



Caste, Constitution, Court, Equality: The Social Justice Imbroglio in Contemporary India

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ABSTRACT *How do democratic ideals and constitutional provisions of inclusive citizenship and “reasonable classification” of universal rights to combat social oppression and promote social justice get worked out in the crannies of state policies, citizen politics and legislative and legal pronouncements? This article addresses these issues by revisiting the convoluted trajectory of positive discrimination (termed “reservation”) in India as an illustrative and instructive example. It combines an innovative reading of Constitutional Assembly Debates, constitutional provisions, constitutional amendments, and crucial Supreme Court rulings to trace the gradual undoing of constitutional ideals and provisions. An exploration of changing state policies in tune with the imperatives of a neo-liberal Hindu authoritarian regime, and shifting electoral demands of privileged upper castes and classes, allows the article to underscore a radical shift in ethos that has resulted in an interrogation of constitutional provisions for social equality and justice. A lack of consensus on the justifiability of (re)distribution of resources by extending special benefits to the socially suppressed (“backward”) castes and classes of citizens, has laid bare the ambiguities inherent in constitutional ideals and provisions, highlighted the resourceful use of such ambiguities by the socially entitled citizens to disavow caste-based social oppression, and insist on economic weakness that hampers equal opportunity as the fair ground for “reservation.” A shift in emphasis from “social backwardness” of the oppressed to “economic weakness” of the advantaged in the language of the state ratified by the Supreme Court, underscores the undemocratic consequences of democratic provisions. A serious interrogation of the fairness of reasonable classification of equality and the justifiability of distribution on the part of the socially privileged, has served to disavow calls for social justice and recognition of difference by the oppressed, and overturned the basic premise of equal respect that ground liberal theories of social justice and social democracy.*

KEYWORDS caste; constitution; social backwardness; equality; reservation; social justice; Supreme Court

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ISSN: 1911-4788



Introduction

While we are given to believe that the Constitution helmed by Babasaheb Ambedkar created a republic that repudiates caste, in reality the republic of India has been constructed on the foundation of caste. Although the lawmakers outlawed untouchability in the Constitution, they skillfully consecrated caste which is the source of untouchability. (Teltumbde, 2018, p. 13)

These powerful and provocative assertions by Anand Teltumbde, a stimulating academic and civil rights activist, interrogate what is widely accepted to be the foundational ideal of the Constitution – that of constructing independent India as a republic based on universal adult suffrage with equal civic and political rights for all citizens – and special provisions for the socially stigmatized (and hence “backward”) as a means to foster conditions of substantive equality for disadvantaged groups and communities.

India’s early attempt to implement “positive discrimination” (now increasingly called affirmative action) by means of extending state protection to the socially subjugated and backward, had a lot to do with the presence of Dr. B. R. Ambedkar as the chairman of the drafting committee of the Constitution. An eminent intellectual who gave a new direction to anti-caste and Dalit struggle in the first half of the 20th century,¹ Ambedkar (endearingly called Babasaheb) made graded social inequality and exclusion important themes of debate in the Constituent Assembly. His assault on the logic, structure and operation of caste,² an ascribed, hereditary, deleterious, hierarchical classification of occupation or calling tied to social-ritual status as the principal cause of stigma, segregation, and indignity faced by Dalits, open disputes with Mahatma Gandhi who was concerned with untouchability and its eradication, and arguments with political leaders on the shape independent India was to take, made members of the Constituent Assembly alert to the problems of granting political equality under conditions of social inequity. Ambedkar introduced “backwardness” generated by caste as a key debilitating element that hampered equality and fraternity and, after long deliberations, members of the Constituent Assembly agreed to extend particular state aids to the socially suppressed groups and communities as a mode to counter social oppression and promote social justice.

The Indian Constitution that came into force on January 26, 1950 (ConstitutionofIndia.net, n.d.) directed the national and provincial states to offer special benefits to the socially (and educationally) backward castes and classes of citizens. Even though the colonial demarcation, enumeration and classification of Depressed and Backward Classes, and Scheduled Castes

¹ The term Dalit, literally a broken people, was adopted by radical groups of “untouchable” castes from the 1930s in opposition to Gandhiji’s term Harijan, people of the God (Lord Vishnu/Hari) to expose the enduring oppression inherent in their stigmatized classification as “polluted” on grounds of ascribed occupation in the caste order.

² Caste is a combination of *varna*, literally color, but is also used to signify idealized social calling or occupation, and *jati*, birth groups or species.

(SCs/Dalits) and Scheduled (and De-Notified) Tribes (STs) were retained, “reservation” – reserved seats or quotas in state educational institutions, public employment and legislatures for the SCs and STs were re-signified. They now became tools to combat “social backwardness,”³ foster conditions of substantive equality and enhance social democracy. Articles 341 and 342 empowered the President of India to draw up state-wise lists of Scheduled Castes and Scheduled Tribes to bring them under state protection.⁴

Ambedkar regarded fraternity and solidarity poised on mutual respect in social relations among hierarchically graded caste-communities to be essential for social justice. Substantive equality therefore required an attention to equality of outcomes and not just of opportunities, and mutual respect could be achieved only when the inherited, unearned social privilege of Brahmins and upper castes (Subramanian, 2019; Teltumbde, 2018) was balanced by the countervailing force of particular benefits offered to Dalits who had suffered historic injustice on account of the “impure” manual tasks assigned to them. Such benefits, initially introduced as a temporary measure, were expected to enable the Dalits and other suppressed groups to earn dignity and social-cultural-economic capital and make use of “equal opportunity” under muted conditions of inequity.

The career of reservation in India, unfortunately, has been one of bitter contests and conflicts that has resulted in its recent unraveling. The fiercest battles have been fought over the extension of reservation to the Other (Socially and Educationally) Backward Classes of citizens (OBCs/SEBCs), an amorphous category whose identification, definition, and classification the Constitution had left to the respective state governments. While this has produced severe rivalry among different groups and castes around claims to state benefits on grounds of varying degrees of social backwardness, the clamor for special privileges has heightened the latent opprobrium toward “quota candidates” – Dalits and OBCs/SEBCs – among the advantaged, some of whom in turn have laid claims to state benefits on grounds of economic weakness instead of social backwardness. Their demands, in conjunction with the electoral imperatives of the current Hindu nationalist government and its

³ Reservation in India has a very long genealogy going back to the end of the 19th and the beginning of the 20th century, when the princely states of Kolhapur and Mysore implemented policies to counter Brahman (the highest caste in the caste order) predominance. The pan-India censuses of British India introduced enumeration on the basis of caste and social status from the beginning of the 20th century and the Reforms of 1919 marked out the “Depressed Classes” that needed special safeguards. The policy of state protection for “Backward Classes” and “Depressed Classes” all-over British India became operative after the Government of India Act of 1935 (Internet Archive, n.d.) that came into force in 1937. Depressed Classes and Tribes were enumerated in separate schedules and the term “scheduled castes,” was used for the first time defining the group as including “such castes, races or tribes or parts of or groups within castes, races or tribes, ... which appear to His Majesty in Council to correspond to the classes of persons formerly known as ‘the Depressed Classes,’ as His Majesty in Council may specify” (Chuni Lal Anand (1944) cited in Tripathi (2018)).

⁴ Specific articles of the Constitution of India may be found by searching for the article by number (e.g., Article 341) at ConstitutionofIndia.net (n.d.).

majoritarian politics, have resulted in the extension of reservation to the Economically Weaker Sections (EWS) by the 103rd Amendment of the Constitution.

The Constitution Amendment Bill to extend reservation to the Economically Weaker Sections of unreserved castes and groups who are not backward, was introduced in the legislature by the union government in early January 2019, prior to general elections.⁵ It was quickly passed by both houses of the Indian Parliament, ratified by the President, and implemented by the Center, even though the constitutional validity of the Amendment was challenged by citizen groups in the Supreme Court of India. The decision of the Supreme Court of November 7, 2022 upheld the validity of the Amendment and the extension of reservation to the EWS. An extension of special benefits to the “traditionally privileged castes” which outweighed “the claims for representation made by subaltern castes against disabilities and deprivation,” overturned initial constitutional ideals of social justice, and de-stigmatized quotas (Nite & Dash, 2022, p. 412). It also transgressed the limit of 50% set on reservation by a landmark Supreme Court judgment of 1992 (*Indra Sawhney and Others v the Union of India and Others*, 1992).

This article offers an innovative reading of the convoluted trajectory of reservation to understand and comment on the implications of the gradual undoing of constitutional ideals and provisions to counter severe social oppression and promote social equality and justice.⁶ It explores changing state policies, shifting electoral demands of privileged upper castes and classes, and imperatives of a neo-liberal, Hindu authoritarian regime through the prism of Constitutional Assembly Debates, constitutional provisions, constitutional amendments, and, most importantly, crucial Supreme Court rulings to trace the gradual yet radical shift in ethos that has resulted in an overturning of initial ideals of social citizenship and justice. It tracks the contradictory, undemocratic consequences of the lopsided recognition of caste as the key external and unfair element generative of backwardness for historically stigmatized social groups by highlighting the many ways socially advantaged citizens have deployed the crisscrossing intersections of caste and class (and gender and race) to disavow caste and social oppression.⁷ Significantly, this

⁵ *The Constitution (One Hundred and Twenty Fourth Amendment) Bill, 2019* may be found at <https://prsindia.org/billtrack/the-constitution-one-hundred-and-twenty-fourth-amendment-bill-2019>

⁶ For sensitive economic and social examinations of the 103rd Amendment see Deshpande and Ramchandran (2017, 2019). For explorations of “reservation” from distinct perspectives see Deshpande (2006), Guru (2010), Subramanian (2019), Teltumbde (2018).

⁷ In contrast to the economic determinism of the Marxist (and socialist) idea of class as premised on economic status and privilege incumbent upon control of the means of production, this essay takes social class to be constituted by cultural capital, evaluations of prestige of an occupation, or family descent that make a group of individuals share the same socio-cultural and economic status and affinities. These elements make social class coincide with caste in very important ways. Teltumbde sees caste as a concrete reality that often encompasses the abstract concept of class (Teltumbde, 2018, p. 14). He notes the mutual distrust of socialists and Dalits on account of

transformation has found reflection in a shift in emphasis from protection of the socially backward classes to support for the economically weaker sections, not just in the language of the state but also that of the Supreme Court.

The Indian experiment and experience are illustrative of the limitations and loopholes of state-centered schemes of social transformation, and of the contingency of social justice in societies marked by huge disparities of social, cultural, economic capital and status. The lack of consensus on notions of rights, social (and moral) worth and fair distribution among different citizen groups in differential positions of power and privilege reveals the contradictions of social citizenship (Marshall, 1950), and underscores the fragile and tense relationship between democracy and social justice.

Immediate Impulses

On November 7, 2022 a five-judge Constitution Bench of the Supreme Court of India upheld by a three to two majority the constitutional validity of the 103rd Constitutional Amendment Act, initiated by the current union government and passed by both houses of the Indian parliament in January 2019. The verdict resolved the law suit filed by a citizen group immediately after the 124th Amendment Bill (that became the 103rd Constitutional Amendment Act) was passed (*Janhit Abhiyan v Union Of India*, 2022).

This ruling was a follow-up to an earlier ruling of the same Court (of May 5, 2021) that stated that even though the 102nd Constitution Amendment Act of August 2018 abrogated the power of the federal states to identify, classify and take special measures with regard to the Socially and Educationally Backward Classes (SEBCs) by conferring such rights on the President of India, it did not limit the states' power to adopt such measures in relation to all other groups and communities, and hence, did not affect or damage the federal structure of the constitution.

The 123rd and 124th Constitution Amendment Bills, had been passed by the lower and upper houses of the Indian parliament in rapid succession in August

their respective focus on economically determined class and socio-culturally determined caste oppression. Gail Omvedt, a pioneering scholar of the Dalit movement saw it as a part of the wider democratic, "value-oriented," anti-systemic movements that included socialist and communist led peasant and worker's struggles during the upsurge of nationalism and Marxism in colonial India (Omvedt, 1994, p. 13). At the same time, she acknowledged that the Marxist equation of caste/class-base/super-structure widened divisions within anti-caste struggles (Omvedt, 1994, p. 25). This article, unfortunately, will not be able to take up the vital issue of gender, which intersects with caste and class in significant ways. The dense and multiple dimensions of caste, education, exclusion, and struggles of Dalit women require elaboration in a different essay (see Guru, 1995; Paik, 2014; Rao, 2003, 2018).

2018 and January 2019 to become the 102nd and 103rd Amendment Acts.⁸ The 102nd Amendment inserted new Articles and clauses in the Constitution related to Directive Principles of State Policy on reservation (338B, 342A and 366 [26C]) in order to confer special powers on the President of India to appoint the chairperson, vice chairperson and other members of the National Commission for Backward Classes dedicated to the task of monitoring the working of safeguards for members of the socially and educationally backward classes, and to assess “the socio-economic development” of such classes (*The Gazette of India* 2018, p. 2, article 338B, clauses 3, 5 [a], [c]).

The 103rd Amendment added new clauses to Articles 15 and 16 that form a part of Fundamental Rights,⁹ to allow the introduction of a new category of Economically Weaker Sections (EWS) and extended a maximum of 10% reservation to them. The EWS includes groups that do not belong to the Scheduled Castes, Scheduled Tribes and the “creamy layer” of the Other (Socially and Educationally) Backward Classes (OBCs/SEBCs) – beneficiaries of “preferential treatment.” This 10% extension of reservation to the socially privileged EWS by the Amendment transgressed the limit of 50% of the total population to be covered by reservation set by the influential 1992 judgment of the Supreme Court (*Indra Sawhney and Others v the Union of India and Others*).

The two Acts came in the wake of a long struggle on the part of the dominant groups of Patidars or Patels of Gujarat, the Marathas of Maharashtra and the Jats of Haryana, Rajasthan and other parts of north and west India (middle-ranking castes) who first challenged reservation and then staked claims on special aids extended by the state on grounds of a particular kind of economic weakness that prevents their entry into premier educational institutions. The text of the 124th Constitution Amendment Bill placed in the Parliament in January 2019 reiterated that the financial incapacity of the economically weaker sections among the socially privileged made them incapable of competing on equal grounds with their economically more privileged counterparts, a fact that hindered their access to higher educational institutions and public employment. Such incapacity excluded them from the benefits of Articles 15 and 16 on non-discrimination and equal opportunity. The purpose of the Amendment bill was to give the poor “a fair chance in life” (*Business Today*, 2019).

Widely viewed by political analysts, academics, and parties in the Opposition as being motivated by the then forthcoming general elections in May 2019, the 103rd Amendment Act, together with the jubilant declaration of

⁸ *The Constitution (123rd Amendment) Bill, 2017* may be found at <https://prsindia.org/billtrack/the-constitution-one-hundred-and-twenty-third-amendment-bill-2017>. *The Constitution (124th Amendment) Bill, 2019* may be found at [https://prsindia.org/files/bills_acts/bills_parliament/2019/Constitution%20\(124th%20Amendment\)%20Bill,%202019_0.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2019/Constitution%20(124th%20Amendment)%20Bill,%202019_0.pdf). *The 102nd and 103rd Amendment Acts* may be found at <https://legislative.gov.in/document-category/amendment-acts-102-to-onwards/>

⁹ See <https://indiankanoon.org/doc/609295/>; <https://indiankanoon.org/doc/211089/>

Prime Minister Modi that the passage of the Act was a victory of social justice, signaled a transformation in the state's mandate to protect the socially backward classes into a moral duty to support the economically weaker sections and afford them a fair chance in life.

An organization called Youth for Equality filed a petition in the Supreme Court against the 124th Amendment Bill (*Janhit Abhiyan v Union of India*, 2019) on grounds that the bill violated the equality code of the Constitution and was “in breach of the basic structure of the Constitution.” It reverted to the Supreme Court judgment of 1992 that had affirmed that economic criteria cannot be the sole basis for reservation under the Constitution and also set a limit of 50% on reservation.

The Supreme Court judgment of November 7, 2022 made a deft use of Affirmative Actions (instead of positive discrimination) to determine that support for the economically weak to enter educational institutions and public service complements reservation for the socially backward. This enabled three of the five justices to grant legal legitimacy to the extension of reservation to the EWS by quashing the petitioners' claim that the 103rd Amendment Act contravened the very structure and spirit of the constitution.

Constitution, Backwardness, Education, Equality, Justice

The Constitution of independent India marked a significant rupture with the colonial past. It established India as a sovereign democratic republic based on universal adult suffrage, overturning the limited voting rights of colonial times. The Preamble to the Constitution accorded priority to justice – social, economic and political – over equality and liberty in the rights “The People of India” pledged to confer on themselves. And the constitution directed the state to adopt special measures to counter existing social subjugation and inequality.

Article 16, that stipulates in clause 1 that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and in clause 2 that,

No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State declares in clause (4) that “nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any *backward class of citizens* which, in the opinion of the State, is not *adequately represented* in the services under the State” (emphasis added).¹⁰

The succeeding Article (17) declares untouchability to be illegal, offering insights into what was considered unmerited social inequality. Significantly, the emphasis on adequate representation in services under the state

¹⁰ See <https://indiankanoon.org/doc/211089/>

underscored an understanding of disparities in power and privilege and an attempt to grant backward classes of citizens a share in governance and state service.

Articles 341 and 366 (clauses 24, 25), that pertain to the Directive Principles of State Policy, enjoined the union and federal states to introduce special quotas for members of the Scheduled Castes, Scheduled Tribes, Anglo Indians, and Other Backward Classes in public education including institutions of higher learning, state employment and union and state legislatures. These were initially thought of as a temporary measure.

Scholars have taken note of the awareness shown by Constitution-makers of the contradictions between the universal ideal of civic nationalism, individual liberty, and equal rights that ignored social distinctions of caste, religion, class, race (gender), and the prevalence of inequity on account of caste oppression and class disparity. Accepting caste and the social status conferred by class as unfair external factors generative of inequality, they introduced “reasonable classification” of universal rights (Austin, 1966, p. 318), and worked towards “*communitarian egalitarianism*” that recognized and affirmed difference instead of jettisoning it (Bhargava, 2001, pp. 20-21; emphasis in original).

Such considerations notwithstanding, Constituent Assembly Debates (1947-1949)¹¹ divulge serious tensions tied to divergent visions for the new democratic nation-state and imperatives of development and modernization. When Ambedkar introduced backwardness as an element that hampered substantive equality of minority communities, he had the Dalits in mind. Dalits were not a demographic minority (like the Muslims), but a social minority constituted by extreme social stigma that derived from the caste division of laborers (and not labor) into touchable and untouchable (Ambedkar, 2014, p. 47). The ensuing debate in the Constituent Assembly, however, centered on considerations of equal opportunity and took as backward all communities that for historic reasons had not had a share in the administration and public service, displacing Ambedkar’s fight to destroy caste. It was further agreed that in order for equal opportunity to gain substance and not lose its meaning such representation was to be adequate and not proportional,¹² and the inclusion of SCs and STs within state protection had to be consistent with the maintenance of efficiency in public administration. Such affirmations disclose endeavors to balance the fundamental rights of liberal equality and non-discrimination with special measures of redress for social inequality.

¹¹ See <https://www.constitutionofindia.net/constitution-assembly-debates/>

¹²While the *Indra Sawhney* judgment, 1992 (p. 188) recapped Ambedkar’s arguments in the Constituent Assembly that a co-relation between demographic enumeration of “backward” communities that could indicate a 70% reservation and left 30% as un-reserved and general undermined equal opportunity and destroyed the very purpose of reservation to set a limit of 50% on reservation, the *Janhit Abhijan* judgment of 2022, stressed the use of “economic democracy” by Ambedkar in the Constituent Assembly to complement political democracy and interpreted his argument against a demographic co-relation to sustain adequate and not proportional representation of the “socially backward” (*Janhit Abhijan v Union of India*, 2022, pp. 59, 88, 178-180).

Reservation as an exceptional measure, argues Teltumbde, would have been viable if it applied only to the Dalits, a community in a historically exceptional position. The addition of Scheduled Tribes and Other Backward Classes diluted its practicability. On the other hand, if reservation as a measure of social justice was extended to STs and OBCs who suffer social precarity and humiliation but do not labor under the extreme social ostracism that apply to Dalits, a renamed single schedule that included all vulnerable groups would have neutralized the acute social prejudice suffered by Dalits (Teltumbde, 2018, p. 37).

Arguing from a different position, Niraja Jayal Gopal demonstrates the hierarchy inherent in the state and constitution's construction and recognition of backward social groups. While the oppression and backwardness of Dalits on account of caste was openly acknowledged and special provisions for them granted as a result of their legitimate demands, the backwardness of "tribals" (STs) was attributed to their "primitiveness" and privation and the conferral of special benefits to them was considered a "benefaction" of the postcolonial state (Gopal, 2013, p. 230).

There were further complications relating to the mechanism of reservation. As indicated earlier, while SCs and STs had been identified by the colonial state, the task of identifying Other (Socially and Educationally) Backward Classes was ascribed to local governments, a fact that has generated perpetual and bitter conflicts and competition. Such problems were compounded by disagreements over distribution. Many members argued strongly in favor of a fair distribution of social and economic resources (Gopal, 2013, pp. 148-160), and Jawaharlal Nehru was more inclined towards redistribution of material goods and resources along socialist lines to promote economic uplift of the general mass of the population (Austin, 1966, pp. 26-27). Even though redress of grave social inequality was accorded priority, reservation, by avowing caste as the basis of "nonachievement" of the socially oppressed and obviating "caste inheritances as the basis of achievement" (Subramanian, 2019, p. 204), left the way clear for upper caste critique of reservation and their politics of meritocracy.

Ambedkar and Nehru differed widely on their perception of caste. Nehru saw caste as an archaic institution internal to Hinduism that was to wither away with the "scientific temper" and critical thinking that education would foster (Nehru, 1989, p. 520). Caste, for Ambedkar, was essentially social and political, and the fight against caste had to be fought in the political and social arena. He agreed on the pragmatic provision of preferential access to political power, state employment, and education for Dalits in the hope that it would help individual members acquire social merit and dignity and get rid of social prejudice that would in turn dissolve the collective community constituted by stigma paving the way for moral and cultural good (one-man-one-value) as the defining condition of justice (Guru, 2008, p. 244).

Education in general was seen as the panacea for different grades of backwardness as well as a way forward for the republican nation. Education,

science and technology were to teach and train the primitive and socially backward citizens along with the endowed ones in order for them to be able to contribute to the “productive economy” of the nation and consolidate nation-building (Kumar, 2022, p. 58). The recent extension of reservation to the socially advantaged EWS hinges precisely on an adroit use of this entanglement of nation, education and development with the social worth of citizens.

Ambedkar’s arguments entailed an ambivalent mix of distribution and recognition. He wanted a fair distribution of measurable, material resources such as seats in education, and quotas in state employment and legislatures to enable oppressed, backward communities to gain rights and representation together with an enhancement of dignity and respect, both immeasurable values. A mix of aspiration and practical solution found reflection in his speeches. While his undelivered address (published as the *Annihilation of Caste*) to the *Jat-Pat-Todak Mandal* (Caste-destruction Society) of Lahore (1936), had insisted on the necessity to annihilate caste in order for India to become a true nation with the recognition of equal social (and moral) worth of all its individual members that would make the principle of one man, one vote (one value) operational (Ambedkar, 2014, p. 412), his oft-quoted closing speech of November in the Constituent Assembly Debates (1949) reiterated the deplorable impact of caste on the ethics and public spirit of the Hindus and underscored the “life of contradictions” (para. 325) India was to enter with the implementation of the Constitution.

This speech highlighted how inequality in social and economic life would put political democracy in peril and detract from India becoming a true nation socially and psychologically, and urged the necessity of sustaining political democracy with solidarity and fraternity (i.e., mutual respect) (Constituent Assembly Debates, 1949). Ambedkar’s interrogation of “presumptive equality” addressed a core tension in modern political thought in caste-class based capitalist societies: the compromise of universal equality with naturalized social and (economic) hierarchy.¹³

Social Backwardness and Economic Weakness: Legal Interpretations and Citizen Action

The ambiguities and tensions that underlay reservation have produced diverse and contradictory consequences. On the one hand, reserved seats in legislatures have occasioned a “silent revolution” (Jaffrelot, 2003) that has increased the political representation and participation of the socially backward as a strategic numerical majority. Dalits, in particular, have assumed an important role in

¹³ See Nancy Fraser’s critique of the “bourgeois public sphere” and its implicit acceptance that “it is possible for interlocutors to bracket status differentials and to deliberate ‘as if’ they were social equals” (Fraser, 1990, p. 62) sustained by the supposition that societal equality is not a necessary condition for political democracy.

tilting the balance of political power in elections, and “an educated, professional middle class among them” has “redefined the contours of public debate” by demanding “equal rights and a share in the nation” (Jangam, 2016, p. 412). This has encouraged certain subcastes and groups of Dalits in the lowest social and economic rung to complain of hierarchy and discrimination among Dalits that have prevented their access to state benefits, a complaint that has been niftily used by the central and state governments to introduce sub-classification (sub-categorization) among the SCS, and validated by the supreme Court in a recent verdict (*State of Punjab v Davindar Singh*, 2024).¹⁴

Dalit and OBC assertion, on the other hand, has augmented the covert and now blatant antagonism to reservation among the socially privileged. They have insisted on equality of opportunity based on individual “merit,”¹⁵ challenged reservation as being discriminatory, and subsequently claimed state protection on account of economic weakness that hampers them from joining premier institutions of higher learning. The fierce battles fought against measures of the union and provincial states by groups of citizens through legal suits have involved constant and important interventions of the High Courts and the Supreme Court, and reinforced powers of the executive and judiciary as agents of social change,¹⁶ powers that have been variously used to invalidate caste oppression and social marginalization.

Indeed, the first challenge to reservation came within a year of the promulgation of the Constitution when a Brahman woman resorted to the Madras High Court by taking recourse to Article 15 (on prohibition of discrimination) and petitioned for the protection of her fundamental rights against a government order authorizing a caste-wise allocation of admissions in medical colleges. The case was referred to the Supreme Court, which struck down the communal quota after which it was discovered that the appellant had not even applied for admission. If this underscored the resourceful ways in which upper castes can manipulate constitutional provisions, it also made the executive conscious of the gaps in such provisions. The Indian Parliament passed the Constitution First Amendment Act (drafted by Ambedkar) in 1951 that inserted a new clause (4) in Article 15, which clarified that even though Article 15 prohibited discrimination on grounds of race, religion, caste, etc., “nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any *socially and*

¹⁴ The Supreme Court verdict of August 1, 2024 (*State of Punjab v Davindar Singh*, 2024), allowed sub classification of the Scheduled Castes to exclude the creamy layer. “The Scheduled Castes are not a homogenous class. Preferential treatment can be given to the most downtrodden of the class who are not adequately represented. Such a sub-classification is meant to provide equality of opportunity, so as to achieve the purpose of reservation” (*State of Punjab v Davindar Singh*, 2024, p. 110).

¹⁵ This article interrogates the notion of individual merit as neutral, objective, and measurable. It agrees with the Mandal Commission’s critique of merit, cited below, and with Iris Young’s (1990, pp. 192-225) arguments.

¹⁶ For a different and forceful elaboration of this argument see Narula (2008).

educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes” (emphasis added).¹⁷

Ajantha Subramanian’s rich ethnography of the development of technical knowledge in the Madras Presidency (now Tamil Nadu) in colonial and postcolonial times, opens a new vista on Brahman (upper caste) politics. She unveils how technical knowledge and education went from being “the purview of Indian lower caste artisans to becoming integral to state power, economic development and upper caste status through the rise of engineering and technological modernization” (Subramanian, 2019, p. 2), consolidated further by the supposedly democratizing examinations that continue with cultural gate-keeping and certification to mark out the naturally “gifted” from the “coached” (p. 202). Together, they have prompted Tamil Brahmans and privileged castes to use the constitutional guarantee of equality and non-discrimination in their questioning of reservation, and assert that they are “quintessentially meritocratic” (p. 205). Such confident blends of caste and social class in upper caste-middle class identity politics have made caste and merit intimate instead of antithetical, fueled disdain for Dalit and other quota candidates, and consolidated newer forms of upper casteness as the basis for capital accumulation (p. 4).

The 103rd Amendment that ratified the struggle of middle-ranking castes and classes, was not premised on an affirmation of natural merit. Instead, it posited economic weakness of the socially dominant as a factor that excludes them from higher learning and state employment, and turn them into victims in relation to the advantageous position of the socially mobile and economically robust creamy layer of the socially backward, who no longer deserve state protection.

The Supreme Court judgment of 1992 (*Indra Sawhney & Others v Union of India*, 1992) that came in the wake of citizen petitions against the decision of the central government under V. P. Singh (in August 1990) to implement the recommendations of the Second National Backward Classes Commission (the Mandal Commission) and extend 27% reservation in civil services and government employment to the Socially and Educationally Backward Classes for the first time in independent India, has become a point of reference for all subsequent Supreme Court rulings on reservation. Delivered in unanimity by a bench of five judges, the long and detailed verdict is remarkable for its serious consideration and analysis of the social and social backwardness, and its interpretation of constitutional ideals of social justice and equality.

The judgment dealt with two different issues. It ruled on citizen petitions filed against the decision of the central government to extend reservation to the OBCs and SEBCs. The second verdict judged the validity of an amended Office Memorandum of the central (United Progressive Alliance/UPA) government issued on 25 September 1991 that acknowledged the necessity of giving priority to the “poorer sections” among the SEBCs as beneficiaries of

¹⁷ See <https://legislative.gov.in/the-constitution-amendment-acts/>

reservation, and indicated the possibility of including a 10% reservation for “other economically backward sections” not covered by any provision of reservation so far (*Indra Sawhney & Others v Union of India*, 1992, p. 18).

Beginning with a commendation of the invaluable work done by “men of vision” who framed the Indian Constitution as an “instrument of change,” developed the framework for the state, pointed out its goal of ensuring social, economic, political justice, and equality, and laid out the methodology for reaching that goal (*Indra Sawhney & Others v Union of India*, 1992, p. 1), the ruling declared that the clause of reservation exemplified the constitution makers’ concern with “real” equality (p. 190), and showed their intent to provide different un-represented communities a share in state power (p. 26).

Admitting that the meaning of the expression “Backward Class of citizens” in Article 16 (4) and the mode to identify them has constituted the “single most difficult question tormenting this nation” (*Indra Sawhney & Others v Union of India*, 1992, p. 49), the verdict emphasized that the use of class in the constitution and of community by Dr. Ambedkar was meant to include socially backward citizens of different groups and communities (and not just the Hindus) from the beginning. It took note of different definitions of backward in encyclopedia and lexicons including juridical ones, and accepted the lexical definition as “retarded in physical, material or intellectual development,” or slow in growth or development in a very specific sense, to conclude:

A group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense not having so much of intellect and ability will fall within the ambit of “any backward class of citizens” under Article 16(4) of the Constitution. (*Indra Sawhney & Others v Union of India*, 1992, p. 119)

“Retarded” here is used in concurrence with the Mandal Commission’s avowal that merit in a hierarchical society is not innate but the result of environmental privileges enjoyed by higher castes and classes (*Indra Sawhney & Others v Union of India*, 1992, p. 10), and that slow or retarded growth, in social, material and intellectual development, is produced by extraneous circumstances. Together, the environmental privileges enjoyed by the socially entitled and the extraneous circumstances that hamper the growth of others, make it very difficult for a member of a dominated class to compete on equal terms with the privileged ones.

The justices reverted to four different rulings of the US Supreme Court delivered between the 1970s and 1990 in relation to special “preferences” for racially disadvantaged sections in educational institutions and employment to reiterate the necessity of preferential treatment for the socially (and racially) underprivileged (*Indra Sawhney & Others v Union of India*, 1992, pp. 35-42). Since racial and caste-discrimination corresponded to the “ground-realities” of US and Indian life, the principle that “all men are created equal” and the maxim that laws be “colour-blind” were more “an aspiration rather than a description of reality” (p. 37).

Commenting on heightened social tensions among the upper and lower castes generated by social mobility among the backward classes, the judgment proclaimed that a proper resolution of such tensions depended on the ability of the “ruling upper castes” to handle the “legitimate” aspirations and demands of the “historically suppressed” and backward classes (*Indra Sawhney & Others v Union of India*, 1992, p. 10). It also asserted that since backwardness emerged out of the dynamic and changing interaction of social and economic forces, periodic review to guarantee that citizens actually suffer from disabilities and disadvantage at the time special benefits are extended to them is essential (pp. 178-180).

At the same time, it showed disapproval of the arguments made against the appearance of a top creamy layer among the backward, particularly among the OBCs and SEBCs who were snatching and “lapping up” state benefits depriving thereby their more needy counterparts. It highlighted the irony that underlay the valorization of the top creamy layer or elites amongst the socially privileged who also monopolized seats and employment on grounds of merit, and the antagonism toward the emergence of elites among backward classes (*Indra Sawhney & Others v Union of India*, 1992, pp. 86, 69-70), offering thereby a perceptive analysis of the direct relation between the democratization of privileges and the growth of hostility generated by the threat of the loss of privilege.

The judgment on the revised Office Memorandum of 25 September, 1991 that indicated the possibility of including economically backward sections’ of groups and communities not belonging to socially and educationally backward classes, was categorical in its assertion that the principal cause of backwardness is *social*, linked to caste for Hindus, and occupation, low social and educational status and poverty for communities such as Muslims, Christians, Buddhists and others that do not officially have caste. Social backwardness occasioned educational backwardness and together they culminated in economic backwardness (*Indra Sawhney & Others v Union of India*, 1992, p. 130). Reservation on the basis of economic backwardness of socially entitled citizens therefore, was not valid constitutionally (p. 155). The separation made in the amended Office Memorandum of 1991 between the poorer and non-poorer sections among classes identified as socially backward, was “not permissible and valid” and “is liable to be struck down as being violative of Clause (4) of Article 16 of the Constitution” (p. 151).

The ruling clarified that although clauses 1 and 4 of Article 16 did not contravene each other, clause 1 (equal opportunity) was the rule and clause 4 (reasonable classification to achieve the goal of equal opportunity) was the exception. Article 16 (4), therefore, should not infringe upon equal opportunity (p. 191) and reservation under Article 16 (4) “should in no case exceed 50%” (*Indra Sawhney & Others v Union of India*, 1992, p. 191). Reservation as an “extreme form” of protective measure needed to be confined to a minority of seats (p. 197). The judges recapped Ambedkar’s arguments in the Constituent Assembly that a co-relation between demographic enumeration of backward

communities that could indicate a 70% reservation and left 30% as un-reserved and general undermined equal opportunity and destroyed the very purpose of reservation (p. 188).

This argument was reiterated in another important judgement of March 17, 2015 (*Ram Singh & Others v Union of India*, 2015) that sustained the opinion expressed in the 1992 judgement with regard to the implementation of the extension of 27% reservation to the OBCs, underscored the necessity reviewing the criteria to identify backwardness, and asserted that backwardness can no longer be determined on the basis of “mathematical formulae” evolved by taking into account social, economic and educational indicators and that it should also cease to be relative (p. 65). It quashed the notification of the UPA government of March 4, 2014 that had effected the inclusion of the Jats in the central list of Backward Classes on grounds that it had been “actuated by political motives, namely, to gain electoral advantages,” and was tantamount to “an abdication of the constitutional duty of the State” (p. 65).

The Supreme Court verdict of November 2022 in relation to the constitutional validity of the extension of reservation to the EWS marks a significant departure from these earlier decisions. Stressing that the law “in our democracy” seeks to build-up a “socio-economic” structure, it asserts that real and substantive equality calls for affirmative actions, and that reservation for the socially backward constitutes only one such action (*Janhit Abhiyan v Union of India*, 2019, pp. 94-95). Moreover, reservation as an exception to the general rule of equality, cannot be regarded as “an essential feature of the Constitution that cannot be modulated,” or whose modulation for a “valid reason” (i.e., that of benefitting any other section in addition to the ones who are already “availing its benefit”) may damage the basic structure (p. 95).

The ruling also signals a change in the interpretation of *reasonable classification* that allowed it to authorize the extension of reservation beyond the 50% limit set by the 1992 judgment. For the justices, the principle of equality means that “*equals must be treated equally while unequals need to be treated differently*” (*Janhit Abhiyan v Union of India*, 2019, p. 55, emphasis added). When applied to real life, “we have to differentiate between those who being equal are grouped together, and those who being different are left out from the group” (p. 55). A subtle distinction between the economically weak among the socially dominant permitted them to uphold that the economically weak are different and excluded despite being socially privileged, and had to be brought under reservation through the application of the principle of reasonable classification (p. 44). Such reasoning completely inverted the *Indra Sawhney & Others v Union of India* (1992) ruling’s assertion that social backwardness occasioned educational backwardness and together they culminated in economic backwardness by positing economic weakness as the cause of educational backwardness. Following the same logic, the creamy layer of the socially backward, different from and in a better position than their economically vulnerable counterparts, were excluded from special protection.

This significant shift from the social to the economic as an element of weakness was accompanied by a change in terminology from castes, classes (and tribes) to “sections” that erased caste and class as factors that produce unfair social backwardness. The right of the socially advantaged to higher education and state employment with state aids that allows them to overcome economic barriers was upheld. The special emphasis on education in the narrative of development was adroitly turned around to abjure the intimate link of caste and social discrimination based on prejudice, and give priority to economic redistribution to enhance social justice.

As a corollary to the exclusion of the creamy layer of SCs (and STs), sub-classification of the SCs (and STs) to identify the creamy layer was accepted by a recent ruling of the Supreme Court (*State of Punjab v Davindar Singh*, 2024). Dominant groups in north and northwest India (Jats, Patidars, Marathas) have been demanding sub-classification of the large agglomerate of Dalit (and OBC) castes and groups for over a decade, and certain Dalit sub-castes (particularly in Telangana) had recently come forward with such demands. The Modi government showed its approval by setting-up a “high power” committee to hear such demands in early 2024, once again prior to the general elections. The August 1, 2024 verdict of the Supreme Court on a civil suit that had been filed in 2011 in Punjab along with several others in the following years on the issue of sub-classification of SCs (STs), ratified the constitutional validity of sub-classification and authorized the states to implement sub-classification. Drawn-up by the Chief Justice of India, this extensive verdict engaged with the different connotations of equal opportunity and interpreted the implications of Articles 14, 15 and 16 of the Constitution to uphold the necessity of sub-classification as a mode to counter inequality among SCs (STs and OBCs). Delivered six months after the hearing had concluded, and seven weeks after the Hindu-right government under Modi returned to power for a third term (without single-party majority), this 565 page ruling “casts a dark shadow” on the project of substantive equality (Surendranath, 2024, para. 30).

The reasons are not difficult to find. While equal opportunity and non-discrimination in the equality of opportunity is stressed, the verdict obviates an attention to the equality of outcome that was considered to be an integral part of substantive equality. It completely ignores the persistent discrimination suffered by Dalits, STs and OBCs, and sidesteps the vital issues of how reservation can help abate such discrimination, and whether upward mobility among certain groups of SCs/STs (and OBCs) has mitigated caste bias (Kalyani & Kabir, 2024). Sub-classification of a group (SCs) negates the possibility of considering individuals within the group to track the distinct registers of discrimination (gender, caste, class, ethnicity) they suffer from in the allotment of quotas. The supplanting of the social with the economic endorsed by the 103rd Amendment is strengthened in the ruling’s assertion that “quantifiable and demonstrable data” (*State of Punjab v Davindar Singh*, 2024, p. 132), based on economic criteria and other elements, is essential for sub-classification. The judgment moreover, overturns an important Supreme Court

verdict (of 2004) that held that since the President's list of SCs made them a "homogenous," socially precarious group despite heterogeneity, tinkering with the list through sub-classification was not constitutionally valid.

Careful analyses of socio-economic status indicators and a comparison of the position of Jats, Patels (Patidars) and Marathas in Haryana, Gujarat and Maharashtra with that of other dominant castes and classes as well as with the SCs, STs and OBCs have shown that they are socially dominant, and concluded that their struggle is "empirically unjustified" (Deshpande & Ramachandran, 2017), and that the 10% quota for the economically weaker sections turns the original logic of reservation on its head (Deshpande & Ramachandran, 2019, pp. 27-28).

Studies have also underlined that "quota candidates" cover a minimal percentage of state employment, and that too only in the lower rungs (Thorat et al., 2016). Quotas in higher education and higher rungs of state service still remain unfulfilled due to the absence of qualified candidates, a fact that reveals the gap between expectation and outcome of state measures after decades of reservation. Disclaiming the current government's concern for the economically weak, scholars have shown that the first term of Modi's rule (2014-2019) recorded a significant 58% increase in the total wealth of the country owned by the richest one percent, while the wealth of the poorest half of the population grew only one percent (Nilsen, 2019, p. 1).

The ratification of the 102nd and 103rd Amendment Acts, and the August 1, 2024 ruling signal the Indian judiciary's acquiescence of planned steps taken by a dictatorial Hindu-nationalist regime to nullify caste oppression and inequity among the "Hindu" majority, undo special provisions to counter social vulnerability and subjugation, reconfigure citizenship by chastising minorities, and ruling out heterogeneity and difference, steps that invalidate calls for social justice.

Conclusions: Vindicated Privilege and Stymied Justice

This article has read the troubled trajectory of reservation in India through the lens of Constituent Assembly Debates, Constitutional Provisions and Amendments, Supreme Court Judgments and citizen and state politics, in order to explore the ideas and ideals that guided the adoption of special provisions by the Constitution to tackle social oppression and encourage social justice. It has probed the ambiguities of such ideals and measures, and studied their divergent and contradictory consequences manifest in and governed by the conflictive and changing identity politics and struggles of the privileged and disadvantaged castes and classes of citizens. The recent crumbling of reservation illustrates the undemocratic consequences of democratic provisions emerging from limitations of state measures powered by developmental nationalist imperatives, and the lack of consensus on social exploitation, disparity and social worth among citizens in differential positions

of power and privilege. Such discord generates severe disagreement over the fairness of reasonable classification of universal rights, and the justifiability of distribution.

The Indian experiment exemplifies the elusiveness of social justice in democratic societies marked by disproportionate differences of socio-cultural and economic status and entitlement. In such societies, democratization of privileges and provisions of inclusive citizenship often exacerbate prejudice and umbrage of the dominant against disadvantaged groups marked out for special state aids, as “unmerited” and “undeserving,” cancelling thereby appeals or demands for recognition of difference. The entitled castes, classes and groups of India have frustrated the basic conditions of justice by not trying to empathetically handle the legitimate demands and aspirations of the “historically suppressed” (*Indra Sawhney & Others v Union of India*, 1992), not hearing with compassion the calls to justice by the oppressed (Young, 1990), nor agreeing with state measures to identify and redress remedial injustice (Sen, 2009, vi-ix). Instead, they have resorted to “nondiscrimination” and “equality of opportunity” to proclaim their natural (and neutral) merit, and disregard the principle of *equal respect for persons* that constitutes the “greatest common denominator” of liberal theories of social justice (Valentini, 2013, p. 3).

The lopsided recognition of caste as generative of disproportionate privation for the socially oppressed, and caste-class blends in producing social (and economic) inequalities for the backward classes without an admission of the unearned and inherited privileges of the upper caste-class conglomerate, has tempered a serious critique of the politics of merit. The ambiguous mix of assertions, aspirations, and acquiescence in state measures in the struggle for social justice, moreover, has fueled severe conflicts over distribution of state resources, and heightened contempt of the privileged.

Ambedkar’s hope that the emergence of “public conscience” as a democratic value arising from collective responsibility and public debate on what constitutes social good would lead to a moral transformation and collective stance against all forms of social oppression (e.g., Ambedkar, 1936/1945) has not only been belied, it has been superseded by a change in the social-cultural and political ethos powered by bold assertions of Hindu majoritarianism. An intermeshing of identity politics and electoral demands of the entitled neo-liberal citizens with the exercise of arbitrary power by an elected, authoritarian, centralizing executive, and compliance of the legislature and a partly compromised judiciary, has served to undo constitutional ideals and provisions by means of Constitutional Amendments and Supreme Court judgments.

The 103rd Amendment represents a disavowal of caste and “unmerited” social backwardness, and a repudiation of the struggle for dignity and respect of the socially subjugated. The consolidation of an aggressive nationalist state with its ethos of an undifferentiated and superior Hindu social citizenry as the national and democratic majority has enabled privileged groups to demarcate the deserving and undeserving members of the national community and polity,

deny the existence of an organized system of socio-cultural-economic deprivation that threatens the construct of an un-fissured Hindu majority, and stake confident claims on the benefits offered by a Hindu state.

India's thorny experience has proved the fragility of the relation between democracy and social justice, and demonstrated how a lack of commitment to the abstract and universal call to the principle of equal respect can offset an agreement on justifiability and sustain the prevalence of injustice (Valentini, 2013, p. 180). A clever shift in social justice from each according to their birth or community – an ascriptive categorization imposed by caste that had formed the initial basis of positive discrimination – to each according to their acquired merits has made the recognition of Dalits regressive rather than radical (Guru, 2010, p. 367), excluded the creamy layer of the SCs/STs OBCs and SEBCs from the EWS, and made astute use of the state emphasis on the equality of access to higher education and state service to supplant social backwardness with economic weakness. The socially advantaged have successfully refuted the acceptance of equal social worth of the socially subjugated, quashed mutual respect and dignity in politics and social relations, and laid bare the internal contradiction of social citizenship (i.e., its simultaneous commitment to undermine social inequality and uphold its legitimacy) (Gopal, 2013, p. 163). Equal recognition of difference, necessary for citizenship to be complete and democratic ideals to be concrete, has been offset by the deeply entrenched biases of citizens and their government (Calhoun et al., 2022, pp.141-143). The Indian experience offers a sobering example of the contingencies of social democracy and social justice in diversely hierarchical societies.

Acknowledgements

I wish to extend special thanks to Craig Calhoun for encouraging me to write this article and for carefully reading a preliminary draft and offering extremely insightful suggestions. My thanks also go to the three anonymous readers whose distinctly critical engagement and comments have enriched this article in significant ways. I deeply appreciate David Butz and Nisha Nath's care and support through a long process of review and editing.

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