

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

NITISH DUBEY¹ & SHIVANK VERMA²

This paper explores the loopholes and gaps present in the current reservation policy adopted in India. It identifies four main areas of concern. First, it explores whether Article 341 or a notification issued thereunder is subject to Article 14 of the Constitution of India. Answering this question in the affirmative, it notes that the absence of any specific identifiable parameter for the designation of Scheduled Castes makes the application of Article 14 to the list of Scheduled Castes merely theoretical. Second, in the absence of any specified parameter, the paper draws on the observations of the Supreme Court in the Indra Sawhney case to trace the distinction between the classification of Scheduled Castes and the Other Backward Classes and concludes that there is considerable overlapping between their criteria, and the distinction, if any, is the fact of designation itself. Third, it makes a point that the executive designation of a socially backward caste as an Other Backward Class, thereby entitling it to get the benefit of reservation under Article 16(4) of the Constitution, could constitute a colourable exercise of power in lieu of the fact that Article 341(2) prohibits such designation for a socially backward caste explicitly. Fourth, the paper argues that the test of reservation under Article 16(4) is not the backwardness of a given class, but whether such class is inadequately represented in the services, a condition which is largely ignored. The paper concludes by making suggestions to address the above concerns and rectify the lacunae present in the present system of reservations.

TABLE OF CONTENTS

Introduction	82
Designation of Scheduled Castes Under the Constitution Vis-À-Vis Equality	84
Scheduled Castes and OBCs: What's the Difference?	88
Colorable Exercise of Power – Revisiting Indra Sawhney	95

* Cite it as: Dubey & Verma, Constitutionality of Caste Based Reservations: Uncovering Loopholes and Inconsistencies, 8(1) COMP. CONST. L. & ADMIN. L. J. 81 (2023).

¹ Nitish Dubey is a final year student of law at Hidayatullah National Law University. The author can be reached at <nitish.hnlu19@gmail.com>.

² Shivank Verma is an advocate who graduated from the Hidayatullah National Law University in 2023. The author can be reached at <shivankbhu12846@gmail.com>.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

Opinion Of The State Under Article 16(4)	97
Proposals And Conclusion	99

INTRODUCTION

The Right to Equality is guaranteed under Articles 14-18 of the Constitution of India (“**the Constitution**”). It is often said that Article 14 is the genus of which Articles 15 and 16 are the species; they expound upon the same principle given under Article 14. If that is so, all the basic principles, tests and doctrines that are applicable to Article 14, should be similarly applicable to Articles 15 and 16 as well.

Reservations in services are provided to Scheduled Castes, Scheduled Tribes and Other Backward Classes (“**OBCs**”) under Article 16(4) of the Constitution.³ The list of the Scheduled Castes is drawn in the Constitution (Scheduled Castes) Order, 1950 (“**The Order**”) issued under Article 341.⁴ The Other Backward Classes are designated both by the Centre and the States for the purposes of reservation in the concerned services. On the basis of the report of the Second Backward Classes Commission headed by the B.P. Mandal (“**Mandal Commission Report**”), the first Office Memorandum (“**OM**”) was issued by the VP Singh Government to extend reservations to Socially and Educationally Backward Classes or OBCs.⁵ This was examined by a nine-judge bench of the Supreme Court of India (“**the Supreme Court**”) in *Indra Sawhney v. Union of India*⁶ which upheld the extension of reservations to OBCs subject to the condition that the creamy layer in the OBC must be excluded.

While the Supreme Court has had the opportunity to examine this policy of reservation on many occasions, including setting aside the inclusion of

³ INDIA CONST. art. 16, cl. 4.

⁴ Ministry of Law, Govt. of India, Gazette Notification No. 27, The Constitution (Scheduled Castes) Order, 1950 (1950).

⁵ Ministry of Personnel Public Grievances and Pensions, Department of Personnel and Training, Govt. of India, O.M. No. 36012/31/90-Estt. (SCT) , Recommendations of Second Backward Classes Commission (Mandal Report)—Reservation for Socially and Educationally Backward Classes in services under the Government of India (1991).

⁶ *Indra Sawhney & Ors. v. Union of India and Ors.*, AIR 1993 SC 477.

some castes as OBCs on grounds of non-backwardness⁷, however, there are some fundamental questions that the Court in all these cases seem to have largely ignored, and this paper seeks to explore those areas.

This paper is divided into five parts. Part I of this paper undertakes a discussion on whether the list of the Scheduled Castes and Article 341 of the Constitution are subject to the requirements of Article 14 or the basic tenets of equality. We felt that unless this question is answered in affirmative, further analysis of the issue is not possible. This Part also incidentally explores whether original provisions of the Constitution, like Article 341, can be subject to the basic structure of the Constitution and, hence, amenable to the same standards of equality, which forms a part of the basic structure.

Part II of this paper tries to ascertain the clear parameters of the Scheduled Castes and the OBCs separately. In doing so, the paper notes that the criteria of Scheduled Castes and OBCs overlap considerably and in effect, a person who is entitled to be designated as a Scheduled Caste can be designated as an OBC too. Thus, on principle, the Scheduled Castes and OBCs do not constitute two separate classes, and as such there is no basis of classification between them. The absence of the basis of classification negates the existence of intelligible differentia, which is an essential condition for reasonable classification.

Part III of this paper contends that the absence of exclusivity between Scheduled Castes and OBCs allows the government to take advantage of this loophole and exclude parliamentary supervision over the castes to which the benefits of affirmative discrimination are to be extended. This constitutes a colourable exercise of power meant to dilute the requirement under Article 341(2), which mandates that any further amendment in the list of Scheduled Castes can only be done by Parliament. Thus, while States could not amend the list of the Scheduled Castes, it can instead designate the caste as an OBC, therefore, entitling such caste to receive similar benefits as a Scheduled Caste.

Part IV of this paper then argues that as per the constitutional scheme, the ultimate test for providing reservation to a given class is not whether such

⁷ Ram Singh & Ors. v. Union of India, (2015) 4 SCC 697.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

class is backward, but whether the backward class is not adequately represented in the services in the opinion of the State. Thus, those castes, whether classified as a Scheduled Caste or an OBC, if their representation is adequate, are not eligible for reservation.

Part V of this paper concludes by making proposals or recommendations for rectifying the issues that we raised in this paper.

Note: In this article, we have used the words ‘State’ and ‘state’ differently and they should be treated accordingly. ‘State’ means the State as understood with reference to Article 12 of the Constitution, whereas ‘state’ means the constituent states of India. Similarly, the terms ‘SEBCs’ and ‘OBCs’ have been used synonymously with each other. SEBCs stand for Socially and Educationally Backward Classes and this expression is found in the Constitution of India and in general parlance they are called Other Backward Classes.

DESIGNATION OF SCHEDULED CASTES UNDER THE CONSTITUTION VIS-À-VIS EQUALITY

I. ARTICLE 14 AND DESIGNATION OF SCHEDULED CASTES

As already stated before, the designation of any caste as a scheduled caste is done under Article 341 of the Constitution. As such, under clause (1), the President by a notification draws the list of the ‘castes, races or tribes’ designated as scheduled castes.⁸ Once drawn, the said list cannot be modified further by the President, as clause (2) of the Article only vests the Parliament with such power.⁹ To put simply, the first list of the Scheduled Castes has to be issued by the President, which subsequently is amendable only by the Parliament.

As mentioned earlier, it is important to analyse whether the requirements of equality under Article 14 can be extended to constitutional provisions like Articles 341 and 342. Article 14 guarantees equality before “the law” and equal protection of “the laws”. The Supreme Court has time and again reiterated that amendments to the Constitution fall outside the scope of

⁸ INDIA CONST. art. 341, cl. 1.

⁹ INDIA CONST. art. 341, cl. 2.

“law” under Article 13,¹⁰ and hence cannot be challenged merely on the ground that they violate Fundamental Rights, unless they also incidentally happen to violate the basic structure. Since provisions inserted into the Constitution cannot be challenged as law under Article 13, there is no reason why an original provision of the Constitution, like Article 341, should also be amenable to such a challenge. Amendment to the Constitution is not a “law”, neither is the Constitution itself. However, the law under Article 13 does include a “notification”, and since the designation of Scheduled Castes under Article 341 is done by a notification, such notification would be a “law” in the sense of Article 13. Thus, any notification issued under Article 341 cannot take away or abridge the Fundamental Rights. In a sense, it can be argued that Part III of the Constitution provides guidance to Articles 341 and 342; the discretion provided to the President under these Articles is not absolute and must comply with the requirements of Article 14 including reasonable classification.

II. APPLICATION OF BASIC STRUCTURE DOCTRINE TO ARTICLE 341

There is another issue that is incidental to the above discussion. One may argue in the first instance that bringing the notification issued under Article 341 under the scrutiny of Part III will invariably subject the President’s power to a limitation which was neither intended by the framers of the Constitution nor reflected in the bare text of the Constitution. That is to say, because Article 341 does not specify a guideline or parameter to designate Scheduled Castes, it is an entirely discretionary power. Thus, no limitation should be read into the Article where none has been intended. On the other hand, we are contending that the provisions of the Constitution should not be read in a manner which is detrimental to equality, which is the basic structure of the Constitution.¹¹ One might ask, if a provision of the Constitution is by nature inconsistent with the principle of equality, can it be struck down? In case of provisions that have been inserted into the Constitution by a constitutional amendment, the issue is settled - any amendment that derogates the basic structure of the

¹⁰ *E.g.*, Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala and Anr., (1973) 4 SCC 225.

¹¹ *See*, I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861, at 109.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

Constitution in any manner can indeed be struck down.¹² However, what about the original provisions of the Constitution, the ones that have been there as they are since its inception, like Article 341? Certainly, arguing that even the original provisions of the Constitution can be challenged on the ground that they violate the basic structure is difficult for us, because in a way it would suggest a counter intuitive proposition that the Constituent Assembly members enacted a provision against the basic structure of the Constitution. This is illogical, given that the intention of the framers of the Constituent Assembly is one of the determinants of what constitutes the basic structure of the Constitution.¹³

This, however, has not precluded the Supreme Court from examining even the original provisions of the Constitution, in juxtaposition with the basic structure of the Constitution. The approach of the Court in these cases however is not that of examining whether the original provisions of the Constitution violate the basic structure, and if they do so, striking them down as unconstitutional. Instead, if the Court finds that the effects of any such provision might be inconsistent with one or more basic features, it finds a way to ‘radically’ reinterpret it. For instance, in the *Second Judges*¹⁴ case, the Supreme Court invoked the basic structure doctrine to state that since independence of the judiciary is a basic feature of the Constitution¹⁵, the consultation as mandated by Article 124(2) and Article 217(1) of the Constitution, with regards to the appointment of Judges of the Supreme Court and the High Courts is mandatory upon the President.¹⁶

Moreover, while Article 124(2) is very explicit in giving the President the freedom to decide which judges other than the Chief Justice they are required to consult with for the appointment of the Supreme Court judges, the Supreme Court effectively eliminated this freedom by introducing the collegium into this Article, which mandatorily includes the four senior-

¹² *E.g.*, *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

¹³ *See*, *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala and Anr.*, (1973) 4 SCC 225, at 282-285.

¹⁴ *Supreme Court Advocates-On-Record Assn. & Ors. v. Union of India*, (1993) 4 SCC 441.

¹⁵ *Id.* at 432.

¹⁶ *Id.* at 385.

most judges of the Supreme Court.¹⁷ Thus, the basic structure doctrine was invoked to read Article 124(2), which is an original provision in the Constitution, in a manner that some argue was rewriting the Constitution.¹⁸

A similar instance was again observed in the recent case of the *CEC Appointments*¹⁹ case wherein the Supreme Court while examining the President's power under Article 324(2) of the Constitution to appoint the Chief Election Commissioner and other Election Commissioners, subject to any law made in that behalf by the Parliament. However, noting that no such law was enacted by the Parliament even after seventy-three years of the adoption of the Constitution which had the danger of compromising the neutrality of an institution entrusted with the function of performing free and fair elections, the Supreme Court invoked the doctrine to state that since free and fair elections form part of the basic structure of the Constitution²⁰, the appointment of the Chief Election Commissioner and other Election Commissioners must not vest exclusively with the Executive. Accordingly, to fill in this legislative gap, the Supreme Court laid down the norm that the President shall make such appointment upon the recommendation of the Committee comprising the Prime Minister, Leader of the Opposition or where there is no such leader of the opposition, then, the single largest party in Lok Sabha or the Chief Justice of India or a Judge of the Supreme Court nominated by him, until a law in that respect is made by the Parliament.²¹ This has an effect of limiting the scope of Article 74(1)²², though no such limitation is present in the text of

¹⁷ *Id.* at 411. (at 211, the Court notes that introduction of Collegium does not stand in the way of the President making consultations with other judges. However, this allows for a dubious situation where the word 'consultation' and 'consulted' mean different things in the same provision, in the first it means mere consultation without any binding concurrence, while at the other, it means concurrence. Therefore, while the President can consult other judges, such consultation holds no relevance against the decision of the Collegium. Hence, the authors opine that the collegium system effectively eliminates the discretion of the President to consult other judges).

¹⁸ See Ashok H. Desai, *Judicial Overreach: A Critique*, (2013) 9 SCC J-1; RAJU RAMACHANDRAN, A CASE OF SELF-SELECTION: JUDICIAL ACCOUNTABILITY AND APPOINTMENT OF JUDGES, STATE OF THE INDIAN JUDICIARY: A REPORT BY DAKSH (2016).

¹⁹ Anoop Baranwal v. Union of India, (2023) SCC OnLine SC 216.

²⁰ *Id.* at 329-331.

²¹ *Id.* at 314-315.

²² *Id.* at 209.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

the Article, which prescribes that the President shall act on the aid and advice of the Council of Ministers. Thus, for the appointment of the CEC and other Election Commissioners, the President will act not on what the Council of Ministers advise, but on what the Committee of Prime Minister, Leader of the Opposition and Chief Justice of India recommends.²³

Thus, while the doctrine of basic structure was propounded with respect to constitutional amendments, this hasn't precluded the Court from extending its scope over the original provisions as well. However, in the latter, the Court's approach has been not to immediately strike down the provision, but to instead interpret it differently, or to modify its operation or applicability. In the end, all provisions are subject to the basic structure of the Constitution, and not otherwise.²⁴ This should make Article 341 subservient to the basic structure of equality, and not otherwise.

SCHEDULED CASTES AND OBCS: WHAT'S THE DIFFERENCE?

“Is the backward designated as such because it is backward or is it backward because it is designated as such?” This variation of the Euthyphro dilemma²⁵ is important if we are to ascertain the characteristics of castes (or even the necessity to look for their characteristics) that are included in the lists of Scheduled Castes and OBCs. With respect to Scheduled Castes, it is often opined that the President's list of 1950 is exhaustive of all the Scheduled Castes.²⁶ Consequently, a member of a caste cannot claim that his caste must be included in the list on the grounds that the backwardness of his caste is comparable or similar to other Scheduled Castes. The list, therefore, cannot be challenged as violative of Article 14²⁷,

²³ *Id.* at 385(1).

²⁴ See also Rimcy Keshri & Samarth Nayar, *Comparative Analysis of Kelsen's Theory of Grundnorm and India's Basic Structure Doctrine*, 8(1) RGNUL Student Res. Rev. 182, (2021).

²⁵ The Euthyphro dilemma is found in Plato's dialogue 'Euthyphro' in which Socrates asks Euthyphros, “*Is the pious loved by the gods because it is pious, or is pious because it is loved by the gods?*”

²⁶ E.g., ANIRUDH PRASAD & CHANDRA SEN PRATAP SINGH, *RESERVATION: POLICY, PRACTICE AND ITS IMPACT ON SOCIETY*, VOL. 1 167 (Kalpaz Publications, 1st ed., 2016); See also *Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India*, (2007) 5 SCC 360, ¶4.

²⁷ See *Gurmukh Singh v. Union of India*, 1951 SCC OnLine Punj 75.

because the determination of the backwardness of a caste is solely the domain of the executive.

Viewed in this way, the definition of the Scheduled Caste in Article 366(24) of the Constitution is more appropriate; Scheduled castes are castes, races or tribes that are deemed as such under Article 341. However, while it can be said that the determination of backwardness is the domain of the executive, it is hard to say that the President's list is exhaustive, given that the clause (2) of Article 341 allows the Parliament to include other castes, races or tribes in the said list. If the list can be altered, and other castes included, do these included castes become backwards only when they are included in the list? Not necessarily. Rather, it is more appropriate to say that when Parliament deems that a given caste fulfils all the criteria for its designation as a Scheduled Caste then it is included in the list. Therefore, the list cannot be challenged as violative of Article 14 by members of other castes for not including them, not necessarily because the list is exhaustive, but because the Parliament is not satisfied with their status for their inclusion.

Backwardness of a Scheduled Caste, therefore, is a status separate from its designation; backwardness precedes designation. While the 1950 list provides no definitive criteria or parameter to determine the basis on which the designation of Scheduled Castes was made, it is permissible for us to fall back to the relevant records to ascertain the true parameter of their backwardness. This is important, not only for us to find the true criteria of the backwardness of a Scheduled Caste, but also to draw a clearer distinction between Scheduled Castes and OBCs. Currently, the Scheduled Castes and OBCs constitute two separate classes, each entitled to different benefits/caps of reservations and having separate mechanisms for their designations.

A. CRITERIA FOR SCHEDULED CASTES

With reference to Scheduled Castes, the Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes ("Lokur Committee Report") stated in 1962:

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

*“The relevant records show that in drawing up the list of Scheduled Castes, the test applied was the social, educational and economic backwardness arising out of the historical custom of untouchability.”*²⁸

To arrive at this conclusion, the Lokur Committee states that the 1950 list was a revised version of the list of the Scheduled Castes drawn under the Government of India (Scheduled Castes) Order, 1936, which itself was the continuation of an earliest of Depressed Classes. The Census Commissioner who drew the list of these Depressed Classes had remarked:

*“I have explained depressed castes as the castes, contact with whom entails purification on the part of high caste Hindus.”*²⁹

J.H. Hutton, who was the Census Commissioner in 1931 had proposed a series of tests to determine untouchability and its associated disabilities in order to draw the list of Depressed Classes, which further pertain to the same basis – *social backwardness resulting from the disabilities inflicted by untouchability.*³⁰

Untouchability as the criterion was further strongly asserted by the first Backward Classes Commission, which in its Preamble to the Questionnaire stated:

*“In the matter of Scheduled Castes, the criterion is clear. Untouchability is the criterion and it being peculiar to the Hindus, those Hindu castes that were regarded as untouchables by societies are included in that particular Schedule.”*³¹

Therefore, there is sufficient basis to conclude that the basis of classification of Scheduled Castes is “social backwardness arising out of the historical practice of untouchability or other disabilities associated with it.”

²⁸ DEPT’ OF SOCIAL SECURITY, GOV’T OF IND., REPORT OF THE ADVISORY COMMITTEE ON THE REVISION OF THE LISTS OF SCHEDULED CASTES AND SCHEDULED TRIBES, 5 (1967), <https://indianculture.gov.in/reports-proceedings/report-advisory-committee-revision-lists-scheduled-castes-and-scheduled-tribes>.

²⁹ Jakob De Roover, *Scheduled Castes Vs. Caste Hindus: About A Colonial Distinction and Its Legal Impact*, 13 SLR 22, 36-37 (2017).

³⁰ PRASAD & SINGH, *supra* note 26, 130.

³¹ LOKUR, *supra* note 28, at 6.

B. CRITERIA FOR OTHER BACKWARD CLASSES

Who are the OBCs? In simple terms, they are backward classes other than those designated as Scheduled Castes and Scheduled Tribes.³² Article 16(4) uses a wide phrase “backward classes of citizens” instead of using Scheduled Castes and Scheduled Tribes. This enables the State to identify OBCs of citizens which are covered in the expression.³³

It was the opinion of one of the members of the Constituent Assembly that these OBCs lie in the middle in terms of degree of backwardness where the upper caste Hindus have the least or negligible backwardness, and the Scheduled Castes having the most backwardness.³⁴ It was argued that these are castes that are in a better position compared to the Scheduled Castes but are still inferior to the upper class, and hence deserve preferential treatment.³⁵ In his opinion, therefore, it is the castes only that would comprise the Other Backward Classes. In fact, BR Ambedkar once stated in the Constituent Assembly that backward classes were nothing but a “collection of certain castes”.³⁶ Thus, while the term ‘class’ was used, it was “caste” that was to play a major factor in the determination of these OBCs.

Initially, the Courts showed resistance to the idea that caste can be relevant, let alone a dominant factor in determining OBCs. For instance, Subba Rao J in *R Chitralkha* had stated that a caste could not be equated to a class.³⁷ Therefore, the exclusion of caste as a factor for ascertaining backwardness for the purposes of Article 16(4) is not necessarily bad. A similar opinion was expressed by Chief Justice AN Ray where he had opined that caste

³² Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458, at 22.

³³ PRASAD & SINGH, *supra* note 26; *see also*, GOV'T OF INDIA, REPORT OF THE BACKWARD CLASSES COMMISSION, VOLUME I (1980), <http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf>.

³⁴ PRASAD & SINGH, *supra* note 26, at 21.

³⁵ *Id.* at 26.

³⁶ *Id.* at 30.

³⁷ *R. Chitralkha v. State of Mysore*, (1964) 6 SCR 368, at 21.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

may be an irrelevant factor for ascertaining the backwardness of any class of citizens. In *State of UP v. Pradip Tandon*³⁸, he opined:

*“Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression “classes” in that case violates the rule of **expressio unius est exclusio alterius**. The socially and educationally backward classes of citizens are groups other than groups based on caste.”*³⁹

Despite the initial reluctance of the Supreme Court to recognise caste as a relevant factor for the identification of backward classes, it did state on occasions that, since class means a homogenous section of people grouped together because of common characteristics, caste can indeed be identified as a class.⁴⁰ In *State of AP v. USV Balaram*,⁴¹ the Court accepted that even though a given list of backward classes was based exclusively on caste considerations it can be accepted. Hedge J stated in *A Peeriakaruppan (Minor) v. State of Tamil Nadu*⁴² that “a caste has always been recognised as a class”. This gradual shift in perspective ultimately culminated in the *Indra Sawhney* case, where the extension of 27 per cent reservation to Socially and Educationally Backward Classes (“SEBCs”) was under challenge before a nine-judge bench of the Supreme Court, in which the Court rejected the contention that the expression “backward classes” exclude caste and hence identification of OBCs on the basis of caste was upheld. In doing so, it emphasised that any caste so identified as OBC must be socially backward and its educational and economic backwardness must be on account of its social backwardness.

C. DRAWING THE JUDICIAL DISTINCTION BETWEEN SCHEDULED CASTES AND OBCS

³⁸ *State of U.P. & Ors. v. Pradip Tandon*, (1975) 1 SCC 267.

³⁹ *Id.*, at 15.

⁴⁰ *M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439, ¶ 22.

⁴¹ *State of A.P. v. U.S.V. Balram*, (1972) 1 SCC 660.

⁴² *A. Peeriakaruppan (Minor) v. State of T.N.*, (1971) 1 SCC 38.

Both Scheduled Castes and OBCs include castes which are socially backward. However, except designation, what is the determinative distinct factor that makes a caste fall into one category and not the other?

There appears to be a tilt reflected in the judicial decisions that the fact of designation itself makes the distinction. For instance, in *Indra Sawhney*, the Court observed that the OBCs are “*composed of persons whose backwardness is in degree and nature comparable to that of the Scheduled Castes and the Scheduled Tribes, whatever be their religion.*”⁴³ The Court’s focus in the case was more on ascertaining the nature of the backwardness of OBCs, and it did not attempt to distinguish between the OBCs and Scheduled Castes.

In fact, with respect to castes that have converted to other religions, the Court has even drawn an identity of backwardness between Scheduled Castes and OBCs while analysing Para 3 of the 1950 list of Scheduled Castes in the following terms –

*“The ‘backward class’ mentioned in Article 16(4) is a synonym for the classes mentioned in Article 15(4); M.R. Balaji, Janki Prasad Parimoo. These two provisions read with the President’s Order of 1950 (as amended in 1976) show that the benefit of Article 15(4) and Article 16(4) extends to the Scheduled Castes (which expression is confined to those professing the Hindu, the Sikh or the Buddhist religion) and the Scheduled Tribes as well as the backward classes of citizens who must necessarily be such backward classes of citizens who would have, but for their not professing the Hindu, the Sikh or the Buddhist religion, qualified to be notified as members of the Scheduled Castes This means, all those depressed classes of citizens who suffered the odium and isolation of untouchability prior to their conversion to other religions and whose backwardness continued despite their conversion come within the expression ‘backward class of citizens in Articles 15(4) and 16(4).”*⁴⁴

The approach of the Court in this paragraph seems to overlook the fact that the reason Scheduled Castes do not include citizens from other religions is not because Article 341 mandates so, but because it was an earlier conviction that since untouchability is exclusive to Hindus, non-Hindus cannot be included in it. If the Court disagrees with this

⁴³ *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶¶ 267, 294, 323 .

⁴⁴ *Id.* at 267.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

proposition, the Court should have disagreed with the presence of Para 3 in the Order itself. However, instead the Court, while acquiescing to the idea that in terms of backwardness the status of Scheduled Castes and OBCs is comparable, has failed to draw or identify any clear distinctive basis that distinguishes these two classes. Thus, for both the Scheduled Castes and OBCs, the criterion is the same – “*social backwardness*”, and the distinction, if any, is the designation itself.

This brings us to the question of whether this distinction satisfies the test of reasonable classification. The doctrine of reasonable classification states that while Article 14 prohibits class legislation, it still permits reasonable classification. To constitute reasonable classification, two things have to be satisfied:

- a. There must be an *intelligible differentia*, distinguishing the things or persons grouped together from the persons left out of the group;
- b. Such an *intelligible differentia* must have a rational nexus with the object sought to be achieved.

Surprisingly, the Supreme Court in the cases relating to reservation, including *Indra Sawhney* has barely put the classification between Scheduled Caste and OBCs to this test of reasonable classification. While arguments relating to the exclusion of caste as a factor for determining OBCs have been considered (and rejected), a judicious scrutiny on whether categories of OBC and Scheduled Castes constitute a case of reasonable classification remains pending.

Intelligible differentia means that in any classification of persons or things grouped together, what is to be seen is the basis of classification. This basis of classification may either be gathered from the law-making the classification or from the relevant records. In the case of Scheduled Castes and OBCs, we have observed that these classes have the same criteria, or at least that their criteria overlap considerably. In fact, a person who owing to his caste is designated as an OBC can very well be designated as a Scheduled Caste. An illustration of this was provided by Sawant J in his concurring opinion in *Indra Sawhney*:

“What is further, if the other backward classes are backward exactly in all respects as the Scheduled Castes and Scheduled Tribes, the President has the

*power to notify them as Scheduled Castes and Scheduled Tribes, and they would not continue to be the other backward classes.*⁴⁵

The emphasis on designation as the distinctive factor between Scheduled Castes and OBCs demonstrates that rather than being a reasonable classification, it is in fact a case of class legislation. Class legislation is a term that is applied to statutory enactments which divide the people or subjects of legislation into classes with reference either to the grant of privileges or the imposition of burdens, upon an arbitrary, unjust or invidious principle of division.⁴⁶ Since there is no principle behind the distinction between Scheduled Castes and OBCs, the designation of a caste as either vests with the executive (in the case of OBCs) and the Parliament (for Scheduled Castes). This designation, as an infallible principle of division between two classes, is arbitrary because it is based on no principle⁴⁷ and is, hence, violative of Article 14.⁴⁸

COLORABLE EXERCISE OF POWER – REVISITING INDRA SAWHNEY

There is one other aspect that the Court in *Indra Sawhney* missed while analysing whether a socially backward caste can be included as a class. Article 341 prescribes that while the President may draw the list of Scheduled Castes, such list cannot be varied by the President through a subsequent notification. The first O.M. issued by the V.P. Singh in 1990, notified by the V.P. Singh government in 1990 stated that the list of S.E.B.Cs shall comprise of those castes and communities in common with those mentioned in the Mandal Commission and the State's list. While *Indra Sawhney* conceded that these castes were comparable in backwardness to the Scheduled Castes, it did not ask the basic question – if the castes notified as SEBCs were comparable in terms of backwardness to Scheduled Castes, why were they not included in the list of Scheduled Castes and instead in the list of SEBCs?

⁴⁵ *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶ 447.

⁴⁶ BLACK'S LAW DICTIONARY 315 (4th ed., 1968).

⁴⁷ *See S.G. Jaisinghani v. Union of India*, (1967) 2 SCR 703, at 14.

⁴⁸ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, ¶85.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

One possible answer is that the process of designating a Scheduled Caste is cumbersome as it can only be done by Parliament by virtue of Article 341(2) and not directly by the executive. The process of notifying SEBCs however, is much more flexible because the designation of SEBCs could be made by the government alone⁴⁹ and reliance on the approval of the Parliament was not necessary. This explanation is plausible given the fact that the V.P. Singh government did not have an absolute majority in the Lok Sabha.

The above exercise, however, dilutes the purpose behind clause (2) of Article 341. The said clause prevents the President from including a caste in the list by an executive notification directly. Speaking on the purpose behind the clause, BR Ambedkar stated in the Constituent Assembly that the object of this limitation was to “*eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.*”⁵⁰

The designation of a socially backward caste as an OBC, however, entitles such caste to receive the benefit of Article 16(4) in the same way that a Scheduled Caste can. It can be argued, therefore, that the executive notifying a caste as OBC where it could not notify it as Scheduled Caste but giving it the benefit under Article 16(4) implies that there is a colourable exercise of power which dilutes the requirement under Article 341(2). An authority is said to colorably exercise power when it does something indirectly under a pretext or disguises what it is not competent to do directly.⁵¹ In a sense, the government instead of amending the list of Scheduled Castes through the parliamentary process, created a new class of OBCs, which includes castes which are socially backward, on a similar parameter or basis as the Scheduled Castes and gave them a similar treatment as Scheduled Castes without resorting to the normal legislative process.

Pursuant to the Constitution (102nd Amendment) Act, 2018, parliamentary supervision for the list of OBCs was mandated for the first time in the Constitution. Similar to the list of Scheduled Castes and Scheduled Tribes,

⁴⁹ Indra Sawhney & Ors. v. Union of India, AIR 1993 SC 477, ¶ 736.

⁵⁰ B. R. Ambedkar, CONST. ASSEMB. DEB., ¶ 9.143.381, (Sep. 17, 1949), , <https://www.constitutionofindia.net/debates/17-sep-1949/>.

⁵¹ Abraham Patani v. State of Maharashtra, (2022) SCC OnLine SC 1143.

the amendment inserted Article 342A in the Constitution which states that the list of SEBCs shall be issued by the President which cannot be varied by a subsequent notification by the President, but can only be varied by the Parliament.⁵² However, after the Supreme Court pointed out in the *Maratha Reservation*⁵³ that the effect of the amendment was to deprive the states of their power to draw their own lists of the OBCs, the Parliament enacted the Constitution (105th Amendment) Act, 2021 which inserted clause (3) in Article 342A allowing the States and Union Territories to maintain its own list of SEBCs, the entries in which can be different from the Central List.⁵⁴ The amendment thus restored the power of the states to designate OBCs for their own purposes. However, while there is a parliamentary safeguard against the change in the Central list of OBCs, the amendment did not place a similar limitation for the maintenance of the State’s list, in effect, which means that the state list of OBCs can be maintained and varied exclusively by the executive without any scrutiny by the legislature, leaving the scope for the colourable exercise of power by the states to designate socially backward castes intact.

OPINION OF THE STATE UNDER ARTICLE 16(4)

Article 16(4), which enables the States to make reservations, specifies that it can do so for “*any backward classes of citizens, which in the opinion of the State is not adequately represented in the services under the State.*” As already mentioned, the expression “*backward classes of citizens*” includes Scheduled Castes, Scheduled Tribes and OBCs. However, in practice, the latter part of the provision is ignored. A Literal reading of clause (4) would reveal that for the State to provide reservations to any class of citizens, two conditions must be satisfied:

- a. The class must be a backward class;
- b. Such backward class, in the opinion of the State, is not adequately represented in the services under the State.

⁵² INDIA CONST., art. 342A. cl. 1 & 2, *amended by* The Constitution (One Hundred and Second Amendment) Act, 2018.

⁵³ Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1.

⁵⁴ INDIA CONST., art. 342A. cl. 3, *amended by* The Constitution (One Hundred and Fifth Amendment) Act, 2021.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

However, various notifications for recruitment released by the government indicate that the condition specified in (b) above is largely ignored. Thus, reservation is provided to the members of Scheduled Castes, Scheduled Tribes and Other Backward Classes in direct recruitment at 15%, 7.5% and 27% respectively, without any consideration of whether castes or categories included in these lists are adequately represented or not.⁵⁵ In effect, clause (4) of Article 16 is simply read as enabling the State to make reservations for “*any backward classes of citizens*” and the condition stated after that is not given any consideration.

Kuldip Singh J. pointed out in his dissenting opinion in *Indra Sawhney* that the Mandal Commission in identifying backward classes, did not consider those classes that were inadequately represented in the services and also did not demonstrate that 3743 castes identified as SEBCs were inadequately represented in the services.⁵⁶ While his concern was legitimate, it is submitted that underrepresentation in the public service has never been considered a deciding factor for determining social backwardness.⁵⁷ Identification of backward classes and determining whether they are entitled to reservation under Article 16(4) are two different exercises. This entails that not all backward classes are eligible for reservations, but only those who are not adequately represented in the services provided by the State. Since backward classes include the Scheduled Castes and OBCs, this limitation extends to them as well. In other words, for extending the benefit of reservation to any class, the ultimate question is not whether a given class or caste is socially or otherwise backward, but whether they are adequately represented in the services, in the opinion of the State. To ascertain whether such an opinion was formed, we filed an RTI application with the Ministry of Social Justice and Ministry of Tribal Affairs inquiring

⁵⁵ MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES & PENSIONS, GOV'T OF IND., RESERVATION FOR SCs, STs, OBCs, PwDs AND EWS IN POSTS AND SERVICES IN THE CENTRAL GOVERNMENT, (2022), <https://doptirculars.nic.in/OM/ViewOM.aspx?id=138&headid=6>.

⁵⁶ *Indra Sawhney & Ors. v. Union of India*, AIR 1993 SC 477, ¶ 393 (iv).

⁵⁷ For e.g., *See* Government of India Report of the Backward Classes Commission, Volume 1 (1980); *See* also Mandal Commission Report, underrepresentation in the public services is not mentioned as a factor for designation of SEBCs.

whether such an opinion⁵⁸ was formed with respect to the Scheduled Castes and Scheduled Tribes as to their inadequacy of representation of services.⁵⁹ In response, the Ministry of Social Justice and Empowerment as well as the Ministry of Tribal Affairs denied having such an opinion⁶⁰ with regards to the Scheduled Castes and Scheduled Tribes respectively. Suffice to say that the formation of such an opinion should involve an extensive survey of each caste or class and its recruitment in the public services. This is one of the exercises that some states do undertake for the designation of Other Backward Classes itself⁶¹ but no such survey or test for the formation of opinion under Article 16(4) is undertaken by the Central Government with respect to the Scheduled Castes and Scheduled Tribes.

PROPOSALS AND CONCLUSION

The paper identified several key issues that persist with the policy of reservation and designation of backward classes, particularly Scheduled Castes. The paper is not concerned with the effectiveness of any policy of reservation or affirmative discrimination. Whether such practices promote equality and causes of social justice is a question best settled by politics. Our concern was to identify key areas that are ignored in the consideration of these cases.

In Part I, we saw that a notification under Article 341 was said to be immune from the challenge under Article 14 on the ground that the determination of backwardness is solely the domain of the Parliament or the executive. Therefore, despite the fact that notification is a 'law' under Article 13 and is subject to Article 14, such subjection is merely theoretical

⁵⁸ Information under Section 2(f) of the Right to Information Act, 2005 includes an opinion.

⁵⁹ RTI Application, registered as MOSJE/R/E/23/00157 (subsequently transferred to Ministry of Tribal Affairs and National Commission for Scheduled Castes, on file with author), PDF copy can be accessed at https://drive.google.com/file/d/1osEOuxhEE-iMBpVrFwfRDBLhnttZvITP/view?usp=share_link.

⁶⁰ Replies to the RTI Application from various Ministries and Departments (on file with author), PDF copies can be accessed at https://drive.google.com/drive/folders/1n_D8V_KgAQmHID7dHG7pqgbQzOskNmMu?usp=share_link.

⁶¹ Kerala State Commission for Backward Classes, Criteria for Identifying Backward Classes, Acts & Rules, <https://ksbc.kerala.gov.in/acts-rules/criteria-for-identifying-backward-classes/>.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

in light of the fact that there is no objective criteria or parameter of backwardness, and its determination lies solely with the Parliament. Thus, the Courts are stopped from considering which criteria have been considered and if so, whether other castes which are backward in terms of the said criteria have been excluded from the list. We emphasise that the criteria for determining backwardness for the purposes of Articles 341, 342 or 16(4) must be made more objective so that the application of Article 14 to Article 341 and its notification is not merely theoretical but also practical.

Drawing on the judicial determination of bases of classification of Scheduled Castes and OBCs, in Part II we found that their bases of classification overlap considerably which negates the existence of *intelligible differentia*. There could be an argument that since both of these classifications are receiving similar treatment under Article 16(4), they should not be hit by Article 14. However, this is erroneous on two counts. One, that a classification of two classes made without a sound basis cannot be justified on the count that they both will receive similar treatment; i.e., the absence of an *intelligible differentia* cannot be compensated for by the fact that the classes made under will be treated similarly. Second, as it turns out, there are indeed other ways in which both of these classes are treated differently. For instance, the Constitution provides reservations in the seats of Parliament and State legislatures for the Scheduled Castes and Scheduled Tribes but not for OBCs. Similarly, we have penal statutes like the Prevention of Atrocities on Scheduled Castes and Scheduled Tribes Act, 1989, the provisions of which are attracted only when certain acts of atrocities and hate crimes are committed by a person not being a member of Scheduled Castes or Scheduled Tribes, inflict them upon the persons from the Scheduled Castes and Scheduled Tribes. Thus, while Scheduled Castes and Scheduled Tribes cannot be prosecuted under the Act, OBCs can be. Similarly, while the Act provides Scheduled Castes and Scheduled Tribes from atrocities, the same protection is not provided to members of OBCs despite the fact that they can be similarly situated.

This brings us to the necessity of making the basis of classification of SEBCs and Scheduled Castes exclusive. If socially backward castes are included in Scheduled Castes, then OBCs should not include socially backward castes. Thus, we side with the opinion expressed by AN Ray CJ in *State of UP v. Pradip Tandon* and Subba Rao J in *R Chitralkesha v. State of*

Mysore who emphasised that SEBCs are groups other than groups based on caste. In the *Jat Reservations* case,⁶² the Supreme Court opined that SEBCs can be classes based on disability and gender. It also emphasised that the usage of caste as the sole criterion for the identification of backwardness be discouraged and backed by the development of new yardsticks and standards moving away from the caste-centric definition of backwardness. Kuldip Singh J also stated in his dissenting opinion in *Indra Sawbhney* that backward classes of citizens under Article 16(4) are not synonymous with the expression “socially and educationally backward classes of citizens” used in Article 15(4). We believe that this is a good approach, as it enables the state to make reservations for classes which are backward on other considerations like occupation, linguistic advancement, or even the extent of technological penetration in classes of citizens. Thus, the State can target certain kinds of backwardness that might disable the citizens from adequately representing themselves in public services.

In Part III, we observed that *Indra Sawbhney* ignored the facet that the determination of the SEBCs by the executive can constitute a colourable exercise of power due to the fact that castes that should be included in the Scheduled Castes are included in the list of SEBCs on the same criteria without parliamentary oversight and thus receive the benefit under Article 16(4). While this flaw has been remedied to some extent by the introduction of Article 342A with regards to the Central list of SEBCs, the state lists of SEBCs are still completely in the hands of the executive. Accordingly in clause (3) of Article 342A, we propose that:

- a. before the words “every State”, the words “the legislature of” be inserted.
- b. before the words “Union territory”, the words “with respect to a” be inserted.
- c. after the words “Union territory”, the words “the Parliament” be inserted.

So that the amended clause reads as:

“Notwithstanding anything contained in clauses (1) and (2), the legislature of every State or with respect to a Union territory the Parliament may, by law,

⁶² Ram Singh v. Union of India, (2015) 4 SCC 697.

CONSTITUTIONALITY OF CASTE BASED RESERVATIONS: UNCOVERING LOOPHOLES AND INCONSISTENCIES

prepare and maintain for its own purposes a list of socially and educationally backward classes, entries in which may be different from the Central List.”

We believe that the above amendment as proposed above resolves the issue that we raised in Part III.

In Part IV, we pointed out that unless a backward class is inadequately represented in the services under the State, it is not entitled to reap the benefits of reservation under Article 16(4). Accordingly, it is incumbent upon the State to regularly monitor the status of the backward classes and their representation in the services, and those backward classes which are adequately represented therein be specifically excluded. Thus, the recruitment notification of public service can read like “15 percent of the seats are reserved in favour of Scheduled Castes except those which are listed in Annexure-A (where such annexure contains the list of those Scheduled Castes which are adequately represented in the services of the State).” We believe that this greatly extends the capacity of the State to target those classes which are more backward as against those which were backwards in the past but by virtue of their adequate representation have their statuses greatly improved.

Last, we part ways with the observations made by the Supreme Court in the recent case of *Janhit Abhiyan v. Union of India*, where it was reiterated that the reservations cannot be for an indefinite period of time so as to become a vested interest in itself.⁶³ However, when reservations should cease to operate is a question that is determined by factors other than backwardness, including political considerations.⁶⁴ We believe that the safeguards suggested in this paper are sufficient to ensure that reservations do not become a vested interest and remain only a measure of affirmative action.

⁶³ *Janhit Abhiyan v. Union of India*, 2022 SCC OnLine SC 540, ¶ 190.

⁶⁴ R. Puri, *The Politics of Reservation*, OUTLOOK INDIA, (Feb. 03, 2022), <https://www.outlookindia.com/website/story/the-politics-of-reservation/231422/>.