

# Policy Watch

*No. 9*



**Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?**

K. Ashok Vardhan Shetty



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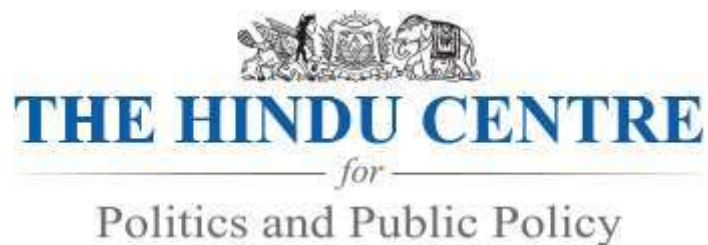
**Cover Photo:** Jat community members staging a protest during a one-day dharma demanding reservation in jobs and educational institutions, at Jantar Mantar in New Delhi on December 27, 2018. Photo: Shiv Kumar Pushpakar – The Hindu

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# Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?

K. Ashok Vardhan Shetty



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## ABSTRACT

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**T**he Constitution (103<sup>rd</sup> Amendment) Act, 2019 has empowered the state to provide up to 10 per cent reservation in education and public employment for “economically weaker sections” (EWS) of citizens *other than* the Scheduled Castes (SC), the Scheduled Tribes (ST), and the non-creamy layer of the Other Backward Classes (OBC-NCL). This will be over and above the existing scheme of reservations and increases the total reservations to 59.50 per cent.

The fraught legal history of reservations in India shows that from 1951 onwards whenever the Supreme Court gave an adverse ruling on some aspect of reservations in education or public employment, the Parliament responded by amending the Constitution to reverse or overcome the inconvenient judicial pronouncements. The 103<sup>rd</sup> Amendment is the latest step in this direction aimed at overcoming the Supreme Court’s rulings that (1) economic backwardness cannot be sole criterion for reservation and (2) the total reservations should not be greater than 50 per cent.

Even a Constitutional amendment can be struck down by the Supreme Court if it has the effect of destroying or abrogating the ‘basic structure’ of the Constitution. So, the only possible legal challenge to the validity of the 103<sup>rd</sup> Amendment is a ‘basic structure challenge’.

In this Policy Watch, **K. Ashok Vardhan Shetty**, retired Indian Administrative Service (IAS) officer, traces the constitutional and legislative history of reservations in India, discusses past ‘basic structure’ challenges relating to reservations, highlights the legal infirmities in the 103<sup>rd</sup> Amendment, looks at the different scenarios available before the Supreme Court, and analyses if a successful ‘basic structure’ challenge can be made out in this case. All these years, the “50 per cent ceiling” rule was the only thing that had stood in the way of the demands for greater reservation from various pressure groups. Once this *Lakshman Rekha* is crossed, there is no going back and we may be letting the genie of proportional representation out of the bottle.

## I. INTRODUCTION

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“We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty”.

**Dr B.R. Ambedkar<sup>1</sup>**

**T**he Constitution (103<sup>rd</sup> Amendment) Act, 2019<sup>2</sup>, which came into effect on January 14, 2019, has amended Articles 15 and 16 of the Constitution by adding two new clauses which empower the state to provide a maximum of 10 per cent reservation for “economically weaker sections” (EWS) of citizens *other than* the Scheduled Castes (SC), the Scheduled Tribes (ST) and the non-creamy layer of the Other Backward Classes (OBC-NCL).

The new clause (6) of Article 15 allows the state to take any “special provision” including reservation in admissions to educational institutions, whether aided or unaided, other than minority educational institutions under Article 30(1). The new clause (6) of Article 16 allows reservations in appointments or posts under the state.

The reservation for the new category will be over and above the existing scheme of 15 per cent, 7.50 per cent and 27 per cent reservations respectively for the SC, ST and OBC-NCL thus bringing the total reservations to 59.50 per cent.

An ‘Explanation’ states that EWS shall be such as may be notified by the State from time to time based on family income and other indicators of economic disadvantage.

In its Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019, the Ministry of Social Justice and Empowerment, Government of India has stipulated that only persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in

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<sup>1</sup> Ambedkar, B.R. 1949. “[Speech at The Constituent Assembly of India](https://www.inc.in/en/media/speech/speech-at-the-constituent-assembly-of-india)”, *Indian National Congress*, November 25. [https://www.inc.in/en/media/speech/speech-at-the-constituent-assembly-of-india].

<sup>2</sup> Ministry of Law and Justice. 2019. “[The Constitution \(103<sup>rd</sup> Amendment\) Act, 2019](http://egazette.nic.in/WriteReadData/2019/195175.pdf)”, January 12. [http://egazette.nic.in/WriteReadData/2019/195175.pdf].

notified Municipalities, or residential plots less than 200 sq. yards in areas other than notified Municipalities, are to be identified as EWS for the benefit of reservation.

It is true that the Supreme Court has repeatedly held that economic backwardness cannot be the sole criterion for reservation, and that reservation only provides a right of access for the under-represented classes and is not an anti-poverty programme. But those Supreme Court decisions involved testing a legislation or an executive order against the Constitutional provisions as they existed then. They stand negated now that we have a Constitution amendment validating economic backwardness as the sole criterion for a new category of reservation.

It is also true that the Supreme Court has consistently ruled that for reservation to be reasonable and not defeat or nullify the main right to equality, the total reservations should not be greater than 50 per cent. The Court has emphasised that this is not a mere rule of prudence but a binding rule. But this '50 per cent ceiling' stands effectively breached by the latest Constitution amendment.

The fraught legal history of reservations in India shows that from 1951 onwards whenever the Supreme Court gave an adverse ruling on some aspect of reservations in education or public employment, the Parliament responded by amending the Constitution to reverse or overcome the inconvenient judicial pronouncements. The Constitution (103<sup>rd</sup> Amendment) Act, 2019, is the latest step in this direction to overcome the Supreme Court's bar on economic criteria for backwardness and the 50 per cent ceiling on total reservations.

The only possible legal challenge to the validity of the 103<sup>rd</sup> Amendment is a 'basic structure challenge'. In the landmark case of *Kesavananda Bharati vs State of Kerala* (1973)<sup>3</sup>, the Supreme Court ruled that the Parliament's power to amend the Constitution under Article 368 is not absolute and even a Constitutional amendment can be struck down if it has the effect of destroying or abrogating the 'basic structure' of the Constitution. The phrase is not to be found in the Constitution and is a judicial invention. The "doctrine of basic structure"<sup>4</sup>, also known

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<sup>3</sup> **Supreme Court of India. 1973.** ['Kesavananda Bharati ... vs State Of Kerala And Anr'](https://indiankanoon.org/doc/257876/), April 24. [https://indiankanoon.org/doc/257876/]

<sup>4</sup> The basic structure doctrine is borrowed from German Constitutional law. Professor Dietrich Conrad of South Asia Institute of the University of Heidelberg, Germany had delivered a lecture on "*Implied Limitation of the Amending Power*" in the Faculty of Law, Banaras Hindu University, in February 1965. The Supreme Court hesitated to accept this doctrine in "*I.C. Golaknath v. State of Punjab*" (1967). Later the Court adopted it by a

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as the “doctrine of constitutional identity”, holds that there are certain systematic and structural principles such as the democratic form of government, republican form of government, federalism, equality, freedom, secularism, independence of the judiciary, power of judicial review and so on that form the core or the essence of the Constitution and give it a particular ‘identity’. They are beyond the words of any particular Article, and underpin and connect several related Articles of the Constitution. They are part of the Constitutional law even if they are not expressly stated in the form of rules. They are beyond the amending power of the Parliament because amending them would amount to destroying the very identity of the Constitution.

In *Indira Nehru Gandhi v. Raj Narain* (1975)<sup>5</sup>, the Supreme Court ruled that the claim of any particular feature of the Constitution to be a ‘basic feature’ would be determined by the Court in each case that comes before it. So far, a multitude of features have been declared ‘basic’ by different Judges, individually, in different cases. However, this lack of unanimity has not stood in the way of the Supreme Court applying the basic structure doctrine in several cases.

It is pertinent to note that, out of the 72 Constitution Amendment Acts enacted since 1973 excluding the latest one, the Supreme Court has invoked the “basic structure” doctrine to strike down only seven of them—mostly in cases where the power of judicial review or the independence of the judiciary was threatened by a Constitutional amendment. While in six of these cases, only some parts of the Amendment Acts were struck down, the first time an entire Amendment Act was struck down was the recent Constitution (99<sup>th</sup> Amendment) Act, 2015 relating to the replacement of the Collegium system by the National Judicial Appointments Commission. The Court has otherwise been loath to invalidate Constitutional amendments, especially those relating to reservations. For the legal challenge against the 103<sup>rd</sup> Amendment

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wafer-thin margin of 7 to 6 in “*Kesavananda Bharati v. State of Kerala*” (1973). As Justice H.R.Khanna put it, “The word ‘amendment’ postulates that the old Constitution survives without loss of its identity despite the changes, and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form.” The basic structure doctrine was reaffirmed in a series of subsequent judgments of the Supreme Court. It ensured a system of checks and balances between Parliament and Judiciary - while conceding to Parliament the power to amend the Constitution to a large extent, the Supreme Court reserved to itself the power of reviewing the amendment and striking it down if it violated the basic structure.

<sup>5</sup> **Supreme Court of India. 1975.** “[Indira Nehru Gandhi vs Shri Raj Narain & Anr](https://indiankanoon.org/doc/936707/)”, November 7. [https://indiankanoon.org/doc/936707/].



to succeed, one must therefore show that it has mangled the right to equality, which is part of the basic structure of the Constitution, beyond recognition.

## II. RESERVATION - A MISUNDERSTOOD NECESSITY

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“The equality principle does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. . . To treat unequal matters differently according to their inequality is not only permitted but *also required*.”

**Judge Kotaro Tanaka**, International Court of Justice,  
in *South West Africa (Liberia v. South Africa)* (1966)<sup>6</sup>

**A**s a concept, ‘equality’ seems simple but it is, in fact, devilishly complicated. Jurists have distinguished between two conceptions of equality – ‘formal equality’ and ‘substantive equality’. An example of formal equality is a teacher spending the exact same amount of time on each student in a classroom. But if the teacher were to devote different amounts of time to different groups of students based on their perceived needs, it is an example of substantive equality.

Whereas formal equality expects the state to treat everyone as equal before the law, substantive equality recognises the fact that there is equality only among equals and to treat unequals equally is to perpetuate inequality. If, due to grave historic injustices, certain classes of people have been placed at a significant disadvantage, then the state may legitimately take positive action to remedy that situation until such time that the former victims can enlarge their capabilities and manage without the special protections. In *State of Kerala v. N.M. Thomas*(1975)<sup>7</sup>, the Supreme Court quoted a hypothetical example given by the English philosopher Bernard Williams to illustrate the point that mere formal equality is insufficient to eliminate entrenched discrimination or remove the barriers to equal competition:

"Suppose that in a certain society great prestige is attached to membership of a warrior class, the duties of which require great physical strength. This class has in the past been recruited from certain wealthy families only. But egalitarian reformers achieve a change in the rules, by which warriors are recruited from all sections of the society, on the

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<sup>6</sup> **jusmundi.com**. nd. “[dissenting opinion of judge Tanaka](https://jusmundi.com/en/document/opinion/en-south-west-africa-liberia-v-south-africa-dissenting-opinion-of-judge-tanaka-monday-18th-july-1966#opinion_1410)”.  
[[https://jusmundi.com/en/document/opinion/en-south-west-africa-liberia-v-south-africa-dissenting-opinion-of-judge-tanaka-monday-18th-july-1966#opinion\\_1410](https://jusmundi.com/en/document/opinion/en-south-west-africa-liberia-v-south-africa-dissenting-opinion-of-judge-tanaka-monday-18th-july-1966#opinion_1410)].

<sup>7</sup> **Supreme Court of India**. 1975. “[State Of Kerala & Anr vs N. M. Thomas & Ors](https://indiankanoon.org/doc/1130169/)”, September 19.  
[<https://indiankanoon.org/doc/1130169/>].

result of a suitable competition. The effect of this, however, is that the wealthy families still provide virtually all the warriors because the rest of the populace is so undernourished by reason of poverty that their physical strength is inferior to that of the wealthy and well nourished. The reformers protest that equality of opportunity has not really been achieved. The wealthy reply that in fact it has, and that the poor now have the opportunity of becoming warriors - it is just bad luck that their characteristics are such that they do not pass the test. "We are not", they might say, "excluding anyone for being poor; we exclude people for being weak, and it is unfortunate that those who are poor are also weak."

A long legacy of unequal treatment may, therefore, justify reasonable classification and compensatory discrimination (or reservation) in favour of the disadvantaged classes in order to bring about a level-playing field. In other words, if formal equality fosters 'equality of opportunity', the goal of substantive equality is 'equality of results'. Substantive equality permeates international human rights law and the national laws of all democratic countries.

### **The Constitution and group inequalities**

In India, owing to the pernicious caste system, large sections of people had been historically stigmatised and subjected to institutionalised discrimination on account of their birth while a few socially and educationally advanced castes had cornered a disproportionate share of higher education and public employment. They could do this not because they were innately more meritorious – after all, science has shown that no one class of humans is genetically superior to any others – but because of their accumulated social privileges and connections and the head start of over a hundred years that they enjoyed. The Princely States of Kolhapur (1902), Mysore (1921) and Travancore (1936), the Madras Presidency (1921) and the Bombay Presidency (1931) took the lead in implementing reservations for SC, ST, and backward classes even before Independence.

The Constitution of India set out to redress the historic injustices and correct the manifest imbalance in matters of higher education and public employment by delineating an "equality code"<sup>8</sup>. Article 14 guarantees equality before the law and the equal protection of law for all

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<sup>8</sup> Articles 14 to 18 of the Constitution of India are shown under the sub-heading "Right to Equality". Of interest to us here are Articles 14 to 16 as they existed *prior to the 103<sup>rd</sup> Amendment*.

**Article 14. Equality before law.**—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

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persons. Article 15(1) prohibits discrimination of any citizen on grounds only of religion, race, caste, sex, or place of birth. Article 16(1) guarantees equality of opportunity for all citizens in matters of public employment. A related provision is Article 29(2) which prohibits denial of admission into any state-maintained or state -aided educational institution on grounds only of

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**Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—**

- 1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- 2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- 3) Nothing in this article shall prevent the State from making any special provision for women and children.
- 4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
- 5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

**Article 16. Equality of opportunity in matters of public employment.—**

- 1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- 2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
- 3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
- 4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.  
(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.  
(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.
- 5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

religion, race, caste or language. These Articles, which are individual-centric, guarantee formal equality. They express a distaste for classifications based on certain markers of identity.

On the other hand, clauses (3) to (5) of Article 15 and of Article 16, and Article 46 (which is part of the legally unenforceable Directive Principles of State Policy), are intended to promote substantive equality. They provide the basic framework for positive discrimination in favour of the grossly under-represented and pathetically neglected sections of the society. For instance, Article 15(4) provides for ‘special provision’ (which includes reservation) in admissions to educational institutions for “socially and educationally backward classes and for Scheduled Castes and Scheduled Tribes” while Article 16(4) provides for reservation in public employment for “backward classes” which are “not adequately represented in the services under the State”. [The term “backward classes” in Article 16(4) includes SC and ST]. Article 46 urges the State to promote the educational and economic interests of the weaker sections, especially SC and ST, and protect them from social injustice and all forms of exploitation. All these Articles are group-centric because *in so far as individuals had suffered discrimination historically, it was because of their membership of certain groups* – as women, as lower castes and so on. There are two criticisms of such a group-based approach for reservations:

(1) It tends to reinforce and perpetuate group identities such as gender, caste or race instead of rendering them irrelevant. The counter-argument is that given the way discrimination has played out historically, a group-based approach is unavoidable and a necessary evil. You cannot remedy discrimination based on gender except by taking gender into account; ditto for caste and race. Even though the Constitution of India has used the word ‘class’ instead of ‘caste’ for defining a beneficiary group eligible for reservation, there is doctrinal disarray among different rulings of the Supreme Court which have held caste as a ‘relevant criterion’, ‘sole criterion’ or ‘dominant criterion’ for defining a class<sup>9</sup>.

(2) While there is little dispute regarding the identification of SC and ST and the historic, institutionalised discrimination against these two groups, the conditions of victimisation suffered by the various Shudra castes are matters of degree with a wide range of variation.

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<sup>9</sup> In “*M.R.Balaji v. State of Mysore*” (1963), the Supreme Court held that caste could be a relevant criterion to identify a backward class but not the sole or dominant criterion. In “*State of Kerala v. N.M. Thomas*” (1975), the Court held that caste could be the sole criterion to determine backwardness. In “*Indra Sawhney v. Union of India*” (1992), the Court held that caste could be the dominant criterion but not the sole criterion in identifying a backward class.

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Inclusion of a Shudra caste in the OBC category generates reasonable claims for inclusion of other caste(s) 'on the margin', and any cut-off is likely to be perceived as arbitrary and unfair. The classification exercise will have what statisticians call Type 1 error (wrongful inclusions of undeserving groups) and Type 2 error (wrongful exclusions of deserving groups). There is also the problem of dominant castes/individuals within the OBC cornering all or most of the benefits. This can be remedied by applying the concept of 'creamy layer' whereby persons having income or assets greater than specified limits are excluded from the benefits of reservation.

### Ambedkar's cautionary principle and the judiciary

Dr B.R. Ambedkar foresaw the possibility that political compulsions may lead to unconstrained levels of reservation. Cautioning the Constituent Assembly that reservation, while indispensable, should be an exception of minority nature, he had remarked in 1948:

“Supposing, for instance, 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 for the unreserved. Could anybody say that this is 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. . . Therefore, the seats to be reserved must be confined to a minority of seats. . . If honourable Members understand this position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain.”<sup>10</sup>

In *M.R. Balaji v. State of Mysore* (1963)<sup>11</sup>, the Supreme Court applied this logic to strike down the 68 per cent reservation made under Article 15(4) for admissions to medical and engineering colleges in the (then) State of Mysore, and ruled that the reservation should in no case exceed 50 per cent. The Court added:

“What is true in regard to Art. 15(4) is equally true in regard to Art. 16(4). There can be no doubt that the Constitution makers assumed (that) . . . care would be taken not

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<sup>10</sup> **Constituent Assembly Debates. 1948.** “[Constituent Assembly of India Debates \(Proceedings\)](https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-11-30)”, November 30, Vol. 7. [https://cadindia.clpr.org.in/constitution\_assembly\_debates/volume/7/1948-11-30].

<sup>11</sup> **Supreme Court of India. 1962.** “[M. R. Balaji And Others vs State Of Mysore](https://indiankanoon.org/doc/599701/)”, September 28. [https://indiankanoon.org/doc/599701/].

to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency.”

According to this view, Articles 15(4) and 16(4), providing for reservation in education and public employment, operate as ‘exceptions’ to the equality and non-discrimination provisions of Articles 15(1) and 16(1) and so breaching the ‘50 per cent ceiling’ results in *reverse discrimination*.

However, in *N.M. Thomas*, the Supreme Court made a radical departure from this view. It ruled that Article 16(1), being a facet of the doctrine of equality, permits reasonable classification of all persons who are similarly situated with respect to the law - just as Article 14 does. In other words, even without Article 16(4), Article 16(1) itself permits reservations and preferential treatment. *Looked at this way, Article 16(4) is not an exception to Article 16(1) but an “emphatic restatement of it” and seeks to make explicit what is already implicit in Article 16(1).*

Further support to this line of reasoning is afforded by the use of the non-obstante clause - “Nothing in this article shall prevent the State from” - in Article 16(4) which is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision i.e. Article 16(1), but falls outside it.<sup>12</sup> Thus Article 16(1) declares one unified vision of equality containing within it ideals of both formal equality and substantive equality. The same logic applies to Articles 15(1) and 15(4).

This is no academic quibble but a matter of great practical significance. The *M.R. Balaji* logic of the ‘50 per cent ceiling’ for reservations was based on the argument that the exception cannot expand to swallow the rule. If Article 16(4) is not an exception to Article 16(1), then this logic no longer holds good and there is nothing to prevent the State from breaching the ‘50 per cent ceiling’ for reservations unless the total population of the under-represented classes itself is less than 50 per cent which is not the case in India. In *K.C. Vasant Kumar v. State of Karnataka* (1985), two learned Supreme Court judges came to precisely opposite conclusions on this question - one held that *N.M. Thomas* (1975) has the effect of undoing the ‘50 per cent ceiling’ rule in *M.R. Balaji* whereas another held that it does not!

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<sup>12</sup> This was Justice Subba Rao’s dissenting opinion in “*T. Devadasan v. Union of India*” (1963).

### The Mandal judgment's middle path

The Supreme Court addressed this question again in *Indra Sawhney v. Union of India* (1992)<sup>13</sup>, better known as the Mandal Commission case. Endorsing the interpretation of *N.M. Thomas*, the Supreme Court ruled:

“Accordingly, we hold that Clause (4) of Article 16 is not an exception to Clause (1) of Article 16. It is an instance of classification implicit in and permitted by Clause (1). . . It is a provision which must be read along with and in harmony with Clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.”

At the same time, the Supreme Court contrived to maintain the ‘50 per cent ceiling’ rule by holding:

“Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonably limits – and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter. . . The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats". No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. From the above discussion, the irresistible conclusion that follows is that the reservation contemplated in Clause (4) of Article 16 should not exceed 50%”.

In short, the Supreme Court’s ruling in *Indra Sawhney* represents a compromise or middle path between *M.R. Balaji* and *N.M. Thomas*. It struck a balance between formal equality and substantive equality by reaffirming the ‘50 per cent ceiling’ rule. Curiously, the Supreme Court left a small loophole open by stating:

“While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people.

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<sup>13</sup> **Supreme Court of India. 1993.** “[Indra Sawhney Etc. Etc vs Union Of India And Others, Etc](https://indiankanoon.org/doc/1363234/)”, November 16. [https://indiankanoon.org/doc/1363234/].



It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic of them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out”.

It is relevant to point out here that when the Government of Gujarat, in response to the Patidar agitation, issued an Ordinance in 2016 providing for 10 per cent reservation in higher education and public employment for “economically weaker sections of unreserved categories with annual income below Rs.6 lakhs”, the same was quashed by the High Court of Gujarat (2016) based on the *Indra Sawhney* precedent. When the State Government relied on the ‘extraordinary situation’ loophole in *Indra Sawhney* for breaching the “50 per ceiling” rule for reservations, the High Court of Gujarat rejected this contention, and rightly so, by stating that no such ‘extraordinary situation’ was made out in the case of reservation for the economically weaker sections.

### III. PAST BASIC STRUCTURE CHALLENGES RELATING TO RESERVATION

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“In order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and, as such, binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.”

**Supreme Court of India**

*in M. Nagaraj v. Union of India (2006)*

**A**fter the Constitution of India came into force in 1950, the Centre as well as the States implemented reservations for SC and ST while several States implemented reservation for backward classes. But the Centre delayed implementing reservation for backward classes. It took no action on the report of the First Backward Classes Commission (1955) headed by Kaka Kalelkar. It accepted the report of the Second Backward Classes Commission (1980) headed by B.P. Mandal in August 1990 after a delay of nearly 10 years. The Mandal Commission identified 3,743 communities (both Hindu and non-Hindu) as “Other Backward Classes” constituting nearly 52 per cent of the population of India. But in deference to the rulings of the Supreme Court limiting the total reservation to 50 per cent, the Commission recommended only 27 per cent reservation in jobs in Central Government in favour of OBC in addition to the 22.50 per cent reservation already existing in favour of SC and ST.

In order to appease the agitating forward castes which were upset over the implementation of reservations for OBC, the Government of India issued an executive order in September 1991 reserving 10 per cent of the vacancies in civil posts and services for other “economically backward sections of the people who are not covered by any of the existing schemes of reservation”. This increased the total reservation to 59.50 per cent, considerably in excess of the ceiling of 50 per cent fixed by the Supreme Court. It may be noted that this 10 per cent reservation was identical to what the 103<sup>rd</sup> Amendment seeks to do except that the 1991 order did not have the backing of a Constitution amendment.

In *Indra Sawhney* the Supreme Court considered the legality of the 27 per cent reservation for OBC; the 10 per cent reservation for economically backward sections of the society other than OBC, SC and ST; and a host of other issues relating to reservations. Some of its more important decisions were as follows:

- It upheld the 27 per cent reservation for OBC subject to the “creamy layer” being excluded.
- It quashed the 10 per cent reservation for economically backward sections and ruled that a backward class of citizens cannot be identified only and exclusively with reference to economic criteria.
- It ruled that reservations should be confined only to the initial appointments and not extended to promotions.
- It ruled that the reservations including the carried-forward or backlog reserved vacancies should not exceed 50 per cent of the appointments *in any given year*.
- It ruled that reservations can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.
- It ruled that relaxation of qualifying marks and standards of evaluation is not permissible in promotion.

### Countering judgments through amendments

*Indra Sawhney* led to a spate of Constitutional amendments which, in turn, led to basic structure challenges of these amendments.

First, Tamil Nadu’s 69 per cent reservations for SC, ST, Backward Classes (BC) and Most Backward Classes (MBC) were in breach of the “50 per cent ceiling” rule reaffirmed by *Indra Sawhney*. The State sought to side-step this rule by enacting the “Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of seats in educational institutions and appointments or posts in services under the State) Act, 1994”, and getting the Constitution (76<sup>th</sup> Amendment) Act, 1994, passed to include this law in the Ninth Schedule of the Constitution so as to place it beyond the pale of judicial review. In *I.R Coelho vs State of Tamil Nadu* (2007), the Supreme Court ruled that laws placed in the Ninth Schedule did not enjoy a blanket protection from judicial scrutiny. The validity of any Constitutional amendment (including the placing of any new law in the Ninth Schedule) done *after 1973* (i.e. after *Kesavananda Bharati*) has to be judged on the touchstone of the basic structure doctrine.

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However, the Supreme Court is yet to apply the ruling in *I.R Coelho* (2007) to the Tamil Nadu legislation<sup>14</sup>.

*Second*, the bar on reservation in promotions raised a controversy as the same was hitherto being enjoyed by SC and ST employees. So, the Constitution (77<sup>th</sup> Amendment Act), 1995 was enacted and a new clause (4A), providing for reservation in promotions for SC and ST employees, was added to Article 16.

*Third*, the stipulation that the number of reserved vacancies to be filled up *in any year*, including the carried-forward or backlog reserved vacancies, should not exceed 50 per cent was an impractical one since the total reservations in current vacancies was already 49.50 per cent, and it would have been virtually impossible to fill up the back-log reserved vacancies. So, the Constitution (81<sup>st</sup> Amendment) Act, 2000, was enacted to insert a new clause (4B) in Article 16 which allowed the *segregation* of the backlog vacancies from the current vacancies and lifted the 50 per cent ‘cap’ on the backlog vacancies which would be treated as a separate class. While the 50 per cent ceiling on current vacancies and for the cadre as a whole will remain, it is up to the State to fill up the backlog vacancies either in one go or spread over several years. It may be noted that Article 16(4B) makes the first Constitutional mention, albeit indirect, of the “50 per ceiling rule” for reservations, which was until then a judicially laid down rule.

*Fourth*, SC and ST employees had been enjoying the facility of relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion but *Indra Sawhney* held such relaxation impermissible<sup>15</sup>. So, the Constitution (82<sup>nd</sup> Amendment) Act, 2000, was enacted and a *proviso* was added in Article 335 restoring the power to make relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion for SC and ST employees.

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<sup>14</sup> Telangana has enacted legislation in 2017 increasing the reservation for socially and educationally backward Muslims (treating them as OBC) from 4 per cent to 12 per cent and for ST from 6 per cent to 10 per cent increasing the State’s total reservations to 62 per cent. Andhra Pradesh has enacted legislation in 2017 granting 5 per cent reservation for the Kapu community increasing the State’s total reservations to 55 per cent. Both the States requested the Centre to include their respective laws in the Ninth Schedule but the Centre has returned the proposals citing the ‘50 per cent ceiling’ rule. In November 2018, Maharashtra enacted legislation granting 16 per cent reservation to Marathas as a socially and educationally backward class and increasing the State’s total reservations which was already 52 per cent to 68 per cent.

<sup>15</sup> In “*S. Vinod Kumar vs. Union India*” (1996), the Supreme Court held that such relaxations were not permissible in view of the command contained in Article 335 to balance reservation with “efficiency in administration” besides the ruling in “*Indra Sawhney*” (1992).

Another controversy arose due to the judgments of the Supreme Court in *Union of India v. Virpal Singh Chauhan* (1995) and *Ajit Singh v. State of Punjab* (1996) which held that SC and ST employees getting the benefit of accelerated promotion by virtue of reservation cannot get ‘consequential seniority’ at the promotional level. In other words, even though the senior general candidates get promoted to the next level at a later point of time than the reserved candidates, they would ‘catch up’ on their seniority and would again be treated as senior to the reserved candidates. Since SC and ST employees had hitherto been enjoying consequential seniority, Article 16(4A) was amended once again by the Constitution (85<sup>th</sup> Amendment) Act, 2001, providing for grant of consequential seniority to them on promotion.

The Supreme Court considered the basic structure challenge mounted against the 77<sup>th</sup>, 81<sup>st</sup>, 82<sup>nd</sup> and 85<sup>th</sup> Constitutional Amendments [i.e. against the constitutionality of Articles 16(4A), 16(4B) and the proviso to Article 335] in *M. Nagaraj v. Union of India* (2006). The Court held that equality is the essence of democracy and accordingly a basic feature of the Constitution but “one must distinguish between the abstract concept of equality and specific conceptions of it”.

### **Tests for the basic structure doctrine**

In order to decide whether the impugned Constitution amendments were *ultra vires* the basic structure doctrine or not, the Supreme Court came up with two tests, namely, the ‘width test’ and the ‘identity test’. The ‘width test’ examines the boundaries of the amending power and whether any of the constitutional requirements have been obliterated by the amendments or not. These include the 50 per cent ceiling for all reservations taken together (quantitative limitation), the concept of creamy layer (qualitative exclusion), the backwardness and inadequacy of representation (compelling reasons), and the overall administrative efficiency. The ‘identity test’ examines whether the amendment has altered the identity of the Constitution beyond recognition. Applying these twin tests to the four impugned amendments, the Supreme Court ruled that there was no violation of the basic structure doctrine by any of them. It concluded with the following remarks:

“reiterate that the ceiling-limit of 50 per cent, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse”.

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In *T.M.A Pai Foundation v. State of Karnataka* (2002), while settling various questions concerning private education and the rights of private institutions (both aided and unaided), the Supreme Court held that the establishment and running of an educational institution, for charity or for profit, is an ‘occupation’, and the right to run the same is a fundamental right within the meaning of Article 19(1)(g) of the Constitution. In *P.A. Inamdar v. State of Maharashtra* (2005), the Court ruled that the government cannot impose reservation in admissions to private, unaided educational institutions. Such an imposition was not a ‘reasonable restriction’ within the meaning of Article 19(6), and no power was vested in the State under Article 19(6) to regulate admissions or enforce the reservation policy of the State in private, unaided educational institutions.

In order to overcome this judgment, the Constitution (93<sup>rd</sup> Amendment) Act, 2005, was passed which added a new clause (5) in Article 15. This vested power in the State to provide for reservation for SC, ST, and OBC-NCL in admissions to educational institutions, *whether aided or unaided*, other than minority educational institutions which are protected by Article 30(1) of the Constitution. It is worth noting that the new Article 15(6) introduced by the Constitution (103<sup>rd</sup> Amendment) Act, 2019 makes identical reservation for EWS in private, unaided educational institutions.

Even though reservation for OBC-NCL in posts and services under the Central Government was implemented after *Indra Sawhney*, reservation in Central Government-maintained educational institutions (including aided institutions) had to wait for another 15 years until the Parliament enacted Act 5 of 2007 under the authority of Article 15(5). The constitutionality of this Act was contested and a basic structure challenge was mounted against the 93<sup>rd</sup> Amendment [and Article 15(5)] in *Ashoka Kumar Thakur v. Union of India* (2008). The Supreme Court ruled that Act 5 of 2007 was constitutionally valid, and that Article 15(5) was at best a “moderate abridgement or alteration” of the principle of equality and did not violate the basic structure doctrine in so far as it relates to Central Government-maintained and aided educational institutions. Since no private institution appeared in this case and the constitutionality of Article 15(5) with regard to private, unaided educational institutions was not argued, the issue was left open, to be decided in a future case.

In *Pramati Educational and Cultural Trust v. Union of India* (2014), the Supreme Court considered and rejected the basic structure challenge to Article 15(5) in so far as it relates to unaided,

private educational institutions. The Court ruled that Article 15(5) does not in any manner change or destroy the identity or abrogate the fundamental right of unaided, private educational institutions guaranteed under Article 19(1)(g) to carry on their ‘occupation’. It observed,

“Article 15(5) advances the constitutional goals and strengthens the objectives sought to be achieved by the Constitution and enables the Parliament to undertake legislative measures in the said direction. Far from either affecting any basic features of the Constitution or undermining or affecting its basic structure, it strengthens it”.

But Article 15(5) is only an enabling provision and Parliament is yet to pass a law to actually implement reservations for SC, ST, and OBC-NCL in unaided, private educational institutions<sup>16</sup>.

So, that part of the new Article 15(6) which provides for reservation for ‘EWS other than SC, ST, and OBCNCL’ in private, unaided educational institutions is likely to withstand the basic structure challenge. The point, however, is whether the rest of the 103<sup>rd</sup> Amendment will withstand the same challenge.

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<sup>16</sup> Shukla, A. 2019. “[10% Quotas in all colleges, universities from this year: Prakash Javdekar](https://www.hindustantimes.com/education/10-quotas-in-all-colleges-universities-from-this-year-prakash-javdekar/story-LPt46oJ86GN20Em7LIZGbM.html)”, *Hindustan Times*, January 16. [https://www.hindustantimes.com/education/10-quotas-in-all-colleges-universities-from-this-year-prakash-javdekar/story-LPt46oJ86GN20Em7LIZGbM.html].

#### IV. LEGAL INFIRMITIES IN THE 103<sup>rd</sup> AMENDMENT

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“It goes without saying that in Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty which, in turn, breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle.”

**Supreme Court of India**  
in *“Indra Sawhney v. Union of India”* (1992)

**I**n order to identify "other backward classes" (OBC), the Mandal Commission developed and applied 11 criteria in all: four of these were social criteria, three educational, and four economic. Each social criterion was given a weightage of 3 points, each educational criterion 2 points, and each economic criterion 1 point. The underlying premise was that socially and educationally backward communities are generally economically backward also but economically backward communities need not necessarily be socially and educationally backward. The Commission judged castes/classes on a scale from 0 to 22; those which had a score of 50 per cent (i.e. 11 points) or more were listed as 'socially and educationally backward' and the rest were treated as 'advanced'. Even if a caste/class fulfilled all the 4 economic criteria, it would not be backward unless it also fulfilled a few criteria relating to social or educational backwardness.

There is consensus among policy makers that any single criterion – social, educational, economic or any other – for determining a complex concept such as "backwardness" is bound to be wrong, and we need to have composite criteria. So, in *Indra Sawhney*, the Supreme Court was right in ruling that a backward class of citizens cannot be identified only and exclusively with reference to economic criteria and in quashing the 10 per cent reservation for economically backward sections. The Court observed that while social and educational attributes are relatively immutable and easily verifiable, economic backwardness is a fluctuating criterion that can be manipulated or falsified rather easily. The Supreme Court also found a legal infirmity in such reservation:

“Reservation of 10 per cent of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10 per cent seats. The question is whether this is



constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by Clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated 25.5.1991 fails and is accordingly declared as such”.

It is a moot point whether this ruling still holds good in the light of the latest Constitution amendment [Articles 15(6) and 15(6)] validating economic backwardness as the sole criterion for reservation. Even if it doesn't, the problem of economic backwardness being a fluctuating criterion that can be manipulated or falsified easily remains. If the Constitution (103<sup>rd</sup> Amendment) Act, 2019, is struck down by the Supreme Court as *ultra vires* the “basic structure” doctrine of “Equality”, it may not be for introduction of economic backwardness as the sole criterion for reservation but for other reasons. The following are some of the glaring legal infirmities present in this amendment.

*First*, the Supreme Court has repeatedly held that the compelling reason for making reservation in admission to educational institutions under Articles 15(4) and 15(5) must be that a class, apart from being “socially backward”, must be “educationally backward”. Likewise, the compelling reason for making reservation in public employment under Articles 16(4) and 16(4A) must be that the class, apart from being “backward”, is “not adequately represented in the services under the State”. These compelling reasons form part of the ‘width test’ laid down by the Supreme Court in *M. Nagaraj* for determining the validity of a constitutional amendment in the light of a basic structure challenge.

But the new Article 15(6), providing for special provision including reservation in educational institutions for "EWS other than SC, ST and OBC-NCL", is silent about the key condition of “educational backwardness”. The new Article 16(6), providing for reservation in public employment for "EWS other than SC, ST and OBC-NCL", is also silent about the key condition of “not adequately represented in the services under the State”. Thus, the 103<sup>rd</sup> Amendment has rendered Articles 15 and 16 internally inconsistent.

The omissions seem deliberate and amount to a tacit acknowledgement that the "EWS other than SC, ST and OBC-NCL" are *not* educationally backward and *not* inadequately represented

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in public services, in which case they don't need the reservation at all. It may be argued that the use of the *non-obstante* clause "Nothing in this article shall prevent the State from" in Articles 15(6) and 16(6) indicates that the power conferred thereunder stands on its own and is not limited by other provisions of Articles 15 and 16. Even the *non-obstante* clauses cannot save Articles 15(6) and 16(6) from being challenged on the ground that they discriminate in favour of "EWS other than SC, ST and OBC-NCL" vis-à-vis the SC, ST and OBC-NCL because they make this new beneficiary category eligible for reservations in education and public employment without the compelling reasons of "educational backwardness" or "inadequate representation in the services under the State". This is a clear violation of Article 14 and cannot pass the 'width test' prescribed in *M. Nagaraj*.

*Second*, the Statement of Objects and Reasons<sup>17</sup> for the 103<sup>rd</sup> Amendment refers to the Directive Principle of State Policy contained in Article 46 of the Constitution which enjoins that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation." The Statement of Objects and Reasons then goes on to declare:

"However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India".

What we see here is a legal sleight of hand with the Statement of Objects and Reasons talking about *EWS in general* whereas Articles 15(6) and 16(6) in the Constitution (103<sup>rd</sup> Amendment) Act, 2019 provide for reservations only for "EWS other than SC, ST and OBC-NCL". This discordance between the object and the result is a serious legal flaw and is unacceptable.

Moreover, according to the canon of statutory interpretation called *ejusdem generis*, when a general expression follows or precedes particular expressions or enumeration of persons or things belonging to a distinct category, then the general expression should not be given its widest possible meaning but only the restricted meaning of that category. For example, if a

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<sup>17</sup> Lok Sabha. 2019. "[The Constitution \(One Hundred and Twenty-Fourth Amendment\) Bill, 2019](https://barandbench.com/wp-content/uploads/2019/01/Constitution-124th-Amendment-Bill-2019.pdf)". [https://barandbench.com/wp-content/uploads/2019/01/Constitution-124th-Amendment-Bill-2019.pdf].

law refers to motor-powered vehicles such as scooters, motorcycles, cars, buses, trucks, tractors and others, then a court may use *ejusdem generis* to hold that such vehicles will not include airplanes, because the enumeration included only land-based transportation. The basis of the principle is that if the legislature had intended to use a general expression in an unrestricted sense, it would not have bothered to use the particular expressions or enumerations at all.

Now, Article 46 uses particular expressions such as "the educational and economic interests", "in particular, of the Scheduled Castes and Tribes", "shall protect them from social injustice and all forms of exploitation". Applying *ejusdem generis* to Article 46, it is clear that the general expression "weaker sections of the people" cannot be given its widest possible meaning so as to include the *socially and educationally advanced classes* such as the Hindu forward castes and similar categories among non-Hindus which is the beneficiary group covered by the term "EWS other than SC, ST and OBC-NCL". Article 46 is aimed at "SC, ST and OBC-NCL" who are likely to be educationally and economically backward and also the victims of social injustice and exploitation. It is an irony that these are precisely the classes the 103<sup>rd</sup> Amendment seeks to exclude from its purview. So, the 103<sup>rd</sup> Amendment cannot rely on Article 46 for support; on the contrary, it makes a mockery of it and violates the "identity test" prescribed in *M. Nagaraj* by destroying the equality code of the Constitution.

*Third*, the "Statement of Objects and Reasons" for the 103<sup>rd</sup> Amendment avers that the EWS have "*largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity*". But this averment is not backed by any empirical data or research study for "EWS other than SC, ST and OBC-NCL" or even for EWS in general. No such study had been undertaken even when the 10 per cent reservation for economically backward sections was made by the Government of India in 1991 or by the Government of Gujarat in 2016. On all the occasions, the decisions were taken arbitrarily and without due diligence and with a view to appeasing the forward castes.

The Supreme Court has repeatedly held, both before the 1992-*Indra Sawhney* judgment and after, that "the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment" before making reservation. For instance, in *Atyant Pichhara Barg Chhatra Sangh v. Jharkhand State Vaishya Federation* (2006), the Supreme Court quashed the Government of Jharkhand's decision to amalgamate the

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Extremely Backward Class and Backward Class and reduce the reservation from 12 per cent and 9 per cent respectively to 14 per cent, on the ground of absence of empirical data and research study. This was also one of the grounds for the quashing of the Gujarat Ordinance of 2016 providing for 10 per cent reservation for EWS.

Due to the absence of empirical data and research study to back the reservations for "EWS other than SC, ST and OBC-NCL", the 103<sup>rd</sup> Amendment fails the 'width test' prescribed in *M. Nagaraj* for determining the validity of a constitutional amendment in the light of a basic structure challenge.

### Equating Unequals

*Fourth*, reservation is meant to promote substantive equality by remedial action in support of the under-represented sections of the society. Do the socially and educationally advanced classes such as the Hindu forward castes and likewise among non-Hindus answer this description? According to a written reply to the Lok Sabha given in December 2018 by Jitendra Singh, the Union Minister of State for Personnel, the representation of SC, ST and OBC in the services of the Central government as on January 1, 2016 was 17.49 per cent, 8.47 per cent and 21.57 per cent respectively<sup>18</sup>. This shows that nearly 25 years after *Indra Sawhney*, the representation of OBC was less than the actual quota. It also shows that 52.47 per cent of the posts were held by "communities other than SC, ST and OBC" whose collective share of the total population is less than 25 per cent<sup>19</sup>.

It is also relevant to point out here that the top jobs in the private sector are almost completely monopolised by the Hindu forward castes<sup>20</sup>. In 2012, a study of caste in corporate boards of India's top 1,000 companies (including public sector undertakings), representing nearly 80 per cent of the market capitalisation of the National Stock Exchange (NSE), revealed that out of

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<sup>18</sup> PTI. 2018. "[OBC Representation in Central Jobs Less Than Actual Quota: Government](https://thewire.in/rights/obc-representation-in-central-jobs-less-than-actual-quota-government)", *The Wire*, December 12. [https://thewire.in/rights/obc-representation-in-central-jobs-less-than-actual-quota-government].

<sup>19</sup> According to Census of India 2011, SC constitute 16.6 per cent and ST 8.6 per cent of India's population. The precise percentage of OBC is not known as the Centre has not made public the results of the Socio-Economic Caste Census 2011. The Mandal Commission, relying on the 1931 Caste Census and making some assumptions, arrived at the OBC percentage as 52. Thus, based on the available data, it can be said that the total percentage of SC, ST and OBC is about 77 per cent and that of forward caste Hindus and sociologically and educationally advanced non-Hindus is about 23 per cent.

<sup>20</sup> Ajit, D., et al. 2012. "Corporate Boards in India – Blocked by Caste", *Economic and Political Weekly*, August 11, Vol. xlvii Issue 31

the 9,052 board directors, 8,387 or 92.6 per cent were Hindu forward castes [Vaishyas: 46.0 per cent; Brahmins: 44.6 per cent; others: 2 per cent] whereas OBC were only 3.8 per cent and SC/ST only 3.5 per cent. The OBC and SC were mostly confined to PSUs. These empirical results show that caste diversity is non-existent in Indian corporate sector and that caste connections count more than merit.

According to the Global Wealth Report-2018 of Credit Suisse Group AG released in October 2018<sup>21</sup>, the richest 1 per cent of Indians own 51.5 per cent of the country's wealth, the richest 10 per cent own 77.4 per cent, the richest 20 per cent own 86.6 per cent, and the bottom 60 per cent own just 4.7 per cent. Though caste-wise break-up is not available, it is reasonable to assume that barring a few exceptions, SC, ST, and OBC-NCL are more likely to figure in the bottom 60 per cent while the Hindu forward castes are more likely to figure in the top 20 per cent.

Thus the 103<sup>rd</sup> Amendment has the effect of enhancing and cementing the representation of the Hindu forward castes and others who are already over-represented in the public services relative to their population, who have almost monopolised the corporate boardrooms, and who own a disproportionate percentage of the country's wealth. This does violence to the concept of equality as is commonly understood and changes it beyond recognition and fails the "identity test" prescribed in *M. Nagaraj*.

*Fifth*, the income limit of Rs. eight lakhs and the asset limits prescribed for determining economic backwardness are the same as the limits fixed for determining the 'creamy layer' for OBC. This would mean that the 103<sup>rd</sup> Amendment *practically erases the difference* between the OBC-NCL (who are socially and educationally backward) and the "EWS other than SC, ST and OBC-NCL" (who are not socially backward and about whom there are no empirical data to show that they are educationally backward). This would be a case of treating unequals equally.

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<sup>21</sup> CREDIT SUISSE AG, 2018. "[Global Wealth Report 2018](https://www.credit-suisse.com/media/assets/private-banking/docs/uk/global-wealth-report-2018.pdf)", October.  
[<https://www.credit-suisse.com/media/assets/private-banking/docs/uk/global-wealth-report-2018.pdf>].

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Moreover, according to a written reply to the Lok Sabha given in August 2018 by Vijay Goel, the Union Minister of State for Statistics, India's per capita income was a mere Rs.82,229<sup>22</sup> in 2016-17. The annual income limit for income tax purposes in India is currently Rs.2.50 lakhs<sup>23</sup> and over 97 per cent of the population is below even this limit. So, the very high annual income limit of Rs.8 lakhs for the "EWS other than SC, ST and OBC-NCL" category makes it too broad-based and unfair to the poorest of the poor within the category. In other words, this is not a reasonable classification of all persons who are similarly situated with respect to the law. It would be a case of treating unequals within the "EWS other than SC, ST and OBC-NCL" category equally.

In *M.G. Badappanavar v. State of Karnataka* (2000), the Supreme Court ruled that “equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution”. Hence, the income limit for determining economic backwardness cannot be the same as that for determining the ‘creamy layer’ for OBC; *it must be lower*. In fact, the annual income limit for economic backwardness needs to be set *well below India's average per capita annual income of Rs.82,229* for it to be fair to the poorest of the poor within the "EWS other than SC, ST and OBC-NCL" category. A similar logic holds good for the assets criteria for determining economic backwardness. So, the constitutionality of the Office Memorandum dated January 17, 2019 of the Ministry of Social Justice and Empowerment is doubtful.

*Sixth*, the 103<sup>rd</sup> Amendment breaches the "50 per cent ceiling" rule for total reservations that the Supreme Court has consistently upheld since *M.R. Balaji* as maintaining the proper balance between formal equality and substantive equality, and which has got Constitutional imprimatur, albeit indirectly, in Article 16(4B) introduced by the Constitution (81<sup>st</sup> Amendment) Act, 2000. It therefore fails one of the conditions (quantitative limitation) of the "width test" prescribed in *M. Nagaraj* for determining the validity of a constitutional amendment in the light of a basic structure challenge.

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<sup>22</sup> PTI. 2018. “[Average per capita income in last 4 years higher at nearly Rs 80,000](https://economictimes.indiatimes.com/news/economy/finance/average-per-capita-income-in-last-4-yrs-higher-at-nearly-rs-80000/articleshow/65322914.cms)”, *The Economic Times*, August 8. [https://economictimes.indiatimes.com/news/economy/finance/average-per-capita-income-in-last-4-yrs-higher-at-nearly-rs-80000/articleshow/65322914.cms].

<sup>23</sup> As per the interim budget for 2019-20, tax payers with annual income up to Rs. 5 lakh will get full tax rebate. This happened *after* the 103<sup>rd</sup> amendment was enacted.

All these years, the *ratio* of the "50 per cent ceiling" was the main judicial counter to the demand for greater reservation from various pressure groups. I can't see the Supreme Court coming up with any satisfactory judicial logic to plug reservations at any limit other than 50 per cent; any higher limit will be artificial and contrived and will not have credibility.

## V. CONCLUDING REMARKS

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"Mere poverty cannot be the test of backwardness because in this country except for a small percentage of the population, the people are generally poor – some being more poor, others less poor. . . In identifying backward classes, one has to guard oneself against including therein sections which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated."

Supreme Court of India

in "*Janki Prasad Parimoo v. State of Jammu and Kashmir*" (1973)<sup>24</sup>

In India, the numerically significant but socially and educationally backward castes/classes have used electoral politics and their legislative clout to advance their interests in education and public employment. As mentioned earlier, in the matter of Constitutional amendments relating to reservations, the Supreme Court has generally been acquiescent, and the only two areas where it has taken a firm stand so far are with regard to the '50 per cent ceiling rule' and the concept of 'creamy layer'. It remains to be seen if the Supreme Court will stand like a rock and reaffirm the '50 per cent ceiling rule' or allow itself to be swept away by the political currents. The following scenarios are possible:

**Scenario 1:** The Supreme Court quashes the Constitution (103<sup>rd</sup> Amendment) Act, 2019 in full as *ultra vires* the "basic structure" doctrine. As discussed in the previous chapter, the amendment fails both the "width test" and the "identity test" prescribed in *M. Nagaraj*; it upsets the delicate balance between formal equality and substantive equality; it treats unequals as equals; it enhances and cements the representation of the already over-represented castes/classes; and thereby mangles the equality code of the Constitution beyond recognition.

**Scenario 2:** The Supreme Court quashes the amendment in part – the part where the total reservations exceed 50 per cent along with the ridiculously high income and asset limits set by the Central Government in its O.M. dated January 17, 2019. The Court may direct that the income and assets limits for "EWS other than SC, ST and OBC-NCL" should be set at a much

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<sup>24</sup> Supreme Court of India. 1973. "[Janki Prasad Parimoo & Ors. Etc. ... vs State Of Jammu & Kashmir & Ors](https://indiankanoon.org/doc/579569/)", January 10. [https://indiankanoon.org/doc/579569/]



lower level so that only the genuinely deserving among them benefit from the reservation. These limits should be equal to or lower than the mean or median per capita annual income or asset holdings for the population of the country, and should be periodically revised. The Court may also direct that the quotas for all the 4 categories be reduced proportionately so that the total reservations do not exceed 50 per cent. This may be not be politically acceptable as it will reduce the present quotas for SC, ST and OBC-NCL, and it is doubtful if the Supreme Court will bite the bullet.

**Scenario 3:** The Supreme Court delays passing orders and allows matters to drift. This scenario is not as absurd as it may seem at first sight when we recall that the final order has not been passed in 25 years in respect of the Tamil Nadu Act for 69 per cent reservations placed in the Ninth Schedule in 1994. It may be noted that whereas the Supreme Court was quick to grant a stay against the implementation of 27 per cent reservation for OBC in jobs in Central Government in 1990 and a stay against 27 per cent reservation for OBC in Central educational institutions in 2007, it has refused to grant stay against the 10 per cent reservation for the "EWS other than SC, ST and OBC-NCL".

If the Court delays passing final orders, then the longer the "EWS other than SC, ST and OBC-NCL" enjoy the 10 per cent reservation, the more difficult it will become both judicially and politically to strike it down. But I am hopeful that things will not come to such a pass and that the Supreme Court will adjudicate on the constitutionality of the Amendment pretty soon. I also believe that when communities like the Gujjars, Patidars, and Jats agitate and force their legislatures to breach the 50 per cent ceiling to accommodate their reservations (some like Marathas and Kapus have already done it), the Supreme Court will be impelled to take a decision in the 103<sup>rd</sup> Amendment and all such related issues sooner or later.

**Scenario 4:** The Supreme Court upholds the 103<sup>rd</sup> Amendment with the present income and asset limits which are on par with those of OBC-NCL and also condones the breach of 50 per cent ceiling. It will require a larger bench than the nine-judge bench which adjudicated *Indra Sawhney* in order to overrule many of the decisions therein. This will be the worst-case scenario. Once the *Lakshman Rekha* is crossed, there is no going back. The OBC will begin to demand proportional representation of 52 per cent and they have the political muscle to do so. The SC and ST in States/UTs where they have large populations will begin to demand proportional representation and they will also be an effective pressure group.

## **CAN THE TEN PER CENT QUOTA FOR ECONOMICALLY WEAKER SECTIONS SURVIVE JUDICIAL SCRUTINY?**

It is true that the Supreme Court held in *Indra Sawhney* that "adequate representation" mentioned in Article 16(4) is not the same as "proportional representation". But it will take just one more Constitutional amendment or a larger bench to 'correct' it. We may then end up with around 90 per cent reservations for OBC-NCL, SC, ST, and EWS leaving only 10 per cent for General Category and making a mockery of the fundamental right to equality of opportunity.

If we rule out scenarios 2 and 3 for reasons cited in the relevant preceding paragraphs, the Supreme Court has effectively only two options before it: either strike down the Constitution (103<sup>rd</sup> Amendment) Act, 2019, in its entirety, or uphold it and be prepared to let the genie of proportional representation out of the bottle. This is going to be a very important decision in Indian Constitutional law.



### About the Author

**K. Ashok Vardhan Shetty** is a former Vice-Chancellor of the Indian Maritime University, Chennai, a Central University under the Ministry of Shipping. Before assuming charge as the Vice-Chancellor, Shetty was a member of the Indian Administrative Service (IAS), Tamil Nadu Cadre, of the 1983 batch.

Prior to his retirement from the IAS, he held a number of key assignments including Registrar, University of Madras, Director of Collegiate Education; District Collector, Viluppuram; Director of Rural Development; Managing Director, Tamil Nadu State Marketing Corporation, (TASMAC); Secretary, Chief Minister's Secretariat; Principal Secretary, Rural Development and Panchayat Raj Department; Principal Secretary, Municipal Administration and Water Supply, among others. Successful project implementation was his forte. He was commended by the Government of Tamil Nadu several times.

Shetty has published several articles on public administration, management, E-Government, popular science, and popular mathematics in leading English and Tamil publications such as The Hindu, The Hindu Centre for Politics and Public Policy, The Hindu - Tamil, The Hindustan Times, Indian Express, The Hindu BusinessLine, and (the now defunct magazine) Science Today.

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