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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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THE CONSTITUTIONALLY **UNSOUND GAMBLE**

Authored By - Medhavi Capoor

BBA LLB

Section-E

“At the end of seventy-five years of our independence, we need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism.” – Justice Bela M Trivedi¹. Reservation is a system that is designed to provide opportunities to historically marginalized and underrepresented groups in society. It is a tool for promoting social justice and ensuring equal representation. However, the use of economic criterion as the basis for reservation is a controversial issue, with arguments both for and against it. In this essay, I will argue that the use of economic criterion as the basis for reservation is constitutionally unsound and goes against Supreme Court's long-standing jurisprudence.

Articles of the Indian constitution with regards to **reservation & what it constitutes of:**

The Indian Constitution provides for reservation for certain groups in educational institutions and public employment. The basis for such reservation is primarily social and educational backwardness, and not economic backwardness. This is evident from the Constitution itself, which refers to "backward classes" and not "economically backward classes." The Constitution of India, under Articles 14, 15(1), and 16(1), guarantees equality before the law and prohibits discrimination based on religion, caste, sex, or place of birth. The reservation system was introduced under Articles 15(4) and 16(4) to ensure the representation of historically disadvantaged sections of the society, primarily the Scheduled Castes, Scheduled Tribes, and Other Backward Classes. The objective of these provisions is to provide social justice and equality of opportunity to these groups and to establish parameters to eliminate transgenerational and economic disadvantages that do not fall under other welfare schemes offered by the Government of India.²

¹ EWS reservation: Key quotes from judges, The Siasat Daily, November 07, 2022 <https://www.siasat.com/ews-reservation-key-quotes-from-judges-2451566/>

² THORAT, SUKHADEO, et al. "Prejudice against Reservation Policies: How and Why?" *Economic and Political Weekly*, vol. 51, no. 8, 2016, pp. 61–69. *JSTOR*, <http://www.jstor.org/stable/44004417>. Accessed 27 Feb. 2023

The introduction of the 103rd amendment and cases argued:

The 103rd Amendment to the Indian Constitution was passed in 2019 to provide 10% reservation in jobs and educational institutions to economically weaker sections (EWS) of the society who are not covered under any existing reservation schemes based on social or educational backwardness. In the Supreme Court judgement with regards to the *Janhit Abhiyan v. Union of India 2022*³ case was to uphold the 103rd Amendment with a 3:2 majority. The Supreme Court of India has gone a little beyond its confines, overturning the entire ceiling limit and allowing for a more flexible interpretation, stating that adding 10% to the existing reservations does not result in a violation of any essential feature of the Constitution and does not harm the basic structure of the Indian Constitution. Yet, it will be interesting to see how individuals react and whether this ruling serves as a model for future attempts.

During the bill's passage in Parliament, most political parties favoured it, while the opposition parties criticised the Central Government for adopting the bill in haste without any debate or consultation. Following that, several applications were filed in the Supreme Court questioning the constitutionality of the legislation. It is suggested that because economically poor sections have profited less from reservation in employment policy than economically better off sections (which is not true), caste should be replaced as a foundation for quota by economic criteria. If the objection that reservation is not pro-poor is empirically unsustainable, the idea that caste be replaced with economic factors is invalid.⁴

P. Wilson, a senior advocate, discusses in his arguments against the amendment's legitimacy. Wilson contended that the "weaker segment" mentioned in Article 46 is not the same as the "weaker section" mentioned in Articles 15(6) and 16(6) of the Constitution. Wilson attempted to rely on a seven-judge bench ruling in *State Of Kerala & Anr vs N. M. Thomas*⁵, to argue that the 103rd amendment is an infiltration because Article 46 never considered upper caste. Article 46 states "*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*"⁶. His argument contended that the individuals who were not the aimed

³ WP (C) 55/2019

⁴ THORAT, SUKHADEO, et al. "Prejudice against Reservation Policies: How and Why?" *Economic and Political Weekly*, vol. 51, no. 8, 2016, pp. 61–69. *JSTOR*, <http://www.jstor.org/stable/44004417>. Accessed 11 Mar. 2023.

⁵ **1976 AIR 490, 1976 SCR (1) 906**

⁶ EWS Quota is Against the Basic Structure of the Constitution, Counsel aver Before the Supreme Court, NewsClick, March 12, 2023 <https://www.newsclick.in/EWS-quota-basic-structure-constitution-counsel-before-supreme-court>

beneficiaries under the quota would now infiltrate the weaker sections category via Article 15(6) and Article 16(6).

The Supreme Court has consistently held that the basis for reservation should be social and educational backwardness, and not economic criteria and was seen to be debated in the landmark case of *Indra Sawhney v. Union of India*⁷. The Court noted that economic criteria could not be the sole basis for reservation, as it would be difficult to determine the extent of economic backwardness. The Court also held that economic criteria were not a proxy for social and educational backwardness. Opposing the Supreme courts verdict, which validates the 103rd Amendment, DMK spokesperson Manuraj Shunmugasundaram writes (Indian Express. November 11, 2022): “Reservation is not a poverty alleviation mechanism. Reservation was always implemented to address representation or the lack thereof in educational institutions and public employment. The Supreme Court has failed to recognize that the 103rd Constitutional Amendment has relied on economic criteria to extend reservations, something that has been expressly barred in law. In *Indra Sawhney vs Union (1992)*, it has been categorically held that in the determination of backwardness, economic condition can never be the sole criterion. The reason for this is that income is a variable factor and not a structural or systematic tool for discrimination.”⁸

The Court further elaborated on its position in the case of *M. Nagaraj v. Union of India*.⁹ The Court held that reservation could be made for economically backward sections of society, but only in addition to reservation based on social and educational backwardness. The Court noted that economic criteria could not be a substitute for social and educational backwardness, as they were not inter-changeable.

In *Jarnail Singh vs Lachhmi Narain Gupta*¹⁰, 2018 it was held that those from the classes who had positions in higher services such as IAS, IPS, and All India Services had achieved a higher level of social advancement and economic status and were hence not entitled to be classed as backward. Those individuals were to be considered as the "creamy layer" without additional investigation. Similarly, persons with sufficient income who are able to create work for others should be

⁷ AIR 1993 SC 477
1992 Supp (3) SCC 217

⁸ DMK's Manuraj Shunmugasundaram writes: EWS judgment is a setback to social justice, India's constitutional scheme, The Indian Express, November 11,2022 <https://indianexpress.com/article/opinion/columns/dmk-manuraj-shunmugasundaram-supreme-court-ews-judgment-8260544/>

⁹ (2006) 8 SCC 212

¹⁰ (2018) 10 SCC 396

considered to have attained a higher social rank and be considered to be "beyond the Backward Class." The article claims that the "creamy layer" is a judicially developed assessment based on judicial hypotheses, and it will continue to analyse the "economic component" that the government has already outlined in order to establish EWS Reservations.¹¹

Reading these judgments, a significant message is being sent out that economic criteria is not a strong enough reservation to stand alone but can in some cases be included along with social and educational backwardness. It is imperative to have a deeper understanding regarding the same as this topic is highly controversial and debatable in a country like India. The provisions made regarding reservations have also been subject to misuse by people who do not actually belong to the categories that apply to get into schools/colleges. Making economic criteria as a basis for reservation would create havoc in a developing country- India.

Shackles of the EWS criteria:

Many petitioners and Dr. Mohan Gopal who represented them have also argued on the grounds of reservations being a tool for representation and not that of financial upliftment. Senior Advocate Meenakshi Arora expressed a similar sentiment, arguing that reservations under Articles 15 and 16 of the Constitution were not intended to provide economic assistance, but rather to address the backwardness caused by "non-representation in the country." Advocate Shadan Farasat also argued on similar grounds and submitted that originally, reservations were granted solely on a "anti-discrimination basis", and not on a "anti-depravation basis". He stated that this was the fundamental structure that was being violated by the amendment that granted reservations based on depravity.¹²

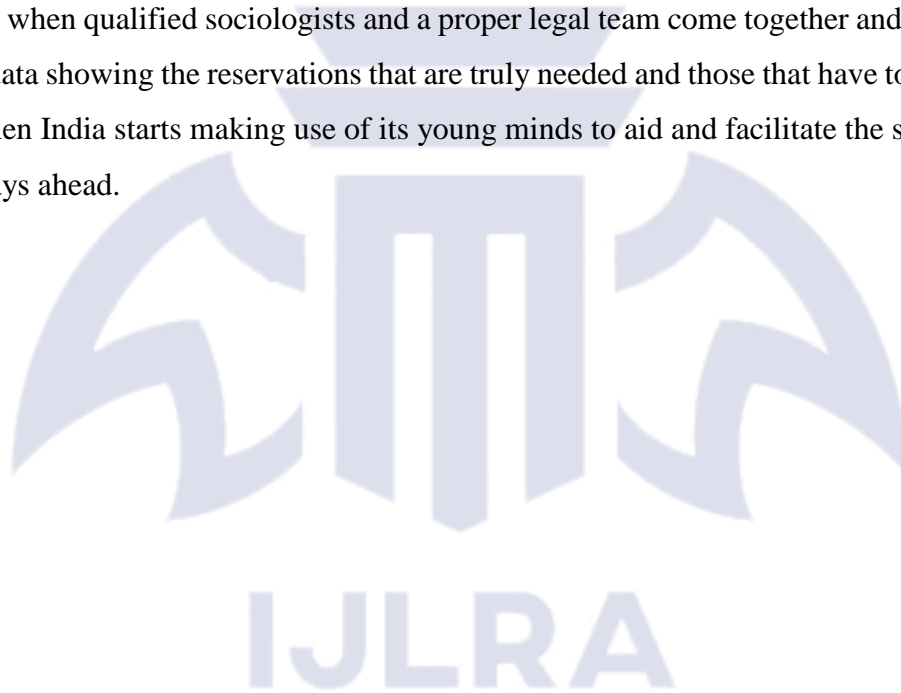
One of the main criticisms of the EWS reservation is that it is not based on any sound constitutional principle. The Constitution itself does not provide for reservation based on economic criteria, and the Supreme Court has consistently held that such reservation is constitutionally unsound. The EWS reservation also goes against the idea of affirmative action, which is to provide opportunities to historically marginalized and underrepresented groups in society. Economic criteria are not a proxy for social and educational backwardness, and using them as the basis for reservation would

11 Singh, S. J. (n.d.). The creamy layer and reservation. Imphal Free Press. Retrieved March 5, 2023, from <https://www.ifp.co.in/opinion/the-creamy-layer-and-reservation>

12 EWS Reservation Day #2: Petitioners Argue that EWS Reservations are a 'Constitutional Fraud', Supreme Court Observer, November 11, 2022 <https://www.scoobserver.in/reports/ews-reservation-2-petitioners-argue-that-ews-reservations-are-a-constitutional-fraud/>

dilute the very purpose of affirmative action.¹³

In conclusion, the use of economic criterion as the basis for reservation is constitutionally unsound and goes against Supreme Court's long-standing jurisprudence. Reservation should be based on social and educational backwardness, as this is the only way to ensure that historically marginalized and underrepresented groups in society are provided with equal opportunities. While economic criteria may be relevant in some cases, they cannot be the sole basis for reservation. The landmark cases of Indra Sawhney and M. Nagaraj provide a clear framework for reservation, and it is important that this framework is followed in letter and spirit. The objective of empowering each and every citizen of India with deserving education and employment opportunities should not be done by categorizing everyone into boxes that are waiting to be ticked off. The change will only be seen when qualified sociologists and a proper legal team come together and develop well-researched data showing the reservations that are truly needed and those that have to be discarded. It is only when India starts making use of its young minds to aid and facilitate the system will we see better days ahead.



¹³ Reservation on an Economic Basis: Some Issues and Challenges, (2021) 15 NSLR 131