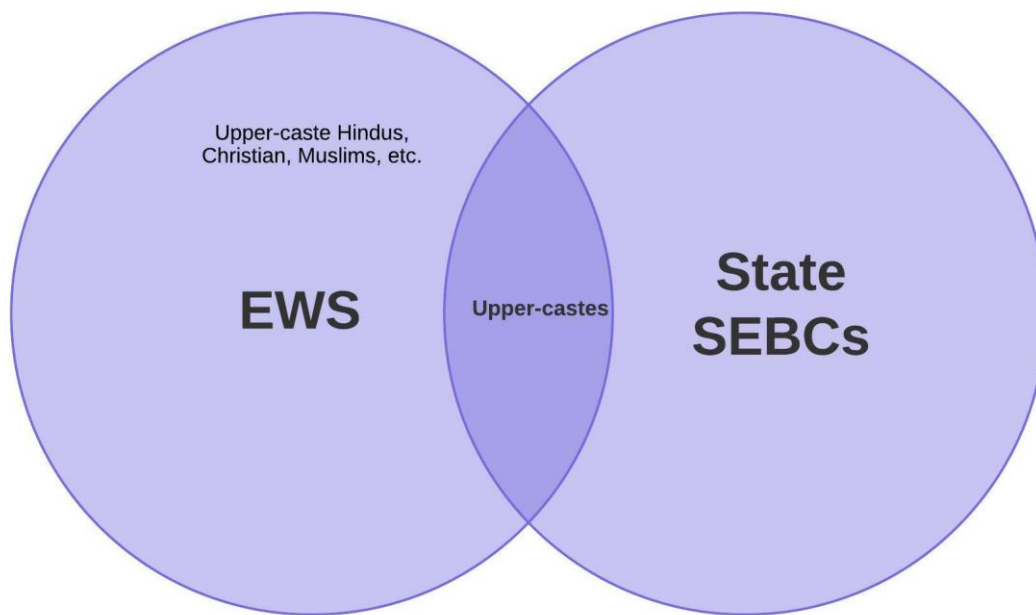
The partisan nature of these affirmative action policies has a key insinuation of negating the existence of economic disadvantage within existing status groups based on a dubious assumption of benefitting protected only through the pre-2019 regime. The partisan character is also indicated in the unwarranted use of the political power by the governments to confer protected group status and benefits of reservation policy to advanced groups within the Hindu social order based on their political demands.<sup>152</sup> It is submitted that extension of reservation cannot be rooted in political demands and pressures. It must be based on sound doctrine and logic, where the groups that suffer from relative group disadvantage must be the deserving beneficiaries of the policy. The haphazard manner of extending the benefits to the groups that are not backward, so to speak, is a clear sham exercise by the legislature deployed through misuse of constitutional power.

---

<sup>151</sup> Khaitan (n 51) 236.

<sup>152</sup> Text to n 121.

The position of state legislature denoting upper-castes as ‘socially and educationally backward classes’ is murkier as the state expressly recognises forward and affluent sections of the population as disadvantaged groups. As seen in chapter 2, courts have repeatedly ruled such exercise as unconstitutional, however, the judgements of the HCs have been patchy where sometimes such policies have been ruled as constitutional.<sup>153</sup>



**Fig 3. Post-2019 regime and state interventions primarily benefit upper-caste groups**

The nature of these interventions, to summarise, is collateral discrimination not amounting to affirmative action, partisan as it values the economic disadvantage of upper-castes more than lower castes, and is promulgated without the existence of ‘substantial, abiding, and pervasive disadvantage.’<sup>154</sup>

Such casual and indiscriminate deployment of affirmative action based on political consideration has already led to some serious instances in the states of

---

<sup>153</sup> See section 3.1.2.

<sup>154</sup> *ibid.*

Maharashtra and Gujarat, in the context of EWS. The state governments have contradictorily interpreted and implemented the new regime in their state policy. Whereas, the EWS category expressly excludes existing protected groups from the benefits of its quota, the Maharashtra government to pacify political backlash from the *Maratha* community amended this very underlying conception.<sup>155</sup> Through the 23-12-2020 Cabinet Decision (Meeting No.49)<sup>156</sup> it was decided to include SEBCs or pre-existing protected groups within the EWS category.<sup>157</sup> Such a move was undertaken during the pendency of the constitutional challenge to the SEBC 2018. It is outrightly unconstitutional as it attempts to amend constitutional norms using an ordinary notification.

Correspondingly, the Gujarat government through a notification decided to only adopt purely income-based criteria for EWS beneficiary identification by expunging the second criterion of property ownership.<sup>158</sup> Meaning Gujarat is the only state in India that extends reservations on purely income backwardness-based EWS classification. The primary reason, in absence of a formal justification by the government for such a move, can be ascribed to the significant land ownership among the Patidar-Patel community as they are the biggest land-owning community in ‘Mehsana, Patan and

---

<sup>155</sup> Surendra P Gangan, ‘Maharashtra govt approves EWS benefits for Marathas’ *Hindustan Times* (Mumbai, 24 December 2020).

<sup>156</sup> Cabinet Decision <[https://maharashtra.gov.in/Site/upload/CabinetDecision/English/23-12-2020%20Cabinet%20Decision%20\(Meeting%20No.49\).pdf](https://maharashtra.gov.in/Site/upload/CabinetDecision/English/23-12-2020%20Cabinet%20Decision%20(Meeting%20No.49).pdf)> accessed 28 December 2020.

<sup>157</sup> Neha Joshi, ‘Maharashtra government opens EWS quota to SEBC in view of Supreme Court stay on SEBC law’ (Bar & Bench 25 December 2020) <<https://www.barandbench.com/news/maharashtra-government-grants-ews-benefits-maratha-community>> accessed 28 December 2020.

<sup>158</sup> PTI, ‘Rs 8 lakh income cap only requirement for EWS quota in Gujarat’ (Business Standard, 23 January 2019) <[https://www.business-standard.com/article/pti-stories/rs-8-lakh-income-cap-only-requirement-for-ews-quota-in-gujarat-119012301511\\_1.html](https://www.business-standard.com/article/pti-stories/rs-8-lakh-income-cap-only-requirement-for-ews-quota-in-gujarat-119012301511_1.html)> accessed 23 December 2020.

Gandhinagar districts in the northern part of Gujarat.’<sup>159</sup> Therefore, such a move was to only benefit Patidar/Patel communities who would otherwise be majorly ineligible due to their large property ownership.

Such partisan and collateral discrimination measures vitiate the pre-2019 doctrinal understanding of substantive equality and affirmative action in India, which rightly rejects a pure socio-economic basis for group identification and does not consider advantaged groups as backward classes.

Relevant to the present discussion is also the issue of addressing socio-economic disadvantage through affirmative action measures. The distinction, as rightly articulated by Fredman, is between the aims of affirmative action policies and the conditions determinant for the eligibility of beneficiaries for attaining policy benefits.<sup>160</sup> The latter clarifies the indispensable need for the presence of ‘common experiences’ of discrimination, exclusion, and a strong history of disadvantage based on status, for affirmative action to be justifiable in theory.<sup>161</sup> Fredman rightly problematises the line of thought that collapses the aim of affirmative action only to address socio-economic disadvantage.<sup>162</sup> Thus, affirmative action measure design must recognise both ‘recognition and redistribution’ dimensions and avoid collapsing these dimensions into each other.<sup>163</sup>

This analysis must be contrasted with the fault lines in affirmative action measures which are ‘pure’ status based and pure socio-economic based. Fredman using

---

<sup>159</sup> Ajoy Mahaprashasta, ‘In North Gujarat's Villages, Patidar Resentment Towards BJP Is Fast Altering Social Dynamics’ (The Wire, 25 November 2017) <<https://thewire.in/politics/patidar-bjp-rural-gujarat-assembly-polls>> accessed 23 December 2020.

<sup>160</sup> Fredman (n 1) ch 5 275.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid* 275-276.

the multi-dimensional framework to substantive equality challenges the instances of ‘pure socio-economic disadvantage’ as justifications for extending affirmative action benefits.<sup>164</sup> While articulating the redistributive aim of affirmative action policies, Fredman argues, ‘status should not be regarded as simply a proxy for socioeconomic disadvantage. In other words, race, gender, and disability cannot simply be collapsed into class’<sup>165</sup> Affirmative actions’ furthering substantive equality recognises such an overlap between the two dimensions, and any design that misses this link ignores the need for addressing both types of injustices.<sup>166</sup> This analysis buttresses the pre-2019 Indian position, which rejects pure socio-economic disadvantages and demands strong historical discrimination as the basis for affirmative action measures.

### **3.3 The extent of quota limit**

Quotas and reservations are *strong distributive measures* that shall be used as a last resort due to their huge expressive costs, especially due to the limitations of resources, available jobs, and places at educational institutions.<sup>167</sup> The theme of the 50% quota ceiling has been a reoccurring one in jurisprudence, as seen in Chapter 2, mainly due to the SCI’s position in *Indra Sawhney* remaining largely unchanged since last three decades on one hand, and significant proliferation in extending quotas to new groups on the other.

As seen in the previous chapter, the Constitutional bench of SCI recently in *Dr. Jaishri Laxmanrao Patil 2021*,<sup>168</sup> unanimously reiterated *Indra Sawhney’s* decision

---

<sup>164</sup> Fredman, ‘Reimagining power relations’ (n 109).

<sup>165</sup> *ibid* 1.

<sup>166</sup> *ibid*.

<sup>167</sup> Khaitan (n 51) 222-223.

<sup>168</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48) [151].

that reservations under Art. 16(4) and 15(4) shall not exceed the 50% quota ceiling, and only under extraordinary circumstances, such ceiling may be breached.<sup>169</sup>

The discussion on the original intention of the framers of the constitution is fundamental where SCI relying on the scope of Art. 16(4), the then draft article 10, held—that the underlying basis for upholding the principle of equal opportunity is to limit the reservation quotas to only a ‘minority of seats.’<sup>170</sup> This doctrinal position is based on Ambedkar’s and Constituent Assembly’s understanding that the quantum of quotas should not destroy the general principle of equality of opportunity itself, and limiting it to minority seats ensures this.<sup>171</sup> Ambedkar’s foresight on what I term as ‘non-immersing rule’ reveals the untenability of the proliferation of reservations beyond minority seats, which he clearly explains through an example—

If reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent. of the total posts under the State and only 30 per cent. are retained as the unreserved. Could anybody say that the reservation of 30 per cent. as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment.<sup>172</sup>

The quota limit strikes balance between the general principle of equality and the reservation by capping the extent of the reservation to only 50 percent of the total available seats.<sup>173</sup>

As observed in the previous chapter dual test is used to satisfy the exceptional circumstances for a permissible breach of the 50% quota limit.<sup>174</sup> Though the instances

---

<sup>169</sup> *ibid* [130]-[132], [216]-[221].

<sup>170</sup> *ibid*.

<sup>171</sup> CAD (n 1); *ibid* [155-157].

<sup>172</sup> CAD (n 1).

<sup>173</sup> *Dr. Jaishri Laxmanrao Patil 2021* (n 48).

<sup>174</sup> *ibid* [210].

culled out in *Indra Sawhney* are illustrative, I submit that the post-2019 regime in its present form does not fit in the extraordinary situation, as the SCI's jurisprudence recognises a 'high threshold' for the scope of exceptional circumstances with a focus on social disadvantage and social exclusion.<sup>175</sup>

Such jurisprudential position aligns with the general theory of affirmative action, where 'strong distributive measures' like quotas must not be casually deployed and measures with 'less expressive costs', such as indirect affirmative action measures, must be preferred.<sup>176</sup> Ambedkar's foresight fits squarely in being critical of the approaches of the central and state government that focus on proliferation, often indiscriminate and expansive. Such interventions that ignore the 'non-immersive rule' have the possibility of destroying the entire general principle of equality of opportunity.

### **3.4 Treatment of socio-economic/pure-economic disadvantages in discrimination law—**

There is an underlying tension between socio-economic disadvantage, substantive equality, and affirmative action in theory.<sup>177</sup> The issue of socio-economic disadvantage, as seen from the preceding discussion, is at the heart of the Indian debate.

The complexities arising out of the post-2019 regime relate to the recognition of economically weaker sections as group beneficiaries of reservation quotas, without expressly amending the grounds of discrimination. The 2019-Amendment, I submit, however, is tantamount to recognising economic disadvantage/income-

---

<sup>175</sup> *ibid* [224]-[225].

<sup>176</sup> Khaitan (n 51) 222-223, 238-239.

<sup>177</sup> Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty', 22 *StB L REV* 566 (2011); Fredman, *Discrimination Law* (n 1) ch 5; Sandra Fredman, 'Poverty and Human Rights' In Dapo Akande, et al., *Human Rights and 21st Century Challenges* (OUP 2020).

backwardness/material disadvantage as a ground of discrimination if construed from its *de facto* effect and implicit character.

This section focuses on—the relationship between socio-economic disadvantage and inequality; what role does pure-economic disadvantage play in inequality; and what are the present strategies put forth by various authors to capture socio-economic disadvantage in equality and discrimination law. Indian interventions sum up as nothing but a struggle of advantaged groups for securing protected group membership and the explicit ground must have been ‘upper-caste middle-class men’ to identify the reality behind such intervention, it is argued.

Using the recognition and redistribution framework and the multi-dimensional understanding of substantive equality, attempts have been made to harmonize the complex interaction of status inequality and socio-economic disadvantages.<sup>178</sup> In particular, academic writings withdraw socio-economic equality from the sphere of welfare state policy and identify the necessity to complement status-based inequality with the socio-economic disadvantages.<sup>179</sup> As socio-economic inequality is usually construed as a non-justiciable right, and because substantive conception recognises both the recognition and redistribution injustices, there are ‘redistributive issues within status wrongs and recognition issues within a redistributive framework’.<sup>180</sup>

There are, however, four ways proposed by Fredman to capture the integrated socio-economic inequality in constitutional and legislative provisions— ‘1) poverty as a separate ground for discrimination; 2) judicial review; 3) making socio-economic

---

<sup>178</sup> Sandra Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23 SAf J HumRts 215-219.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid* 221-222.

rights justiciable; 4) positive duties.’<sup>181</sup> The first method is central to the research questions at hand, where Fredman aptly identifies the paradox of substantive equality and anti-discrimination law framework based on status injustices—‘poor white men’ or persons excluded from status groups due to absence of any experiences of historical discrimination are not beneficiaries of discrimination law provisions.<sup>182</sup> This paradox is at play in India where it has led to demands for including pure economic disadvantage as a protected characteristic. Fredman addresses this question, rightly so, similar to affirmative action measures, by rejecting the attempt to collapse status disadvantage in socio-economic disadvantage.<sup>183</sup> Fredman answers this paradox by outlining the limitations of discrimination law in remedying injustices generating out of poverty—

Including poverty or social exclusion as a ground of discrimination would add a 'recognition' dimension to this primary emphasis on redressing economic disadvantage within the welfare state.<sup>184</sup>

Drawing on these insights, introducing poverty as a ground of discrimination cannot be devoid of including the ‘recognition’ dimension. The post-2019 regime’s approach of standalone poverty is problematic at least while relying on a sound theoretical basis.

It is here that the analysis of locating ‘stigma, social exclusion, and structural aspects’ generating out of poverty is resourceful in arguing for poverty as a separate ground of discrimination. Fredman’s multidimensional approach to substantive equality captures these disadvantages emanating out of poverty.<sup>185</sup> The commitment to addressing status inequality includes addressing poverty due to structural discrimination against status groups and also addressing stigma, exclusion, and

---

<sup>181</sup>     ibid 228.

<sup>182</sup>     ibid.

<sup>183</sup>     Text to n 109

<sup>184</sup>     ibid 228-229.

<sup>185</sup>     Fredman, ‘The Potential and Limits’ (n 177) 567.

structural disadvantages faced by advantaged groups due to poverty that may have status disadvantaged-like characteristics.<sup>186</sup> It provides a strong doctrinal basis for including poverty as a protected ground in the equality clauses and statutes.<sup>187</sup> This thesis also takes the normative position towards such an inclusion; however, the Indian developments are not the way to bridge status inequality and poverty discrimination.

The Indian constitutional amendment may seem like the desired move in this direction especially when other jurisdictions across the world have shown reluctance in amending grounds of discrimination to include poverty.<sup>188</sup> Such an attempt may also seem to be in congruence with the demands of ‘poor white men’ or advantaged groups which Fredman rightly analyses may seem to have a claim for the protection of equality guarantees and discrimination law based on their experiences of stigma and exclusion associated with poverty.<sup>189</sup> I submit such is not the case in India. There are two underlying reasons for not conceiving Indian developments as such—1) Underlying aim is to not address ‘stigmatic, exclusionary and structural aspects of poverty,’ 2) inclusiveness of these affirmative action strategies.

The preceding analysis denotes the problems with the post-2019—its discriminatory and narrow conception of understanding poverty. A more granular analysis indicates, in chapter 1, the political intentions behind legislative interventions and the constitutional amendment. It does not address ‘stigmatic and exclusionary’ aspects of poverty through the right to equality. The Indian interventions are

---

186      ibid.

187      ibid.

188      ibid.

189      ibid; *Fredman* (n 178).

exclusively focused and targeted towards what I term as the *advantaged-reservation excluded sections*.<sup>190</sup>

The inclusiveness of anti-poverty measures is particularly relevant here. Right to equality guarantees being used to challenge anti-poverty measures, in the comparative analysis of the jurisprudence of Canada, South Africa, the US, and the UK, indicates how constitutional courts have rejected under-inclusive anti-poverty measures as discriminatory and unconstitutional.<sup>191</sup> It calls for extending such policies without discrimination.<sup>192</sup> This supports my argument in the preceding section, that EWS quotas are discriminatory as they exclude SC/ST/OBC and pre-existing beneficiaries of reservation policy from its ambit and EWS must be enacted in a non-discriminatory manner. The difference, however, in this thesis and other authors is that I argue for using the right to equality guarantee in COI to challenge the inclusiveness of reservation quotas or affirmative action measures as against anti-poverty welfare-oriented measures.<sup>193</sup>

These theoretical insights draw our attention to the question of what is the nature of the socio-economic disadvantage, is it income backwardness or insufficiency in property or merely economic indicators like household income, as understood in the post-2019 regime? Fredman's analysis of the complex nature of economic disadvantage points towards problems in limiting the understanding of poverty to only material deprivations and 'maldistribution of resources' and income poverty.<sup>194</sup> The critique of the artificial poverty line rejects the narrow understanding of poverty as it

---

<sup>190</sup> See ch 1.

<sup>191</sup> *Fredman, The Potential and Limits* (n 177) 584.

<sup>192</sup> *ibid* 584-586.

<sup>193</sup> *ibid*.

<sup>194</sup> *ibid* 578.

limits understanding poverty to certain arbitrary income thresholds.<sup>195</sup> Focusing on the income gap based on relative poverty within poor groups and inequitable distribution of social goods such as ‘housing, medical, educational and other resources’ must also inform the understanding of poverty.<sup>196</sup> The problem with only relying on income as a measure of poverty is that it ignores ‘relative deprivation, absence of agency, stigma and exclusion’ that must inform the policy outlook.<sup>197</sup> Household income, as rightly pointed out by Fredman only reinforces stereotypes against women by assuming that such income is ‘evenly shared between the partners within the household.’<sup>198</sup>

A mix of creamy layer criteria and property ownership is similar to the artificial poverty line and carries limitations of being unable to provide a more holistic understanding of poverty in the Indian scenario. Identifying EWS as protected groups without corresponding protected ground leads to norm indeterminacy as the understanding of ground remains contested.

Indian discrimination law understands poverty discrimination through a multidimensional understanding of substantive equality.<sup>199</sup> Atrey identifies poverty discrimination in India within a substantive equality framework concerning the impact policies have in perpetuating poverty discrimination.<sup>200</sup> Relying on the cases of *State of Maharashtra v Indian Hotel and Restaurants Association*,<sup>201</sup> *Society for Un-aided Private Schools of Rajasthan v Union of India*,<sup>202</sup> *Senior Divisional Commercial*

---

<sup>195</sup> *ibid* 571.

<sup>196</sup> Townsend (1962) in *ibid* 572.

<sup>197</sup> *ibid* 576.

<sup>198</sup> *ibid*.

<sup>199</sup> *Atrey* (n 64) 429.

<sup>200</sup> *ibid* 411-412.

<sup>201</sup> AIR 2013 SC 2582.

<sup>202</sup> (n 7).

*Manager v SCR Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association*,<sup>203</sup> Atrey recognizes a common thread of intersectional poverty recognition, where courts construed the ‘economic consequences’ along with other deprivations and protected grounds in the general equality guarantee.<sup>204</sup>

For the present discussion the *Society for Un-aided Private Schools* is particularly significant, where through the RTE Act, the central government extended 25% reservation to ‘disadvantage group’ and ‘weaker group’ in primary school.<sup>205</sup> Here the difference in the definition of ‘disadvantage’ and ‘weaker’ group entails the latter identified based on annual household income and the former identifying beneficiaries as protected groups.<sup>206</sup> A key takeaway from this approach of the central government is that doesn’t create ‘reservation opposites’ and extended the reservations to both the ‘disadvantage’ and ‘weaker group’ on a non-discrimination basis.<sup>207</sup>

The court conceived poverty broadly by considering the deprivations associated with the economic manifestations of poverty, the major deprivation being a hindrance in ‘accessing the right to free and compulsory primary education guaranteed under Article 21A.’<sup>208</sup> In the *RTE* decision, the SCI focused not only on economic deprivations arising out of poverty ‘but also other disadvantages like illiteracy and lack of education, especially in the context of young children, via the equality guarantee.’<sup>209</sup> The Indian jurisprudence is thus guided by ‘intersectional deprivations of

---

<sup>203</sup> 2016 [3] SCC 582.

<sup>204</sup> such as ‘social exclusion, illiteracy, prostitution, malnutrition, homelessness,’ etc. Atrey (n 64) 436.

<sup>205</sup> Sections 2(d) (e) and Section 12.

<sup>206</sup> *ibid.*

<sup>207</sup> Section 1.3.

<sup>208</sup> *Atrey* (n 64) 434.

<sup>209</sup> *ibid.*

redistribution, recognition, transformation, and participation, associated with poverty and their occurrence within status groups like women, children and those with minimal employment opportunities.’<sup>210</sup>

Drawing on these insights, Indian parliamentary and legislative interventions did not rely on such jurisprudential developments that conceive poverty discrimination as a layered concept. The legislations have instead adopted an income fixated and exclusionary conception, discriminatory based on caste and gender. It, therefore, misses understanding intersectional poverty in constitutional policy, when SCI’s interpretation points towards the potential of equality guarantee and non-discrimination recognizing and redressing the intersectional nature of poverty.<sup>211</sup>

This contrast between the SCI’s jurisprudence and the 2019-Amendment, importantly, helps identify various forces that amend, change and drastically riddle the institutional aims. In what is a lost opportunity, strenuous demands by political groups for backwardness recognition give rise to knee-jerk constitutional and legal policies that lack sound theoretical vision and are instead designed to perpetuate discrimination against protected groups. It produces constitutional resistance in the otherwise transformative and progressive potential of equality and non-discrimination guarantees. An intersectional and inclusive conceptualisation of poverty would have been a better approach towards poverty discrimination in India. Such constitutional policies end up becoming the foundations for arguments against pre-existing reservation policies in India, as seen in the recent obiters of the SCI.<sup>212</sup>

---

<sup>210</sup> *ibid* 437.

<sup>211</sup> *ibid* 438.

<sup>212</sup> When It Comes to Reservations, the Supreme Court Needs to Change Its Approach (The Wire, 01 April 2021) <<https://thewire.in/law/supreme-court-caste-reservation-approach-change-social-justice>> accessed 15 May 2021.

### 3.5 Sociological meaning of class

The foregoing analysis indicates various forms of backwardness questions at play in India. Sociological insights on the meaning of class help disentangling what is the nature of the class, the disadvantage associated with class, and problems with Indian conceptualisation.

Central to the sociological understanding of class are the accounts of Marxist theory and Weberian conception of ‘class’ which at the outset reject the ‘simple gradational accounts of class in which class is itself directly identified within inequalities in income.’<sup>213</sup> Even when both their conceptions of ‘class relations’ are anchored in social relations originating out of economic resources, the understanding of ‘class exploitation’ and ‘life chances’ involves a more complex phenomenon.<sup>214</sup> The inequality in accessing the resources, especially property ownership, is what adds to the material inequality of the exploited class.<sup>215</sup> For both the Marxist and Weberian understanding of class analysis, the core class relations are between the ‘owners of the means of production and owners of the labour-power,’ and it is the former that economically exploits and appropriates the latter.<sup>216</sup>

The class itself cannot be assumed to be characterised only by income disparities or low income as such and the focus is on ownership of modes of

---

<sup>213</sup> Jens Beckert and Milan Zafirovski (eds.), *International Encyclopaedia of Economic Sociology* (Taylor & Francis Group 2005) 63.

<sup>214</sup> *ibid.*

<sup>215</sup> *ibid* 61, 63-64.

<sup>216</sup> *ibid* 63.

production.<sup>217</sup> Marxist thought refutes the simple understanding of class as ‘income groupings’ as it has the possibility of giving rise to an endless plurality of classes.<sup>218</sup>

Market determined life chances as the basis for understanding class is core to Weberian idea of ‘opportunities’ which are defined by the ownership of resources.<sup>219</sup> Weber develops upon Marx’s work and provides a more in-depth understanding of the meaning and conception of class in terms of instrumental rationality which is embodied in the society and which generates such life chances or the bargaining capacity within the societal exchange.<sup>220</sup> Education is an important method of identifying two sets of classes— ‘acquisition classes’ vs. ‘ownership classes’ and such conception of social class indicates the need to avoid locating the understanding of class predominantly based only on the economic basis of the ownership of means of production.<sup>221</sup>

A key takeaway from this understanding of class and status groups is that the question of any versions of ‘income groupings’ in identifying class must be rejected. Indian scenario benefits from these theories, where identifying disadvantaged groups based on purely economic, income backwardness only through ‘income groupings’ misses out on the multidimensional understanding of class<sup>222</sup> which is crucial from a sociological sense to understand disadvantaged groups.

Furthermore, the distinction between property ownership and income is very useful, as the 2019-Amendment uses a mix of both parameters. The more profound inequality is often embedded in property ownership, which the Indian policy does

---

217     ibid.

218     Karl Marx, and Jon Elster, *Karl Marx: A Reader* (Cambridge Core 1986).

219     Beckert (n 213) 63-64.

220     ibid 65.

221     Sam Whimster (Ed.), *The Essential Weber: A Reader* (Routledge 2004) 176-181.

222     ibid.

consider but in a paradox manner. In Marxist conception, ‘the proletarian is without property.’<sup>223</sup> On the other hand, the post-2019 regime categorically recognises a high family property threshold to demarcate EWS.

The focus, I submit, must have been rather on first identifying landless persons or labourers who do not have access to the property, rather than carrying out an inverted progression exercise of setting up higher limits of income and property threshold. Such measures imply that persons closer to the artificial income and property line have more access to the same quota than the ones who are landless and in extreme poverty.<sup>224</sup> Classification must have been first to provide reservation to landless SC/ST/OBC/Disabled poor women, and other status in a prioritarian manner.

## **Conclusion**

The preceding analysis confirms that substantive equality principle and affirmative action measures as understood in Indian law and general theory reject collapsing of status disadvantage into economic disadvantage. Such measures were never historically conceptualised to address the economic disadvantage claims of advantaged groups in India. There are eight key takeaways from the analysis and critique in this chapter.

First, Indian constitutional law expressly recognises multidimensional understanding of substantive equality and a disadvantage-centric conception of reservations, and not communal quotas. Such conceptions expressly resist addressing only economic disadvantages through the discrimination law framework, where experiences must also be associated with stigma, social exclusion, lack of participation etc. Theoretical accounts support the primacy given to the status-based disadvantages

---

<sup>223</sup> ‘Class consciousness and Class Struggle’ in *Marx* (n 218) 234.

<sup>224</sup> Text to (n 117).

in the pre-2019 regime in India, where without experiences of historical injustices and status-based disadvantages such benefits were not extended to groups. The 2019-Amendment and state measures conflict with this settled jurisprudential understanding.

Second, in general theory, a multidimensional understanding of substantive equality is more convincing in its approach to explaining the nature of injustice and disadvantage and helps understand Indian developments as ‘pure collectivities’ based on redistributive injustices or ‘political-economic differentiation’ requiring only redistributive remedies to tackle such injustices. Academic writings also concur with addressing economic disadvantage through general welfare schemes and legal rights. General theory helps deepen the understanding of Indian substantive equality. Affirmative action policies that solely encompass maldistribution of resources based on purely economic criteria of group identification find no place in equality law.

Third, reservation policies as remedial action was envisaged to address historical discrimination, and Indian law expressly rejected communal quotas for all classes of citizens by limiting the scope to only disadvantaged groups. Indian affirmative action pre-2019 aligns with a general theoretical understanding of the aims and scope of affirmative action—It is a measure to *benefit* groups with protected characteristics (protected groups) based on their membership of disadvantaged groups to *eliminate* relative group disadvantage redressing past disadvantage, enable participation, addresses stigma and prejudice based on status, and enable structural change. 2019-Amendment and state measures defeat the purpose of such policies as they benefit the upper-castes and the most advantaged groups within the general category and do not aim to reduce abiding, pervasive, and substantial relative group disadvantage.

Fourth, EWS is a protected group within the general category/unreserved category defined without a corresponding protected ground. 2019-Amendment fails to include variations of—class/economic disadvantage, property ownership, material backwardness as a ground beside caste, race, religion, sex, etc. and therefore the approach is incoherent and ground insensitive. The pre-2019 regime considered economic disadvantage as an effect of social and educational disadvantage. The post-2019 regime fails to contemplate that poverty is more severely reflected in status groups than advantaged groups. There is also the problem of indefinite group characteristics based on the mutable design of EWS, as persons can lose or gain their group membership due to sudden economic loss or profit-making. EWS is based on fluid and fluctuating group identification advancing possibilities of continuous oscillation. State measures wrongly attempt at characterizing upper-castes as protected groups using unsuitable protected grounds. EWS quota is tantamount to recognising economic disadvantage/income-backwardness/material disadvantage as a ground of discrimination. However, given its *de facto* effect, such ground of discrimination would entail ‘economic disadvantage of upper-caste, middle-class, men.’

Fifth, reservations which benefit dominant upper-castes are paradigmatically discriminatory and amount to collateral discrimination as they burden upper-castes-cognate groups without an underlying aim of addressing relative group disadvantage. EWS quota has an implicit caste, religion, and gender discriminatory character. Thus, they cannot be designated as affirmative action measures rooted in substantive equality.

Sixth, doctrinal limitations on the extent of quotas or ‘non-immersive rule’ leads to a balance between it and the general equality guarantee. Quotas cannot extend to the majority of available seats, as such an exercise will vitiate the general rule of

equality of opportunity. 2019-Amendment and state measures without any doctrinal justification violate such a rule expansively.

Seventh, conceptually the paradox of ‘poor-white men’ is at play, in the specific Indian context, it applies to upper-castes who are not members of historically disadvantaged groups. Harmonising socio-economic disadvantage within the discrimination law framework demands adding a recognition dimension to poverty discrimination. If poverty is to be included as a separate ground of discrimination, such an exercise must locate stigma, exclusion, and structural discrimination generating out of poverty, as poverty discrimination may have status disadvantaged-like characteristics. The Indian approach, however, cannot be categorised as a suitable way of recognising poverty as a ground of discrimination as it does not address ‘stigmatic, exclusionary, and structural’ aspects of poverty and is under-inclusive in its design. Such measures only perpetuate caste and gender-based discrimination expressly prohibited by COI.

Eighth, poverty discrimination is understood through multidimensional substantive equality in Indian discrimination law. It is intersectional, as economic disadvantage is construed along with other status deprivations associated with it and along with its severe presence in status groups. The recent Indian interventions do not rely on an intersectional understanding of poverty and instead adopt a discriminatory and narrow conception of economic disadvantage which is upper-caste, gender, income and property fixated. Furthermore, a superficial income-based definition of class is rejected in leading sociological accounts. Property ownership and Weberian multi-dimensional understanding of class signify a better conceptual approach. The 2019-Amendment design does evoke property ownership, however, in a paradoxical way. In

an inverted progression manner, it sets up higher limits of property threshold, whereas the focus must have been to prioritise landless poor.

Prospecting the impact of the policy on social justice, it is therefore argued that casual deployment of affirmative action policy as a welfare measure for poverty alleviation and for improving the socio-economic status of upper castes creates has created an alternative vision of group preferences and reparative entitlements. Thus, the distinction in the constitutional scheme has collapsed changing characteristics of measures to now accommodate all positions of unfairness in the society under the frame of affirmative action. In the long-term, such developments may lead to withering down and even displacement of the core foundation of reservation policy to a general system of communal quotas and group allotments for all castes and classes in India based on income poverty.

## CONCLUSION

The constitutional imagination of affirmative action as shaped by the Indian parliament in the post-2019 regime and state interventions for upper-caste reservation is restricted by constitutional limits of the extent of quotas and criteria of group classification. The lack of engagement with jurisprudential developments, and theoretical insights by the legislature has paved way for vitiating the constitutional identity—a progressive and transformative one—through a direct amendment to the understanding of substantive equality in Indian constitutional law, by a regressive one. The recent Indian developments are not affirmative action measures rooted in substantive equality but amount to collateral discrimination, they instead violate the principle. They are foundational to directing constitutional vision towards communal quotas, withering down existing historical injustices-based understanding of reservations.

Furthermore, the present conception of economic disadvantage is discriminatory, partisan in nature, and exclusive rendering intersectional disadvantage invisible. The 2019-regime is illegitimate as it ignores the settled constitutional jurisprudence on determining backwardness and establishes the ground for a pan-India communal quota determined exclusively based on economic disadvantage. Theoretical insights too refine the Indian understanding of key themes in discrimination law, and as a key takeaway emphasises the limited role discrimination law can and should play in addressing socio-economic disadvantage.

Such interventions, I submit, due to the oscillation of the issue between the legislature and judiciary gives rise to ‘perpetuity’ of backwardness recognition claims. The demands manifested through legislative and executive interventions do not have

any potential to survive constitutional test due to their inconsistency with constitutional jurisprudence. The states cannot, in perpetuity, engage in repeatedly granting reservation benefits to upper castes, to momentarily pacify public agitations, only for such interventions to be held unconstitutional. On the contrary the career of state policy thus far shows favourable inclinations towards making such repeated attempts.

The question of poverty discrimination within existing status groups in India remains unanswered and new constitutional policy presumably seeks to address it through the existing reservation policy, which has a limited reach in terms of benefits. Addressing socio-economic disadvantage faced by existing status groups outside the fold of affirmative action has the potential in targeting status disadvantage at a deeper level and is an important foundation for future research projects.

# BIBLIOGRAPHY

## Journal Articles

- Anderson S, et al, 'Distress in Marathaland' EPW 2016 Vol 51.
- Atrey S, 'The Intersectional Case of Poverty in Discrimination Law', 18 Human Rights Law Review 411.
- Barnard C and Hepple B, 'Substantive Equality' 59 Cam Law J 562.
- Collins H, 'Discrimination, Equality and Social Inclusion' (2003) 66 Mod L Rev 16.
- Collins H, 'Social Inclusion: A Better Approach to Equality Issues' (2005) 14 Transnat'l L & Contemp Probs 89.
- Darity W, et al, 'Who Is Eligible? Should Affirmative Action be Group- or Class-Based?' (New York) 70 AJES 238.
- De Haan A and Thorat S, 'Addressing Group Inequalities: Social Policies in Emerging Economies' 24 EJDR 105.
- Deshpande A and Ramachandran, 'The 10% Quota Is Caste Still an Indicator of Backwardness?' EPW 2019 Vol. 54, Issue No. 13.
- Deshpande A and Ramachandran, 'Dominant or Backward? Political Economy of the Demand for Quotas by Jats, Patels and Marathas' EPW 2017 Vol 52, Issue No 19.
- Deshpande S and Yadav Y, 'Redesigning Affirmative Action: Castes and Benefits in Higher Education' EPW 2006 vol. 41(24), 2419–2424

- Deshpande S, 'Reservation and the Republic: One Constitution, Two Amendments and Seven Decades' *Social Change*, 49(3) 512–518, 2019, 516
- Fredman S, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *S Afr J on Hum Rts* 214.
- — 'Engendering Socio-Economic Rights' (2009) 25 *S Afr J on Hum Rts* 410.
- — 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 *Stellenbosch L Rev* 566.
- — 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' (2016) 14 *Int'l J of Const L* 747.
- — 'Substantive equality revisited' 2016 14 *IJCL* 712.
- — 'Women and Poverty - A Human Rights Approach' (2016) 24 *Afr J Int'l & Comp L* 494.
- — 'Reimagining power relations: hierarchies of disadvantage and affirmative action' 2017 *Acta Juridica*. Khaitan T, 'Transcending Reservations: A Paradigm Shift in the Debate on Equality' 43 *Economic and Political Weekly* 8
- Kumar AP, 'Revisiting the Rationale for Reservations Claims of 'Middle Castes'' *EPW* 2016 Vol 47
- Kumar M 'Reservations for Marathas in Maharashtra' *EPW* 2009 Vol 14
- Kumar R, 'Stooping to Conquer Jats and Reservations in Haryana' *EPW* 2016 Vol 16
- Kumar S, 'On the Question of Backwardness', *EPW* 2016 Vol 1
- MacKinnon CA, 'Substantive Equality: A Perspective' (2011) 96 *Minn L Rev* 1

- —, ‘Substantive equality revisited: A rejoinder to Sandra Fredman’ 2016 15 IJCL 1174.
- —, ‘Substantive equality revisited: A reply to Sandra Fredman’ 2016 14 IJCL 739 745
- Mubangizi JC and Mubangizi BC, ‘Poverty, human rights law and socio-economic realities in South Africa’ 22 Development southern Africa (Sandton, South Africa) 277.
- Sabbagh D, ‘The Rise of Indirect Affirmative Action: Converging Strategies for Promoting "Diversity" in Selective Institutions of Higher Education in the United States and France’ (2011) 63 World Politics 470.
- Singh M, ‘Reservation amidst the Din of ‘Development’’ EPW 2016 Vol 38.
- Srinivas MN, ‘Caste in Modern India’, JAS (1957)16(4), 529–548.

### **Books**

- Ambedkar B.R., *Annihilation of Caste*
- Beckert J and Zafirovski M (eds.), *International Encyclopaedia of Economic Sociology* (Taylor & Francis Group 2005) 63.
- Chowdhary S, et al, *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)
- Dudley-Jenkins L, *Identity and identification in India : defining the disadvantaged* (RoutledgeCurzon 2002)

- Fraser N, 'From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age' in Nancy Fraser and Kevin Olson, *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (Verso 2008).
- Fredman S, 'Poverty and Human Rights' In Dapo Akande, Jaakko Kuosmanen, Helen McDermott and D Roser, *Human Rights and 21st Century Challenges* (OUP 2020).
- Fredman S, *Discrimination Law* (2nd edn, OUP 2011) Chapter 1, 8.
- Galanter M and Dhavan R, *Law and Society in Modern India* (OUP 1989);
- Galanter M, *Competing Equalities: Law and the Backward Classes in India* (OUP 1991).
- Hasan Z, et al, *India's living constitution: ideas, practices, controversies* (Anthem 2005)
- Khaitan T, *A Theory of Discrimination Law* (OUP 2016) Chapter 3.
- Marx K and Elster J, *Karl Marx : A Reader* (Cambridge Core, Cambridge, 1986).
- Whimster S (Ed.), *The Essential Weber: A Reader* (Routledge 2004) 176-181.

#### **Websites/online resources**

- Cabinet Decision  
[https://maharashtra.gov.in/Site/upload/CabinetDecision/English/23-12-2020%20Cabinet%20Decision%20\(Meeting%20No.49\).pdf](https://maharashtra.gov.in/Site/upload/CabinetDecision/English/23-12-2020%20Cabinet%20Decision%20(Meeting%20No.49).pdf) accessed 28 December 2020.

- Deshpande A and Ramachandran, ‘Jats, Marathas, and Patels Want Quotas, But Do They Need Them?’ <<https://www.epw.in/engage/article/jats-patels-and-marathas-want-quotas-but-do-they-deserve-them>>
- Gangan SP, ‘Maharashtra govt approves EWS benefits for Marathas’ *Hindustan Times* (Mumbai, 24 December 2020).
- Jodhka S, ‘Caste and Power in the Lands of Agri-Culture Revisiting Rural North-West India’ <[https://sas-space.sas.ac.uk/5649/1/AHRC\\_1\\_Jodhka\\_Northwest\\_Caste\\_and\\_Rural\\_Power\\_Shimla.pdf](https://sas-space.sas.ac.uk/5649/1/AHRC_1_Jodhka_Northwest_Caste_and_Rural_Power_Shimla.pdf)> accessed 23 December 2020.
- Joshi Neha, ‘Maharashtra government opens EWS quota to SEBC in view of Supreme Court stay on SEBC law’ (25 December 2020) <<https://www.barandbench.com/news/maharashtra-government-grants-ews-benefits-maratha-community>> accessed 28 December 2020.
- Khalid S, ‘Q&A: Demanding affirmative action in India’s Gujarat’ <<https://www.aljazeera.com/economy/2015/9/19/qa-demanding-affirmative-action-in-indias-gujarat>> accessed 23 December 2020.
- Khosla M, ‘Modi government’s economic quota is unconstitutional’ (11 January 2019) <<https://theprint.in/opinion/modi-governments-economic-quota-is-unconstitutional/176322/>> accessed 26 May 2021.
- Mahaprashasta A, ‘In North Gujarat's Villages, Patidar Resentment Towards BJP Is Fast Altering Social Dynamics’ <<https://thewire.in/politics/patidar-bjp-rural-gujarat-assembly-polls>> accessed 23 December 2020.

- PTI 'Rs 8 lakh income cap only requirement for EWS quota in Gujarat' (23 January 2019) <[https://www.business-standard.com/article/pti-stories/rs-8-lakh-income-cap-only-requirement-for-ews-quota-in-gujarat-119012301511\\_1.html](https://www.business-standard.com/article/pti-stories/rs-8-lakh-income-cap-only-requirement-for-ews-quota-in-gujarat-119012301511_1.html)> accessed 23 December 2020.
- Roy R, 'All Reservations May Go And Only EWS May Remain; But That's A Matter Of Policy' : Supreme Court In Maratha Quota Case'(25 March 2021) <<https://www.livelaw.in/top-stories/all-reservations-may-go-only-ews-may-remain-matter-policy-supreme-court-maratha-quota-case-171750>> accessed 28 April 2021.
- When It Comes To Reservations, the Supreme Court Needs To Change Its Approach (The Wire, 01 April 2021) <<https://thewire.in/law/supreme-court-caste-reservation-approach-change-social-justice>> accessed 15 May 2021.
- World Bank, 'Employment in agriculture (% of total employment)' <<https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>> accessed 16 March 2021.; Annual Report 2018-19 <[https://agricoop.nic.in/sites/default/files/AR\\_2018-19\\_Final\\_for\\_Print.pdf](https://agricoop.nic.in/sites/default/files/AR_2018-19_Final_for_Print.pdf)> accessed 16 March 2021.