

JUDICIAL LIQUIDATION OF SOCIAL JUSTICE THROUGH EWS JUDGEMENT

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ABSTRACT

The Constitution (103rd Amendment) Act, 2019, also known as the Economically Weaker Section (EWS) amendment, provided 10% reservation to the upper caste (Savarna-Ashraaf) sections of society on economic grounds. This Amendment subverting extant social justice laws was validated by a majority of 3:2 judges of the Supreme Court in the EWS judgment after the basic structure review. Critical analysis of the assenting and dissenting opinions of the EWS judgment must take into account the contemporary developments in the social and political theory of post-structural variety to apprehend its conditions of possibility. How much the norms and values of Savarna-Ashraaf have shaped the form and content of the EWS amendment in the Parliament? How far upper caste hegemonic norms and values determined the judicial outcome in this case, where all five judges came from privileged social locations? Whether social justice, through constitutional means can, co-exist with the upper caste hegemony in the judicial process? These questions propel us to explore the Savarna 'self', which mediates legislative and judicial processes by an interpretative drive giving specific contour to our constitutional democracy. This article attempts to apprehend the power play in its judicial form through a critique of the EWS judgment.

Keywords: Reservation, Economic Ground, Hegemony, Savarna, Supreme Court, Caste, Social Justice, Judicial Process.

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1. INTRODUCTION

While the outcome of the Economically Weaker Section/Savarna (EWS)¹ reservation judgment *Janhit Abhiyan v Union of India*² on the validity of the Constitution (103rd Amendment) Act, 2019 was widely expected to be within the upper caste subjectivity, an analysis of the assenting and dissenting judgments delivered by Savarna judges still carries many novel elements and lessons. The judgment stands as a lengthy testimony (399 pages) to the upper caste hegemony in the annals of judicial corridors. A class of people is understood to be hegemonic when their particular norms and values acquire universal character. In order to universalize particular norms and values, it is imperative that the members of the same class systematically articulate their position, opposition and juxtaposition. Relations of domination and subordination incessantly seek to conceal the particularity of those universal norms. Liberating subordinated norms from the dominance of universal ones in order to transform the power relations among different social classes could usher peaceful democratic revolution. This is easier said than done, as the hegemonic norms and values equally structure the subjectivity of the hegemonic and the hegemonized classes. This limitation goes to the very roots that germinate different social classes in the first place, crystallizing into a society as such. However, for the members of the hegemonic class, hegemonic norms appear to be the ultimate truth. This makes it all the more difficult for them to comprehend the utility of any argument against their truth which can destabilize their hegemony.³ Analysis of the majority and minority opinions in the Savarna quota judgment needs to be done from this vantage point.

2. SAVARNA NORMS AND VALUES AS UPHELD BY JUSTICE DINESH MAHESHWARI

As a general rule, the Savarna judges avoid using the expression ‘*upper caste*’ or ‘*Savarna*’ as people avoid corona virus. They are anxious to do

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1. As EWS excludes SC, ST and OBCs from its ambit, Professor Mohan Gopal has rightly expanded this acronym to ‘Economically Weaker Savarna’ in his writings and speeches. In this article, the terms ‘Savarna’ and ‘Ashraaf’ have been used to refer to upper caste beneficiaries of EWS reservation with reference to their Brahminic and Islamic roots respectively. The term ‘Bahujan’ refers to SC, ST and OBCs jointly.
 2. (2023) 5 SCC 1 : 2022 SCC OnLine SC 1540.
 3. For a detailed conceptual detour of this tradition of thinking, see, Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, London 2014); Chantal Mouffe, *The Democratic Paradox* (Verso 2000); Ernesto Laclau, *On Populist Reason* (Verso, London 2005); Ernesto Laclau, ‘Why Constructing a People is the Main Task of Radical Politics’ (2006) 32(4) *Critical Inquiry* 646-680; Ernesto Laclau, *Emancipation(s)* (Verso, London 2007).

so lest the all-upper caste social location of the judges break down the immunity of their judgment. In the opinion of Justice Dinesh Maheshwari, the word upper caste appears only once, that too when the submissions made by the counsels are summarized by him. This conspiracy of silence and avoidance runs throughout the EWS judgment. For instance, Justice Maheshwari makes the following observation in the analysis of Article 16: “*Clauses (4) and (4-A) of Article 16 carve out another exception to the rule of equality*”.⁴ He goes silent on the ratio of *State of Kerala v N M Thomas*⁵ and *Indra Sawhney v Union of India*⁶ whereby it was held by larger benches that Articles 15(4) and 16(4) are *not an exception* to Articles 14, 15(1), 16(1) instead they are *a facet of equality*, it is merely *an emphatic way of stating a principle* implicit in the latter. It only implies that affirmative action would have been valid under Articles 14, 15(1) and 16(1), even in the absence of Articles 15(4) and 16(4). However, Justice Maheshwari did not miss the opportunity to reiterate Savarna judicial trope that provisions contemplated under Articles 15(4) and 16(4) are merely enabling provisions. This trope has already been used in some politically dominant Savarna states to kill reservations effectively.⁷ That’s why it is crucial to assert that if Articles 15(4) and 16(4) are not an exception to Articles 14, 15(1) and 16(1), then Articles 15(4) and 16(4) could not be reduced to mere enabling provisions. Justice Maheshwari incorrectly relies on fallacious ‘reservation is an exception to equality’ view to exclude it from the basic feature of the Constitution overruling a constitutional position settled by much larger benches than itself.⁸

Justice Maheshwari moves on to quote select parts of the Objectives Resolution adopted by the Constituent Assembly, Dr. B.R. Ambedkar’s speech therein, H.M. Seervai’s book and the Preamble where the word ‘economic’ appears and latches on it to argue that our constitutional democracy aspires to achieve economic democracy as well. However, he does not bother to note that none of these references even remotely indicate reservation on economic grounds. Instead, Justice Maheshwari quotes many judgments which refer to social and economic democracy without any reference to the reservation and silently seeks to connect ‘*economic*’ ground with reservation. Similarly, his reference to some U.S. Supreme Court

4. para 52.2 of Justice Maheshwari’s opinion. Henceforth, all referred paras are from Justice Maheshwari’s opinion unless indicated otherwise.

5. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

6. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454.

7. See *Mukesh Kumar v State of Uttarakhand* (2020) 3 SCC 1.

8. para 56.

judgments concerning the Fourth and Fifth Amendments is equally stale as they do not confine economic backwardness to a select class of socially advanced citizens as impugned EWS does. Justice Maheshwari even refers to the United Nations General Assembly Resolution to equate reservation with a poverty reduction program and purge out its representative character entirely. Towards this end, he repeatedly conflates the State's responsibility to act against poverty with the need to make the state representative of all social classes in its configuration.⁹

In order to establish the economic criterion for reservation Justice Maheshwari selectively cites the sympathetic views of fellow upper caste judges from judgments like *M R Balaji v State of Mysore*,¹⁰ *R Chitralekha v State of Mysore*,¹¹ *Janki Prasad Parimoo v State of J&K*,¹² *State of Kerala v N M Thomas*,¹³ *Shantistar Builders v Narayan Khimalal Totame*,¹⁴ *Indra Sawhney*¹⁵ and *M Nagaraj v Union of India*¹⁶ Many of those quotations often carry mutually contradictory views. Everything from these judgments which goes against the exclusive economic ground for reservation is either conveniently ignored or brazened out. Whatever Justice Maheshwari quotes fails miserably to bring out economic factor as an exclusive yardstick for reservations. Some of it actively militates against the exclusive economic criterion. Nevertheless, he persists. His reasoning after an explicitly unfavourable quotation often sounds like this: "Scientists have proved that sun rises from the east in the morning. Therefore we should turn towards the west in the morning to greet the sun"! He seeks to mitigate the absurdity of his proposition by arguing that previous judgments against exclusive economic criteria for reservation were meant "*only for class or classes covered by or seeking coverage under Articles 15(4) and/or 15(5) and/or 16(4)*".¹⁷ Justice Maheshwari makes no effort to defend this conclusion with reference to the quotations that he cites. Instead, he quickly moves on to Article 46 leaving the reader wondering about the purpose of those long quotations which form the bulk of his opinion.

9. paras 58 to 69.

10. *M R Balaji v State of Mysore* 1962 SCC OnLine SC 147 : 1963 Supp (1) SCR 439.

11. *R Chitralekha v State of Mysore* 1964 SCC OnLine SC 88 : (1964) 6 SCR 368.

12. *Janki Prasad Parimoo v State of J&K* (1973) 1 SCC 420.

13. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

14. *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.

15. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454 .

16. *M Nagaraj v Union of India* (2006) 8 SCC 212.

17. para 73.

In reading Article 46, Justice Maheshwari invokes the principle of distributive justice only to turn it on its head. His discussion of Article 46 alongside distributive justice rests on just one assumption that reservation is a poverty alleviation program. Having failed to substantiate this assumption, he turns to Preambular phrases like justice, social, economic and political, including fraternity, for support without providing any plausible legal reasoning. It is absolutely incomprehensible how these words in the Preamble support reservation on economic ground alone. Justice Maheshwari hopes to find some solace in the rules of interpretation. He refers to the living tree theory of the Constitution, which in this context advocates infinite stretching of constitutional text to accommodate any meaning that Justice Maheshwari wants to find there. When Justice Maheshwari looks at the constitutional text, he only sees empty signifiers, which can be filled with whatever meaning he deems necessary to uphold the EWS reservation. Despite labouring considerably with Article 46, he is unable to establish any relationship between economically weaker Savarna and reservation for them. He lamely refers to Articles 38 and 39 which even he knows stand firmly against any such relation.

On the exclusion of socially and educationally backward classes (SEBCs) from the benefit of EWS reservation Justice Maheshwari is even more evasive. He observes that “*poverty is a material factor taken into consideration along with caste, residence, occupation or other dominant feature while recognising any particular class/caste’s entitlement to the affirmative action by way of reservation enabled in terms of Articles 15(4), 15(5) and 16(4)*”.¹⁸ He does not pause to ponder that when poverty is already taken into account for providing reservation to SEBCs, EWS reservation on the ground of poverty loses all its validity. Wherever a caste suffers from poverty, it shows up in its social and educational status, and that caste finds a place in the OBC category. There is no caste that fails to make it to the OBC category and still remains poor as a class. Justice Maheshwari seeks to transcend this reality by conjuring up a classification between “*economically weaker sections*” and “*other weaker sections*” as if the latter does not already include the former. This fallacy was reiterated later in the judgment, where he stated that the 50% ceiling rule was meant to benefit ‘*general merit candidates*’, completely ignoring that it always included the SEBCs. The rising share of SEBCs in the general merit candidate list is the reason why EWS has been brought in the first place. Even if the SEBCs were to be included in the EWS quota, it could not validate reservation

18. para 78.

for the Savarna given their preponderance in all public institutions, power structures and prosperity indicators.¹⁹

Justice Maheshwari treats EWS reservation as another form of “*compensatory discrimination*” so as to put it on the validating pedestal of SEBC reservation. One may ask, if EWS reservation is a compensation scheme for the discrimination that the poor Savarna-Ashraaf have faced, then who was the discriminator? After the departure of the British from India, power fell in the hands of Savarna in India and Ashraaf in Pakistan.²⁰ Is it the case that rich Savarnas, who have been in a position of economic, social and political power since independence, discriminated against the poor Savarnas? Justice Maheshwari assumes that they did. If this assumption is correct, then it is a serious charge against the rich and powerful Savarna, which sociologists, psychologists, economists and political scientists must urgently investigate. However, even if such a charge of discrimination is found to be truthful, then more than the EWS quota, what we need is a comprehensive policy for reforming the rich Savarna Ashraaf who fall prey to classist, casteist and communal impulses so easily. Instead, Justice Maheshwari invokes the creamy layer principle to support the EWS reservation, which the Supreme Court invented to arrest social democracy in the first place.²¹

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19. Prannv Dhawan, Christophe Jaffrelot and Kalaiyarasan A, ‘Supreme Court’s EWS Verdict: Why Diluting Caste-Based Reservations is a Counterproductive Move’ *The Indian Express*, 18 November 2022; Namit Saxena, ‘Disproportionate Representation at the Supreme Court: A Perspective Based on Caste and Religion of Judges’ *Bar and Bench*, 23 May 2021; Shyamlal Yadav, ‘Reservation Candidates are under-Represented in Govt’s Upper Rungs’ *The Indian Express*, 17 January 2019; Who Tells Our Stories Matters, Oxfam India Report, 2 August 2019; IDIA Diversity Survey Report, 2018-2019.
20. G Aloysius, *Nationalism without a Nation in India* (Oxford University Press, New Delhi, 1st edn 1998); D N Jha, *Ancient India: In Historical Outline* (Manohar, New Delhi, 2nd edn 1998); Braj Ranjan Mani, *Debrahmanising History: Dominance and Resistance in Indian Society* (Manohar, New Delhi, 1st edn 2005); Gail Omvedt, *Understanding Caste: From Buddha to Ambedkar and Beyond* (Orient Blackswan, Delhi 2011); Perry Anderson, *The Indian Ideology* (Three Essay Collective, Gurgaon, 2nd edn 2015); Khalid Anis Ansari, ‘Revisiting the Minority Imagination: An Inquiry Into the Anticaste Pasmanda-Muslim Discourse in India’ (2023) 11.1 Critical Philosophy of Race 120-147.
21. See Ayaz Ahmad, ‘Role of Supreme Court in Arresting Social Democracy’ in Salman Khurshid, Yogesh P Singh, Lokendra Malik, et al (eds), *The Supreme Court and the Constitution: An Indian Discourse* (Wolters Kluwer, New Delhi, 2020) 182-205; Kuffir Nalgundwar, ‘Let’s Skim the Upper Caste Creamy Layer’ Round Table India, 14 September 2012.

Having failed comprehensively in finding any constitutional basis for the EWS reservation, Justice Maheshwari triumphantly proclaims that the Amendment in question cannot be said to be in such a violation of the rule of equality which is shocking in the hope that such an act of triumphant proclamation itself will foist the Amendment with a semblance of legitimacy. It is only in his discussion of the basic structure doctrine tempered with Parliamentary sovereignty that Justice Maheshwari sounds little persuasive.²² The discussion of the 50% ceiling by Justice Maheshwari too is rife with many contradictions and unfounded easy conclusions. Here he begins with the understanding that SEBCs do, after all, contain economically weak but immediately asserts that they cannot object to the breach of the 50% ceiling as there is another separate class and section, i.e., economically weaker section.²³ The paradox could not be more palpable. If SEBCs already include the economically weak, then how does EWS constitute a “*separate class and section*”? Similarly, if EWS is a separate class, then why does it not include all people with low incomes in it? Why shouldn’t SEBCs object when the general pool open to them shrinks by 10% without any reason or rhyme especially when their representation is far less than their share in population?

Further, if the ceiling of 50% was so malleable, then what was the justification for imposing it on SEBCs when their population exceeds it by 30-35%? How can the 50% ceiling operate harshly against SEBCs but evaporate without a trace for the Savarna Ashraaf quota? One of the main contentions of Justice Maheshwari in support of such a contradictory position is that the 50% ceiling rule originated in cases pertaining to SEBCs. How could it be otherwise? How could 50% ceiling rule cases refer to EWS when it was non-existent at that time! Be that as it may, if the ceiling of 50% is good to be applied on SEBCs whose population is far in excess, then it must apply to the Savarna quota with equal force as their population is hardly 15%.²⁴ Again, all the judgments that Justice Maheshwari cites only establish that the 50% ceiling is just a rule of caution which cannot be mechanically applied to any case of reservation. Yet he concludes that the 50% ceiling rule somehow can apply exclusively to SEBC cases of affirmative action!

22. para 87.1.

23. para 90.

24. Several official studies conclude that SC, ST and OBC taken together are 85% while Savarna constitute 15% of the total population.

Moreover, Justice Maheshwari quotes the passages from *M Nagaraj v Union of India*²⁵ which created the prerequisite of establishing backwardness and inadequacy of representation for implementing SEBC reservation in order to uphold the breach of the 50% ceiling by the EWS amendment. However, those prerequisites were created in *M Nagaraj* precisely to impose the rule of 50% and not to breach it.²⁶ Similarly, the quotations from *K Krishna Murthy v Union of India*²⁷ and *Jaishri Laxmanrao Patil v Chief Minister*²⁸ cited by Justice Maheshwari, clearly show that the 50% ceiling rule is a general requirement of the equality principle and not confined to SEBCs.²⁹ Therefore, either these requirements are valid for all classes of reservation or none at all. They cannot be imposed on SEBC reservations alone in a contemptuous and discriminatory fashion leaving the pure EWS quota out of their net. Such an approach will collapse the constitutional structure of equality, both formal and substantive, beyond recognition.

Judicial demand for data relating to backwardness, inadequacy and efficiency from SEBC delayed and derailed reservations for them. Not including these demands in the judicial review of the EWS quota makes the review patently partisan. Aware of this truth, Justice Maheshwari seeks to atone by suggesting that the EWS quota, too, can be reviewed with judicial demand for data sometime in future.³⁰ Why such a review in the future when the EWS quota was alive and roaring even before hearings in this case began? The answer is simple that such a review would have compounded the discriminatory character of the EWS amendment, making it even more difficult to survive the basic structure challenge. For all these reasons, there could not have been a more appropriate occasion to invoke the doctrine of basic structure. The EWS judgment lost the opportunity to demonstrate that the basic structure doctrine is not yet another device to serve the vested interests of the hegemonic caste/class.³¹

A more fundamental attack on the reservation is the attempt by Justice Maheshwari to stamp out Article 16 of its representative core. In Para 98, he seeks to establish that the representation related provisions of Article 16 are not confined to ‘*representation*’ alone. This he concludes by referring to the carry forward rule incorporated in Article 16(4B), which was

25. *M Nagaraj v Union of India* (2006) 8 SCC 212.

26. para 92.7.

27. *K Krishna Murthy v Union of India* (2010) 7 SCC 202.

28. *Jaishri Laxmanrao Patil v Chief Minister* (2021) 8 SCC 1.

29. para 92.9.

30. para 97.

31. n 21.

ironically brought in through constitutional Amendment for the purpose of representation only! When nothing appears to favour his particular conclusion on this issue, Justice Maheshwari excludes representation purpose too from the ambit of Article 16(6).³² In Para 99.1, he underlines the need to construct laws, including constitutional amendments, in harmony with International Law without referring to any International Convention which advocates reservation on economic ground.

Similarly, he quotes Justice Cardozo as cited in *Kesavananda Bharati v State of Kerala*³³ and Cooley's passage about the need for judicial restraint in the matters of the challenge to constitutionality, blissfully ignoring that they relate to judicial review of ordinary legislation and not a constitutional amendment like EWS. In the next Para, Justice Maheshwari makes an analogous argument with reference to previous amendments to Articles 15 and 16, which were found to be valid, holding that the EWS amendment, too, is valid.³⁴ This analogy elides the fact that previous amendments were made to overcome judicial impediments to achieve substantive equality, while the EWS amendment seeks to entrench inequality substantially.

Para 101 of Justice Maheshwari's opinion starkly reveals everything that is wrong with the basic structure doctrine. If provisions concerning substantive equality contained in Articles 15 and 16 cannot be treated as an essential feature of the Constitution, does it really matter what else is included? The ease with which Justice Maheshwari brushes aside reservation as a means of affirmative action from being part of the constitutional basic structure while Justice R. F. Nariman includes the creamy layer principle in *Jarnail Singh v Lachhmi Narain Gupta*³⁵ which was judicially developed to qualify reservation should send alarm bells ringing for anyone serious about the rule of law. Not that the doctrine of the basic structure had any real justification before, but after its non-application in the EWS judgment, the doctrine has been significantly weakened. Finally, in his rush to validate the EWS amendment, Justice Maheshwari handed over the '*basic structure pass certificate*' without contesting its part related to EWS admission in private educational institutions.³⁶ For a similar certificate, SEBCs had to struggle for over a decade.³⁷

32. para 98.1.

33. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

34. para 100.

35. *Jarnail Singh v Lachhmi Narain Gupta* (2018) 10 SCC 396.

36. paras 103 and 104.

37. *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.

3. JUSTICE BELA M TRIVEDI'S CONCURRENCE WITH UPPER CASTE NORMS AND VALUES

After concurring with Justice Maheshwari and paying ritualistic homage to the doctrine of basic structure, Justice Trivedi begins to undermine both with select quotes from judgments authored by upper caste judges. The object of her judicial excursion is straightforward: to justify social classification on the economic basis as rational. She deploys the theory of reasonable classification to gouge out social justice from the constitutional principle of equality. With this move, Justice Trivedi supports reservation on economic ground for Savarna *as well as* the exclusion of economically poor SEBCs from it as a rational classification. For once, classification on economic ground alone for the purpose of poverty alleviation can indeed be reasonable. In fact, many poverty reduction programs and schemes run by the Union and State governments to provide food, housing, health, and employment to the poor irrespective of castes serve this purpose which remain valid. EWS, on the other hand, is not on the economic ground alone. It is meant for the Savarna Ashraaf only. So, the basis of EWS is both caste and poverty. The only way this classification could be reasonable is if it was meant to provide representation to the poor Savarna Ashraaf who were not adequately represented in educational institutions and public employment. To ascertain such inadequacy, one needs to find the share of poor Savarna Ashraaf vis-a-vis rich Ashraaf Savarna in public and institutions. However, the reality is that Savarna generally remains excessively represented in public services and educational institutions due to their cultural capital.³⁸ The trinity of Parliament, Executive and Judiciary dominated by the Brahmin Savarna know it very well. Without such dominance, the conception of EWS was impossible. This is why none of them even remotely made an attempt to justify EWS as a measure to provide representation to economically poor Savarna. There is no intelligible differentia between upper caste poor and the lower caste poor. In the absence of any representative character to EWS, there is no rational nexus with the object sought to be achieved by such a classification. This violates the first principle of equality, which is an essential part of the basic structure of the Constitution. Hence, the EWS amendment fails the basic structure scrutiny like no other. All that verbal jugglery in Justice Trivedi's concurrence is to avoid this immanently obvious consequence of basic structure challenge against the EWS classification.

38. n 19.

In Para 21 of her opinion, Justice Trivedi contends that the SEBCs for whom the special provisions has been provided in Articles 15(4), 15(5), and 16(4) form a separate category as distinguished from the “*general or unreserved category*”. The conclusion of Justice Trivedi based on the quoted sentences are factually and legally incorrect. The SEBCs were always an integral part of the *general or unreserved category* to the extent they qualified in this category. Therefore, a separate class of “*economically weaker sections of the citizens*” cannot be rationally created from the *general/unreserved class*, which does not include SEBCs. It is like an attempt to drink only hydrogen from water leaving the oxygen untouched in the glass! Such an egregious violation of the equality principle is so wide and deep that it totally mutilates the identity of the Constitution, rendering the 103rd EWS Amendment patently unconstitutional.

However, Justice Trivedi reserves her best for the comment on the time span of the reservation policy. First, she selectively refers to a few anti-social justice paras from *K C Vasanth Kumar v State of Karnataka*³⁹ and *Ashoka Kumar Thakur v Union of India*⁴⁰ judgments, leaving out a much richer opinion of Justice O Chinnappa Reddy in the former case. On this basis, she advocates the abolition of reservations and representations provided through Article 15 and Article 16 within a certain time limit which she considers ‘transformative constitutionalism’. Justice Trivedi thinks that this kind of ‘affirmative action’ can lead to an egalitarian, casteless and classless society. Savarna judges and their high fancy ideals!

4. IRRESISTIBLE APPEAL OF SAVARNA BELIEFS AND VALUES FOR JUSTICE J.B. PARDIWALA

After noting the majority and minority opinions of Justice Dinesh Maheshwari and Justice Ravindra Bhat, respectively, Justice Pardiwala provides reasons for his agreement with the majority opinion. He starts by referring to *State of Madras v Champakam Dorairajan*⁴¹ which was decided in complete disregard to the constitutional vision of egalitarian society and hence undone by the very first Amendment to the Constitution. What purpose is served by citing a judgment which lost all its legal value soon after it was delivered 75 years ago? By repeatedly referring to this case, Savarna judges hope to normalize judicial aversion to all affirmative action

39. *K C Vasanth Kumar v State of Karnataka* 1985 Supp SCC 714.

40. *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

41. *State of Madras v Champakam Dorairajan* 1951 SCC 351 : 1951 SCR 525.

which can destabilize caste and communal foundations of the Brahminical order.

After this, Justice Pardiwala harks back to the classification principle on which he hardly has anything more to add than what Justice Maheshwari and Justice Trivedi had already said. Later, Justice Pardiwala narcissistically refers to *Mohini Jain v State of Karnataka*,⁴² *Unni Krishnan, J P v State of A.P.*⁴³ and *T M A Pai Foundation v State of Karnataka*⁴⁴ judgments eulogizing the role of the Supreme Court in developing the right to education.⁴⁵ However, an impact analysis of these judgments reveals that they ended up structuring private educational institutions as an exclusive preserve of the wealthy Savarna Ashraaf class.⁴⁶ It is unclear how these references and quotations help the cause of the EWS amendment. Such meaninglessness runs through most of his judgment. For instance, in Para 40 and 41, Justice Pardiwala aimlessly draws a distinction between the “backward classes” referred to in Article 16(4) and “SEBCs” referred to in Article 15(4) only to acknowledge in Para 42 the *undisputed position* that the State is using the categorization of SEBC for both!

Left perplexed by Justice Maheshwari’s per in-curium suggestion that Articles 15(4) and 16(4) are an exception to Articles 14, 15(1) 16(1), Justice Pardiwala refers to *State of Kerala v N M Thomas*⁴⁷ and *Indra Sawhney v Union of India*⁴⁸ in Para 43 and 44 to correct the record. However, he has nothing to say about Justice Maheshwari’s misadventure on this point with the help of these references or his concurrence with him earlier in the judgment. Next, he refers to *Pramati Educational and Cultural Trust v Union of India*⁴⁹ whereby the validity of those parts of Article 15(5), which concern SEBC reservation in private unaided educational institutions added by the Constitution 93rd Amendment Act, 2005, was affirmed. Justice Pardiwala uses *Pramati*’s affirmation to uphold the validity of Article 15(6) added by the EWS Amendment on the basis of analogy.⁵⁰ He completely ignores that the reasoning of *Pramati* related to SEBC class which could not be extended to EWS class unless it is established that both classes have identical characteristics. Instead, he casually touches on subjects like the

42. *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 : AIR 1992 SC 1858.

43. *Unni Krishnan, J P v State of A.P.* (1993) 1 SCC 645 : AIR 1993 SC 2178.

44. *T M A Pai Foundation v State of Karnataka* (2002) 8 SCC 481.

45. paras 36 to 39 of Justice J.B. Pardiwala’s opinion. Henceforth, all referred paras are from Justice Pardiwala’s opinion unless indicated otherwise.

46. For a critical analysis of these judgments, see Ayaz Ahmad and Nachiketa Mittal, ‘Constitutive Functions of Minority Rights and Social Justice in India’ (2022) 64: 3 Journal of Indian Law Institute 341.

right to education, the Preamble, the Fundamental Rights, the Directive Principles of State Policy, social justice, the right to work, the creamy layer, inclusion of castes into the OBC list through quotations from different judgments without any real conclusion.⁵¹ Para 61 to 63 are dedicated to find some grounds, preferably economic, for identifying backward class without reference to historical conditions which create backwardness. This attempt is hardly persuasive as the lone example of judicial recognition of the third gender cited by him is a case of backwardness due to historical reasons only.

On economic criteria for reservation, Justice Pardiwala first quotes certain parts of *N M Thomas case*⁵² from assenting and dissenting opinions, which again gives us no conclusion. This is inevitable as these quotations are so haphazard; now, it is about the affirmative obligation of the State, and then it is about the indigent defendant. Here, you have assenting opinion supporting reasonable classification for social justice; there, you have dissenting opinion rejecting classification as unreasonable.⁵³ In desperation, he leans on the dissenting judgment of Justice Bhat for support on this issue.⁵⁴ Justice Pardiwala seeks to summarize his concurring judgment in Para 68. Here again, we find no conclusion regarding the economic criteria for reservation. It is in Para 69 where there is something of a conclusion about the relevance of economic criteria. He first correctly observes, “*If adequate representation in services of the under-represented class was the sole purpose of Article 16(4), any person from that class would be representative of that class*”.⁵⁵ However, he adds that judicially invented creamy layer exclusion qualifies this statement.⁵⁶ This exclusion of the creamy layer from the ‘backward class’ in Article 16(4) is presented as evidence of economic criteria being relevant for the purposes of Article 16 as a whole! In essence, one generation of Savarna judges invented the creamy layer principle to dilute the purpose of Article 16(4), and the next generation of Savarna judges used this diluted form of Article 16(4) to legitimize its further impoverishment through the EWS Amendment. Upholding the validity of the 103rd Amendment, Justice Pardiwala in Para 70 observes that economically weak Savarna *suffer from similar disadvantages as the OBCs*. If this indeed was the case, then how

51. paras 54 to 60.

52. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

53. para 66.

54. para 67.

55. para 69.

56. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454.

could successive OBC commissions fail to add poor Savarna to the OBC category? In that case, the OBC share could be increased by 10, 20 or 30% to help these poor Savarna as much as possible. However, Savarna legal strategists, jurists and judges are well aware that the economically weak Savarna *do not* suffer from similar disadvantages as the OBCs. They know for sure that the data suggesting even a *remote similarity* has already been exhausted by casually adding many Savarna castes to the state OBC lists.

Later, Justice Pardiwala holds that Article 46 cannot be interpreted on the principle of *ejusdem generis*.⁵⁷ Plasticity of the principles of interpretation allows all judges, including Savarna judges, to apply this or that principle selectively that agrees with the particular meaning that they seek to advance.⁵⁸ Justice Pardiwala makes full use of this plasticity in concluding that Article 46 is not based on the social test but on the means test, making expressions ‘*Scheduled Castes or the Scheduled Tribes*’ and ‘*social injustice*’ used in this Article completely irrelevant and out of place. So much so that he believes taking into account “*social status*” in interpreting Article 46 would be a strain and “*nullify otherwise the pure object of Article 46*”.⁵⁹ The pure object of Article 46, according to Justice Pardiwala, is to provide reservation to poor Savarna!⁶⁰

Next Justice Pardiwala attempts to differentiate the theory of interpretation of a Constitution from the theory of interpretation of statutes. Here again, we find a patchwork of quotations from different judgments without any discernible order or conclusion.⁶¹ A similar pattern ensues in the discussion of the doctrine of basic structure.⁶² One Yaniv Roznai’s PhD thesis occupies the bulk of space in this discussion, including for the standards of review of the constitutional amendments.⁶³ Much of the debate over the basic structure doctrine is an exercise in tautology, making no new point whatsoever.⁶⁴ However, his concern about the difficulty in restraining the judiciary from making indiscriminate, undesirable and arbitrary use

57. para 79.

58. Karl N Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed’ (1950) 3 *Vanderbilt Law Review* 395; Mark V Tushnet, ‘Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles’ (1983) 96 *Harvard Law Review* 781.

59. para 81.

60. paras 82 and 83.

61. paras 84 to 96.

62. paras 97 to 103.

63. paras 104 to 107.

64. paras 108 to 127.

of the basic structure doctrine problematizes the very existence of the doctrine itself.⁶⁵ The highest point of his opinion comes in Para 132 where he proclaims that, “*If the necessary changes cannot be brought through constitutional means, revolution becomes a necessity. Thus, an unlimited amending power and a simple procedure of Amendment is an effective means to bring about social revolution through law*”. It is the only point that has been argued coherently by Justice Pardiwala, as it stems from his awareness that the EWS Amendment could not be justifiably upheld without overthrowing the doctrine of basic structure. But the commitment to logical consistency hardly bothers him as he accepts the basic structure doctrine in the next few Paras without blinking an eye.⁶⁶

Justice Pardiwala in Para 154 ascertains that a constitutional amendment would violate the doctrine of basic structure if it violates some overarching principle of the Constitution. Not only this, in a rare display of continuity, he acknowledges that “*egalitarian equality*” is an overarching principle. Later, he explores how the expression “*Rule of Law*” constitutes an overarching principle⁶⁷ without reasoning out whether the EWS Amendment violates these overarching principles. In the same fashion, the “*effect test*” and the “*degree test*” are referred to without any attempt to review the EWS amendment in their light. Instead, the “*similarly situated test*” is taken up as “*the pivotal or seminal question*” for consideration by Justice Pardiwala. The only problem here is that such a consideration never takes place in any coherent way. Moreover, Justice Pardiwala abandoned all the tests and principles he referred to thus far and returned to the identity test of *Kesavananda Bharati case*.⁶⁸ However, the EWS amendment is not tested even on the identity test.

The real purpose of writing this long, confused and repetitive concurring opinion becomes clear when Justice Pardiwala begs to differ with Justice Ravindra Bhat on the question of SC/ST/OBC exclusion from EWS reservation.⁶⁹ Justice Bhat, in his dissenting opinion, to be analyzed in the next section, quashed the EWS Amendment on the ground of this exclusion. However, to differ from Justice Bhat on this issue, Justice Pardiwala does not use any of the tests and principles he discussed above. Instead, he brings up two facets of classification recognized under Article 14. One is

65. para 128.

66. paras 133 to 136.

67. para 156.

68. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

69. para 163.

left flabbergasted by now; what was the point of quoting and discussing so many tests and principles for reviewing a constitutional amendment if the EWS amendment was to be reviewed on the basis of the Article 14 classification principle developed to review ordinary laws? Even for this review, all that he has to say is that “*differentia used for the classification in the EWS amendment is to promote or uplift the economically weaker sections of citizens*”. What exactly is the differentia here is not explained at all. If it is economic status, then how come the majority of economically weak find themselves out from the EWS? If it is caste, then how come the majority of lower castes find themselves out from it?

In Para 168, Justice Pardiwala observes that “*there is a yardstick used for constituting the class for the purpose of the amendment*”. What is this “*yardstick*” is never revealed. Subsequently, in Para 171, he seeks to justify the exclusion of SEBCs from the EWS by suggesting that such a classification is to prevent double benefit. This suggestion fundamentally undermines the Parliamentary claim that there exists an economically weak class of people who are not adequately represented in need of representation. Minus SEBCs, what is left of EWS is a small minority of Savarna who, in fact, are over-represented in State services and educational institutions.⁷⁰ Is there any data to suggest that this group of Economically Weak Savarna are under-represented in any walk of life? None whatsoever. The only situation in which the poor will appear under-represented is when the category of poor includes SEBCs. To demonstrate under-representation by including SEBCs and then to enact EWS reservation by excluding SEBCs tantamount to public fraud. It is clear that the classification of an economic class under Indian conditions is a theoretical and practical impossibility. Perhaps EWS would have made some sense if it provided 10% reservation to the poor OBC as the OBC population exceeds 50%, but it gets only 27% reservation.

Justice Pardiwala goes on to ask that when provision for the advancement of SEBCs is not characterized as the one based on any prejudice, contempt or insult to any forward class then why should a provision for the advancement of any economically weaker section of the society excluding SEBCs be characterized as the one based on prejudice, contempt or insult to SEBCs? He does not pause to ponder that constitutional affirmative action for SEBCs is due to their systematic and structural exclusion historically enacted through a social system characterized by increasing order of reverence and decreasing order of contempt.⁷¹ This social system

70. n 19.

71. Dr B R Ambedkar, *Annihilation of Caste* 1 (BAWS 1936) 23 to 96.

was presided by the Savarna Ashraaf, including their economically weak sections. EWS amendment seeks to equate such poor Savarna with SEBCs. Does this *equal treatment of unequals* not violate the equality principle? Is it not prejudiced, contemptuous and insulting to the SEBCs who find their socio-economic mobility obstructed both in the past and present due to the complicity of economically weak Savarna with whom they are now equated by the EWS amendment?

Justice Pardiwala quotes from *Ashok Kumar Thakur v Union of India*⁷² on the inclusion of an equality code in the basic feature of the Constitution. The following lines are particularly relevant to decide the issue: “*The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the “basic structure” of the Constitution and may not be subject to amendment*”. EWS amendment violates this significant principle of equality to the extent that the constitutional identity is altered in the most fundamental way. 103rd Amendment empowers socially advanced sections in such a way that the gap with socially disadvantaged sections will expand rather than shrink. In other words, EWS reservation will only increase social inequality, negating the constitutional ideal of social equality.

Para 187 makes it abundantly clear that Justice Pardiwala just wants to eradicate *caste-based reservation*. He invokes Nani A. Palkhivala to support his socially blind conclusion. He even invokes Dr. Ambedkar’s definition of fraternity to railroad against the constitutional promise of social equality. This is a direct attempt to place Dr. Ambedkar’s unflinching commitment to equality against his commitment to the fraternity in order to subvert both. Dr. Ambedkar clearly articulated that fraternity without social equality is impossible. In fact, his undelivered speech titled ‘*Annihilation of Caste*’ cited by Justice Pardiwala, there is not a single instance where Ambedkar’s reference to fraternity is not preceded by his concern for social equality.

By the end of his judgment Justice Pardiwala advocates the elimination of anti-caste reservation policy. He seeks removal of large percentage of backward class members from the backward categories. He has no idea that a periodical review of the backward category list does take place where the decision about exclusion and inclusion of a backward/forward caste is made. Whenever and wherever a caste is found to have fallen backward as a class, it is included in the backward category list along with its economically weak members. This exercise completely obviates the need for enacting a separate reservation for poor Savarna. Justice Pardiwala in Para 190

72. *Ashok Kumar Thakur v Union of India* (2008) 6 SCC 1.

comments on the duration of reservation by wrongly invoking Babasaheb Ambedkar. Even a cursory look at Dr. Ambedkar's life and writings would make it evident that he wanted to bring social harmony by establishing social equality after annihilating caste. He did not introduce reservation for only ten years. As a matter of fact, the present political reservation was imposed on him by snatching the right to double vote through Poona Pact by Gandhiji on a threat of grave physical violence to his people.⁷³ Justice Pardiwala nevertheless concludes his opinion by validating the impugned Amendment on the back of one falsehood after another.

5. DISSENTING ASSENT OF JUSTICE S. RAVINDRA BHAT

At the very outset, Justice Bhat qualifies his dissent by expressing his assent with his Savarna brothers and sister on the issue of 'economic criteria' for affirmative action.⁷⁴ His conscience is pricked only by the exclusionary and discriminatory principle which is integral to the EWS Amendment. He rightly corrects the factual inaccuracy of the majority opinions regarding Articles 15(4) and 16(4) being an exception to Articles 15(1) and 16(1) by citing relevant judgments of much larger benches from *N.M. Thomas*, *Indra Sawhney* to *M. Nagaraj*. Thereafter, Justice Bhat carries out a brief survey of the doctrine of basic structure and concludes that the equality code is an integral part of it. He revisits the test for determining the basic structure and the methodology of determining whether a constitutional amendment violates the basic structure with reference to *Kesavananda Bharati*, *Indira Nehru Gandhi v Raj Narain*⁷⁵ and *M. Nagaraj*. He also notes that the difference in the standard that the Supreme Court adopts for judicial review vis-a-vis basic structure review does not result in a difference in the approach to consider whether the Amendment violates the basic structure. He nicely sets up the basic structure review of the EWS amendment by elaborating that, "*the appropriate test or standard of judicial review of constitutional amendments is...whether the amendment challenged destroys, abrogates, or damages the "identity", or "nature" or "character" or "personality" of the Constitution, by directly impacting one or some of the "overarching principles" which inform its express provisions*".⁷⁶ In other words, "*the test is whether the impact of the amendment is to change the Constitution, into*

73. Kanshi Ram, *The Chamcha Age* (Siddharth Books, Delhi 1982); B R Ambedkar, *What Congress and Gandhi Have Done to the Untouchables* 9 (BAWS 1945) 1-297.

74. For a comprehensive historical, conceptual and theoretical framework of judicial dissent see, Yogesh Pratap Singh, *Judicial Dissent and Indian Supreme Court* (Thomson Reuters, New Delhi 2018).

75. *Indira Nehru Gandhi v Raj Narain* 1975 Supp SCC 1.

76. para 29.

something it could never be considered to be”.⁷⁷ In this background, Justice Bhat answers the 3rd question first, that is, whether the exclusion of SEBCs from the EWS quota is permissible or not.

To answer the exclusion question, Justice Bhat first determines the content of the Equality Code by recalling its history and how the Equality Code is an integral part of the basic structure. He finds that the overarching idea of non-discrimination is one of the fundamental facets of equality, and so is discrimination, directly or indirectly, on proscribed grounds as spelled out under Article 15.⁷⁸ Through a similar process, he identifies Article 16 essentially with the idea of adequate representation of different social classes in public services intrinsic to the Equality Code.⁷⁹ He clearly finds that the idea and identity of equality is “*non-discrimination in any form, for any reason whatsoever on the proscribed grounds, including in matters of public employment*”.⁸⁰ Justice Bhat rightly concludes that *the obligation or duty* to equalize those sections of the population hitherto discriminated against and ostracized through affirmative action *is on the State*.⁸¹

Next he concludes that the destruction the principle of equality will amount to changing the basic structure of the Constitution.⁸² Justice Bhat reaches this conclusion by referring to specific paragraphs from *Kesavananda Bharati* (para 1159), *Minerva Mills Ltd v Union of India*⁸³ (para 19), *Raghunathrao Ganpatrao v Union of India*⁸⁴ (para 142), *R C Poudyal v Union of India*⁸⁵ (para 54), *Indra Sawhney* (para 260-261), *Indra Sawhney (2) v Union of India*⁸⁶ (para 64-65), *M. Nagaraj* (para 31-32), *I R Coelho v State of T.N.*⁸⁷ (para 105), *Saurabh Chaudri v Union of India*⁸⁸ and *S R Bommai v Union of India*.⁸⁹ He further demonstrates that the overwhelming concern of the Constitution is to equalize the status of SEBCs vis-vis upper castes through reservation policies by referring

77. para 30.

78. paras 35 to 40.

79. para 44.

80. para 60.

81. paras 60 and 61.

82. paras 60 and 61.

83. *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.

84. *Raghunathrao Ganpatrao v Union of India* 1994 Supp (1) SCC 191.

85. *R C Poudyal v Union of India* 1994 Supp (1) SCC 324.

86. *Indra Sawhney (2) v Union of India* (2000) 1 SCC 168.

87. *I R Coelho v State of T.N.* (2007) 2 SCC 1.

88. *Saurabh Chaudri v Union of India* (2003) 11 SCC 146.

89. *S R Bommai v Union of India* (1994) 3 SCC 1.

to *Vikas Sankhala v Vikas Kumar Agarwal*,⁹⁰ *Samatha v State of A.P.*,⁹¹ and *Indian Medical Assn v Union of India*⁹² judgments. Accordingly, he reaches the irresistible conclusion that non-discrimination, especially the importance of the injunction not to exclude or discriminate against SC/ST communities, constitutes the essence of equality which is part of the basic structure.

On the strength of the above conclusions, Justice Bhat utilizes the classification principle to determine whether classification by the EWS amendment of ‘*economically weaker sections*’ into SEBC poor and upper caste poor to exclude the former from reservation meant for economically weak is permissible. He finds that “*this classification is plainly contrary to the essence of equal opportunity*”. He rightly argues that when the basis of classification in the impugned Amendment is *economic deprivation*, how can it exclude certain *economically deprived* sections on the basis of *social origins*? He concludes that there is no *intelligible differentia* between the SEBC poor, who may avail of 15(4) and 16(4) reservation and the Savarna poor, who cannot. Nor is there any *rational nexus* between that distinction and the object of the Amendment, which is to achieve economic justice. It is clear that although this mode of legal reasoning renders the EWS amendment invalid, it ends up treating the SEBC poor at par with the Savarna poor erasing additional social deprivations of the former. In the words of Justice Bhat, “*Poverty – or its acute ill effects are equally felt by all, irrespective of which silos they are in*”.⁹³ This inaugurates grave mischief against the cause of social justice. The natural culmination of this line of reasoning is that reservation on economic ground would be valid if it covers both the SEBC and the Savarna poor.⁹⁴ Validation of this formulation would effectively mean the death of social justice. There is a monumental irony in Justice Bhat’s dissent that it may eventually shut the door on social justice that he seeks to keep open. His dissent is not redeemed by his well-meaning observations later in the judgment that existing reservation policies have not yet yielded significant results.⁹⁵

There is another problem in Justice Bhat’s dissent, which relates to the objectives of reservations. He euphemistically explores the objectives

90. *Vikas Sankhala v Vikas Kumar Agarwal* (2017) 1 SCC 350.

91. *Samatha v State of A.P.* (1997) 8 SCC 191.

92. *Indian Medical Assn v Union of India* (2011) 7 SCC 179.

93. para 94.

94. para 87.

95. paras 91 and 92.

of reservation by positing that it is meant to benefit the *individual* in the domain of education and public employment and the *community* in the case of elective public offices. Such a distinction is socially ignorant at best and mischievous at worst. No reservation policy designed to benefit a social *community* can operate without benefiting the *individual* and vice versa. The thesis that reservation is meant to benefit the individual in the domain of education and public employment goes on to legitimize the economic status of the individual for the purposes of reservation in these domains. At one level, this approach atomizes an already fragmented group of SEBCs and solidifies the already organized community of the Savarna Ashraaf. Once again, Justice Bhat's invalidation of the EWS amendment on the basis of *individual* and *community* beneficiary distinction ends up strengthening the economic ground for reservation, which is capable of much more serious mischief in the future.⁹⁶ Therefore, when his judgment holds that the exclusionary clauses of the EWS amendment radically damage the identity of the Constitution and violate the basic structure, it remains a counter-revolutionary verdict.⁹⁷ Justice Bhat is fully aware of this effect. Hence, he adds additional reasoning premised on the *inadequacy of representation* for invalidating the EWS amendment with respect to Article 16(6) in Part V of his opinion.⁹⁸ He reasons as “*the introduction of reservations for economically weaker sections of the society is not premised on their lack of representation.. (it) violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees*”.⁹⁹ He rightly argues that Article 16(6) snaps the “*link - between providing equal opportunity, and representation through reservations*”.¹⁰⁰ With this the “*vital dimension of need to be represented, to be heard in the decision-making process, has been entirely discarded by the impugned amendment in clause (6) of Article 16*”.¹⁰¹

However, Justice Bhat still goes on to support reservation based on economic criteria for the purpose of Article 15. This he does by first treating Article 15(6) as an addition that removes the basis of *Indra Sawhney's* dictum against the economic criteria without answering whether it is permissible in the face of basic structure doctrine.¹⁰² Next, he refers to certain Directive

96. paras 94 to 98.

97. paras 99 to 101.

98. Also see para 143.

99. para 131.

100. paras 125 to 133.

101. para 132.

102. para 107.

Principles of State Policy and elevates economic deprivation as part of the constitutional mandate for substantive equality sans any persuasive substantiation.¹⁰³ Thirdly, he bats for constitutional flexibility to achieve substantive equality in the sphere of economic deprivation, effectively bending the doctrine of basic structure which he had erected in the earlier part of his judgment. Justice Bhat refers to Sinho Commission Report (2010) and NITI Aayog Report on National Multidimensional Poverty Index 2021 but fails to ask whether these reports indicate any lack of Savarna representation in education which could justify their reservation. He validates the State action to give more space to Savarna on economic ground in education who are already over-represented.

It is interesting to note that Justice Bhat makes no attempt to explain that when the economic criteria under Article 16 violate the overarching representation principle of equality, how does it not do the same under Article 15? To be sure, if SEBCs are not proportionately represented in education through Article 15, then the objective of securing their representation in public employment through Article 16 gets so much more difficult. He did not bother to explain this dichotomy even when he “*accepted the contention that the guardrail of ‘adequate representation’ in Article 16 prohibits the introduction of reservation based on economic criteria for the purpose of public employment*”.¹⁰⁴ The only probable explanation could be that Justice Bhat was well aware that the overarching representation principle of the Equality Code is equally applicable to Article 15 as the affirmative spirit running through Articles 15 and 16 is identical. Any sincere attempt to explain its application to Article 16 and non-application to Article 15 could reveal the incongruence of his position and explicitly undermine his reasoning for both. That is why he leaves the matter by simply validating the economic criteria for the purposes of Article 15 and invalidating it for Article 16. Justice Bhat makes a feeble attempt to utilize few Supreme Court judgments on the Right to Education (RTE)¹⁰⁵ to suggest a distinction between the two articles on economic criteria in relation to admission to private unaided institutions.¹⁰⁶ However, he ignores that the definition of the weaker section and disadvantaged group under the RTE Act 2009 mainly relates to the SEBCs and, unlike the impugned

103. paras 108 to 110.

104. paras 143 to 145.

105. *Indian Medical Assn v Union of India* (2011) 7 SCC 179; *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1; *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.

106. paras 134 to 138.

Amendment, it is not exclusively based on economic criteria. Therefore, the RTE judgments cannot be used to validate exclusive economic criteria even for Article 15.

In an attempt to justify the exclusion of SEBCs from the EWS reservation by drawing a parallel with the creamy layer exclusion from the OBC reservation, Justice Bhat takes up a typical Savarna position. On the one hand, he chides against the exclusion of SEBCs from the EWS reservation by invoking the non-discrimination principle. Still, he defends the creamy layer exclusion with the baseless argument that the caste status of those who form part of the creamy layer becomes irrelevant.¹⁰⁷ If the caste status of backward classes can be so easily made irrelevant then the corollary would be to help every backward class person with reservation and make caste irrelevant for all of them!

Similarly, Justice Bhat's disagreement with the majority judges on the deployment of the over/under classification approach and the scope of Article 46 to validate the EWS amendment remains premised on the benign non-discrimination principle.¹⁰⁸ Interestingly, in Para 166, he quotes from *Indra Sawhney's* judgment, where Justice P. B. Sawant explained why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens for the purpose of reservation. Yet, Justice Bhat inexplicably retains economic criteria as the basis for reservation under Article 15 (6) in his dissenting assent.

Justice Bhat rightly argues that reservations under Articles 15(4) and 16(4) were not just compensatory but also reparatory, but the EWS reservation is neither compensatory nor protective. Justice Bhat redeems himself a little more by rejecting the suggestion by the majority opinion that reservation for backward classes stood exhausted by reason of Article 16(4).¹⁰⁹ Moreover, his data discussion on the percentage of poor among SEBCs lays bare the hollowness of any attempt to conceive an economic class without reference to the social location of its constituents.¹¹⁰ His position on the persistence of untouchability and crime against marginalized and stigmatized by caste is also quite sympathetic.¹¹¹ His best observation against the EWS amendment came in Para 175, where Justice Bhat writes that “*what begins as a seemingly innocuous alteration, may result in the “emasculatation” and*

107. paras 160 and 161.

108. paras 162 to 165.

109. para 170.

110. para 171.

111. paras 172 to 175.

ultimate annihilation of the grand principle of equality". However, in his peculiar way, Justice Bhat preferred to keep the question of violation of the 50% rule open.¹¹²

6. SOCIAL PATHOLOGY OF SAVARNA NORMS AND VALUES

For the hegemonic Savarna, mere acknowledgment, even at the subconscious level, that Indian society is beset by caste primarily constructed and sustained by them can generate an existential crisis of humongous proportions. Such an acknowledgment throws many complex challenges to the Savarna mind. It must immediately grapple with their numerical inferiority and how to reconcile their privileged status despite being the upper-caste minority with their dominance over the vast lower-caste majority. It reveals how disproportionate control of Brahmin Savarna Ashraaf over public institutions sits uncomfortably with their democratic commitments. Such an acknowledgment threatens their position as the leader of a carefully constructed communal majority. Thus, Savarna acknowledgment of caste as the significant foundation of economic and social order implicates their past and present in ways that no amount of cultural and nationalist chest-thumping can wriggle out.¹¹³

The EWS judgment clearly brings out the key components of Savarna norms and values: preservation and advancement of Savarna interests without any regard to the principles of justice, morality or the rule of law. EWS reservation is on the basis of upper casteness, not on the basis of economic backwardness, which is a logical and practical impossibility for the purpose of reservation, as argued above. Both the 103rd Amendment and the EWS judgment utterly fail to establish that there exists a class of economically weak Savarna Ashraaf who have suffered historical discrimination or continue to face structural exclusion at the hands of present public institutions. This is why Brahmin Savarna judges are particularly anxious to denude reservation of its representative character. The dilemma of Savarna judges is real: if they confer representative character on EWS, they will first have to establish the inadequacy of their present representation. This can make explicit their disproportionate control over all public and private institutions worth the name. It might begin the process of unraveling their hegemonic norms and values at many levels. Therefore, both the assenting and dissenting Savarna judges seek to

112. paras 172 to 179.

113. n 20.

establish economic deprivation as the basis of reservation in one form or the other.

Overemphasis on economic criteria might give an impression that it is only the economic interests of their caste/class that Savarna judges and jurists seek to preserve by undermining the democratic principle of representation. However, the problem is much deeper than it appears on the surface. For the Brahmin Savarna jurists, upholding the democratic principle of representation does not just compromise their economic interests, but it militates against their whole '*being*' both as an *individual* and as a *community*. This is why there are certain caste barriers that upper caste jurists consistently fail to overcome no matter how hard they try. It is instructive to note that Justice Bhat, even after observing that "*for the first time, the constituent power has been invoked to practice exclusion of victims of social injustice...which stands in stark contradiction of the principle of egalitarianism and social justice for all*"¹¹⁴ feels it necessary to uphold the validity of economic criteria for reservation. Hence, validating the EWS quota is no less than the '*judicial liquidation of social justice*'.

7. CONCLUSION

Lawyers and judges, like everyone else, perceive the world from the universe of social meaning they inhabit. Such perceptions are always partial and limited leaning towards the known and the familiar. However, the nature of judicial process is such that it must unearth mutually unknown and unfamiliar but competing meaning complexes to protect the weak from the powerful. The most plausible method to perform this task is to incorporate as much of social diversity as possible in the justice delivery system. It means that the leadership of the bar and the bench must be representative of different social classes living diverse social worlds of meaning. The profound tragedy of Indian judicial system, like most other limbs of governance, is that it has remained cocooned with the so-called Brahmin Savarna with a very nominal sprinkling of Ashraaf castes. Both the bar and the bench have been infested with high castes which represent no more than 10% of the Indian social world. Legal reasoning based on such a constricted sense of social totality is condemned to remonstrate against social justice provisions designed to accommodate the remaining 90% unrepresented castes in public institutions. As a result, judicial process gets stunted unable to develop a robust jurisprudence for social democracy. Judicial process is hopelessly reduced to policing social

114. para 75 of Justice Bhat's opinion.

democracy, instead of being harbinger of hope.¹¹⁵ Under these conditions, it is imperative that SC, ST and OBCs get proportionate representation in the higher judiciary so that they can interpret the Constitution with the spirit of social democracy. Different constitutional strategies can be explored for this noble purpose.¹¹⁶ Constitutional measures to realize representative higher judiciary alone can now unleash the revolutionary potential of Indian Constitution to establish social democracy as conceived by Dr. B. R. Ambedkar. Therefore, institution of a range of social, educational, cultural, economic, political and legal practices which can dis-articulate the existing hegemonic norms and values of Savarna Ashraaf and re-articulate a democratic order representing the Bahujan majority in the higher judiciary cannot be postponed anymore. Such a democratic order has the potential to revolutionize Indian social, economic, and political life immensely benefiting all sections of society. The road to developed status for Indian nation, it seems, passes through social justice.

115. *See* (n 21).

116. Ayaz Ahmad, 'Constitutional Strategies for Bahujan Representation in the Higher Judiciary' *Round Table India*, 15 August 2020, available at <<https://www.roundtableindia.co.in/constitutional-strategies-for-bahujan-representation-in-the-higher-judiciary/>>.