

**THE 124TH CONSTITUTIONAL AMENDMENT: PROGRESSIVELY
REALISING ECONOMIC EQUALITY AND EQUALITY OF
OPPORTUNITY**

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“May I ask who are the backward class of citizens?... It does not say ‘caste.’ It says ‘class.’ Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth? What is it?”¹

Of the many things the Indian Constitution is known for, it is most known for its flexibility.² It is a perception of many, that Constitutions are living documents and must be read in the same way by judges and jurists alike. Balkin neutralises the debate between originalism and living constitutionalism by calling the two ideas ‘compatible rather than opposed’ and offering a constitutional theory called *framework originalism*. This views the American Constitution as an initial framework for governance that sets politics in motion, which must be filled out over time through constitutional construction.³ Though the American Constitution is at the opposite end of the spectrum of Constitutional flexibility, Balkin’s theory may be applicable to the Indian Constitution also, especially in the matter of the reservation policy in India.

It is not wrong to say that the reservation policy in the Constitution of India is a framework which was to be filled by the succeeding lawmakers after the Constituent Assembly. To understand the current status of the reservation system in India in its entirety, it is important to understand the purpose behind the policy. At the time of independence, there were many sections of the society which were backward in terms of their social, economic and

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¹ Constituent Assembly Debates, 7, 30/11/1948, TT Krishnamachari, ¶ 191.

² Where traditionalists prefer a rigid Constitution, the trend is in favour of a flexible Constitution; Gráinne De Búrca and Joanne Scott, *Constitutional Change in the EU: From Uniformity to Flexibility*, Hart Publishing, Oxford, 2000.

³ Jack M. Balkin, *Living Originalism*, Harvard University Press, Cambridge, 2014.

educational status compared to others. In order to provide a way for the government to make provisions in the future for such marginalised groups, the Constituent Assembly debated on how to empower the future governments. The Constituent Assembly incorporated the system of reservations or affirmative action in order to provide for protection of these marginalised and vulnerable groups in the society. However, over time it has only been used as a system of caste-based reservation to remove social inequalities, despite the provisions being quite broad in interpretation.

The Constitution (One Hundred and Twenty Fourth Amendment) Act, 2019 [hereinafter referred to as the ‘EWS amendment’], introduced a new basis of reservation: economic status. The amendment provides that the state may make any special provision, including reservation, for the advancement of any “Economically Weaker Sections” (EWS) of citizens. The amendment leaves the definition of EWS on the government to be notified later. The background and content of the amendment is briefly discussed in the following section of the paper. In the third section of this paper, it is argued that the EWS reservation is achieving the literal interpretation of ‘equality’ by providing special protective measures on the basis of class and not caste. Though this amendment hasn’t been seen as a progressive realisation of rights,⁴ it cannot be seen as a regressive step either. The fourth section will examine how this legislative measure has in fact aided achieving equality and non-discrimination for the EWS of the society and that affirmative action is finally being used for the progressive realisation of rights.

⁴ Press Trust of India, ‘10 per cent General Category Reservation is Muddled Thinking, may have serious Political, Economic Impact: Amartya Sen’ (2019) India Today, available at <https://www.indiatoday.in/india/story/10-per-cent-general-category-reservation-is-muddled-thinking-may-have-serious-political-economic-impact-amartya-sen-1427548-2019-01-10> (last accessed 24 February 2019); Hridayesh Joshi, ‘Reservation is not poverty alleviation programme, New Bill May Be Struck Down’ (2019) The Wire, available at <https://thewire.in/politics/upper-caste-reservation-bill-ps-krishnan> (last accessed 24 February 2019); The Wire Staff, ‘Opposition Terms New Quota Bill ‘Election Stunt’, But Welcomes Move’ (2019) The Wire, available at <https://thewire.in/politics/opposition-10-percent-reservation-bill> (last accessed 24 February 2019); Ajoy Ashirwad Mahaprashasta, ‘Optics, Not Welfare: The politics of Appeasement Behind the 10% Reservation’ (2019) The Wire, available at <https://thewire.in/politics/reservation-economically-backward-upper-castes-narendra-modi-rss-bjp> (last accessed 24 February 2019); Ashwini Deshpande, ‘Quotas Are Not a Magic Wand to Resolve Problem of discrimination in Universities’ (2017) The Wire, available at <https://thewire.in/caste/quotas-not-magic-wand-resolve-problem-discrimination-universities> (last accessed 24 February 2019).

**THE CONSTITUTION (ONE HUNDRED AND TWENTY
FOURTH AMENDMENT) ACT, 2019**

The original letter of law of the Constitution of India regarding affirmative action is found in Article 14, 15 and 16. Article 15 provides for prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and clause (4) states:

“Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any *socially and educationally backward classes* of citizens or for the Scheduled Castes and the Scheduled Tribes.”
[emphasis added]

Article 16 provides for equality of opportunity in matters of public employment, further clause (4) states:

“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]

The current Article 15 (4) was added by the first amendment made in 1951, which provides for ‘socially and economically backward classes’ whereas the Article 16(4) which provides for ‘Other Backward Classes’ was part of the originally enacted Constitution. The EWS Amendment added another set of special provisions in “favour of any economically weaker sections of citizens other than the classes mentioned.” The new clause of Article 15 reads as follows:

“(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, —

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes

mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.”

The new clause of Article 16 states:

“(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.”

The statement of object and reasons relies on Article 46 of the Constitution which provides for promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections to justify the addition of a new class for positive discrimination. Though the amendment has been accused of ‘perverting the constitution’⁵ and being a ‘cynical fraud’⁶

⁵ Malavika Prasad, ‘Perverting the Constitution’: The Case Against 10% Reservation’ (2019) The Wire, available at- <https://thewire.in/law/economic-quota-bill-case-against-reservation> (last accessed 24 February 2019).

⁶ Partha Chatterjee, ‘The 10% Reservation Is a Cynical Fraud on the Constitution’ (2019) The Wire, available at- <https://thewire.in/government/the-10-reservation-is-a-cynical-fraud-on-the-constitution> (last accessed 24 February 2019).

on the constitution; it is the first political attempt to deinstitutionalize caste and caste-based politics.

THE PARADOX OF AFFIRMATIVE ACTION IN INDIA: INSTITUTIONALISING ‘CASTE’ THROUGH ‘CLASS’ BASED RESERVATION

“The tangible effects of affirmative action differ from what the social construction theory predicts. The backward classes never emerged as a viable identity. What emerged instead was a multiplicity of castes. The government’s prolonged attempt ever since independence to construct the ‘backward classes’ only reinforced the caste system.”⁷

Chalam observes that the “concept of class has been used rather ambiguously ever since its use came into existence in the caste-based Indian society.”⁸ The Constitution of India uses the word ‘class’ for protection of marginalised communities and the jurisprudence developed thereafter⁹ refers to a ‘backward caste’ when interpreting ‘backward class.’ However, the discussion needs a much deeper analysis into the word ‘class’ and its origin in the Constitution of India.

Though India has a well-documented account of the making of the Constitution, a much larger question looms before concluding what the Constitution actually means: How much weightage should be given to the legislative intent displayed in the Constituent Assembly Debates over the literal and contextual meanings of words used in the Constitution? The disparity and confusion over the usage of the term ‘backward classes’ in the Constitution leads one to also question whether the EWS amendment finally

⁷ Frank de Zwart, “The Logic of Affirmative Action: Caste, Class and Quotas in India”, *Acta Sociologica*, Vol. 43, 2009, pp. 235-249.

⁸ KS Chalam, *Caste-Based Reservations and Human Development in India*, Sage Publications, 2007.

⁹ The Mandal Commission identified over 3743 caste’s and came about with statistical data based on field studies, survey’s, census reports etc., *Mandal Commission - National Commission for Backward Classes*, available at- <http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf> (last accessed 24 February 2019).

achieved what the CAD members, especially Ambedkar, originally envisioned?

In the initial days of the Constituent Assembly, the terminologies used to refer to vulnerable or marginalised groups were “*minorities, Backward and Tribal Areas and Depressed and other Backward Classes*”.¹⁰ On the discussion of providing special treatment to certain classes of citizens, KT Shah emphasised that “[It is needed] if equality is not to be equality of name only or on paper only, but equality of fact.”¹¹ Dharam Prakash sees the term ‘backward’ from a disaggregated point of view by identifying that “there is no community which does not have a section of people which is backward, whether economically or educationally or socially.”¹² TT Krishnamachari further asks the Assembly a key difference which could have clarified the current paradox of affirmative action in India:¹³

“May I ask who are the backward class of citizens? It does not apply to a backward caste. It does not apply to a Scheduled caste or to any particular community. I say the basis of any future division as between ‘backward’ and ‘forward’ or non-backward might be in the basis of literacy. If the basis of division is literacy, 80 percent of our people fall into the backward class citizens. Who is going to give the ultimate award? Perhaps the Supreme Court. It will have to find out what the intention of the framers was as to who should come under the category of backward classes. It does not say ‘caste.’ It says ‘class.’ Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth? What is it?”¹⁴

Sardar Hukum Singh fervently argued for a clear definition for the meaning of ‘Backward Classes’ in Article 46 in order to make the reservation policies focussed towards removing the economic disparity of the citizens of the

¹⁰ Constituent Assembly Debates, 2, 21/02/1947, Mr. Devendranath Samanta, ¶ 19.

¹¹ Constituent Assembly Debates, 7, 29/11/1948, ¶ 93.

¹² Constituent Assembly Debates, 7, 30/11/1948, ¶ 129.

¹³ Constituent Assembly Debates, 7, 30/11/1948, TT Krishnamachari, ¶ 191.

¹⁴ Constituent Assembly Debates, 7, 30/11/1948, ¶ 191.

country.¹⁵ He also points out that using undefined terminology like ‘Weaker Sections’ and ‘Backward Classes’ along with ‘Scheduled Castes’ will create confusion which may be used later for political gain by governments to come. Shri Raj Bahadur rejects the proposed definition by Hukum Singh of backward classes as too restrictive as it only includes ‘economically and educationally’ backward sections of the population.¹⁶ In the context of Article 16, Ambedkar hesitates more to justify and define the word ‘backward’ than the communities who haven’t had a ‘proper look-in.’¹⁷ When confronted on the definition of ‘backward’, Ambedkar responds by saying that “a backward community is a community which is backward in the opinion of the Government.”¹⁸

PS Deshmukh looking at the bigger picture, points out that the concept of reservation is present not only in Article 15 and 16, but also in other provisions of the Constitution. He cautions that one must be uniform in approach throughout the Constitution in attributing special treatment to SC, ST and other backward classes.¹⁹ He advocates using a uniform definition of ‘Backward Classes’ in order to encompass all backward communities who are to be given any special treatment to eliminate multiplicity of reservations. The current reservation system which is based squarely on caste is not free from faults; its deep institutionalisation of a ‘caste-based’ reservation has given rise to a new class of ‘creamy layer’.²⁰ The need for reservation on the basis of caste is not as urgent as it was when the Constitution was enacted; rather it has become more of a tool for all political parties to glide through elections in a victorious manner. It is imperative that the government takes steps in order to achieve targets. It appears that while the country was busy figuring out the

¹⁵ Constituent Assembly Debates, 7, 30/11/1948, ¶ 89.

¹⁶ Constituent Assembly Debates, 9, 23/08/1949, ¶ 143.

¹⁷ Constituent Assembly Debates, 7, 30/11/1948, Dr. B. R. Ambedkar, ¶ 205. The language used by Ambedkar while defending the attack by TT Krishnamachari on the use of ‘Backward Classes’ is quite defensive compared to debates where Ambedkar truly feels strongly about a topic, for example, using the village as a unit of administration.; Constituent Assembly Debates, 7, 4/11/1948, Dr. B.R. Ambedkar, ¶ 232. Ambedkar, hailed as the brain behind the Indian Constitution, in *Annihilation of Caste* does not use the word ‘backward’ to identify the marginalised sections of the society; B.R. Ambedkar, *The Annihilation of Caste, 1936*.

¹⁸ Constituent Assembly Debates, 7, 30/11/1948, ¶ 206.

¹⁹ Constituent Assembly Debates, 11, 15/11/1949, ¶ 377, 381.

²⁰ Creamy layer is that category within the class wherein the member is wealthier or better-off and are overall more privileged than the other members.

impact of the creamy layer, there was a section of society which was being systematically ignored: the economically weak. Data if disaggregated would reveal that poverty does not strike on the basis of caste, as the Constitution makers would want us to believe. Rather, it appears that economic backwardness exists pan-India; irrespective of caste, religion, language, race or sex.

Much has been written and debated about the reservation framework of affirmative action in India and how it has actually developed into a permanent and integral policy of development.²¹ It has been observed that the reservation policies in India have led to a change in the political status of the communities rather than a socio-economic change;²² so much so, that the ultimate aim of reservation was lost in the evils of preferential treatment.²³ The EWS amendment has been criticised for violating the 50% reservation cap that had been laid down.²⁴ However, it is interesting to note here that Ambedkar when commenting on reservation opined that it should be ‘confined to a minority of seats’²⁵ and in no mathematical formula is half of something a ‘minority.’ Whilst often justified as a way of compensating for historical mistreatment or for promoting equality, the policy should have been best understood as an instrument aimed at reducing the correlation between caste and class.²⁶ The next section looks at affirmative action from the perspective of the state

²¹ *supra* note 8; ‘Caste or Economic Status: What Should We Base Reservations On?’ (2019) Engage EPW, available at- <https://www.epw.in/engage/article/caste-or-economic-status-what-should-we> (last accessed 20 February 2019).

²² Christophe Jaffrelot, ‘The Impact of Affirmative Action in India: More Political than Socioeconomic’, *India Review*, Vol. 5, 2006, pp.173-189.

²³ Carol Bacchi, ‘Policy and Discourse: Challenging the Construction of Affirmative Action as preferential treatment’, *Journal of European Public Policy*, Vol. 11, 2004, pp. 128-146.

²⁴ Bhadra Sinha, ‘10% Quota for Poorer Sections in General Category Challenged in Supreme Court’ (2019) Hindustan Times, available at- <https://www.hindustantimes.com/india-news/10-quota-for-poorer-sections-challenged-in-sc-petition-says-it-breaches-50-reservation-ceiling/story-ccwcCVU13VTCPLuPgfYYVP.html> (last accessed 18 February 2019).

²⁵ Constituent Assembly Debates, 7, 30/11/1948, Dr. B.R. Ambedkar, ¶ 205. In para 206, Ambedkar says: “If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.”

²⁶ Daniel Sabbagh, ‘The paradox of decategorization: deinstitutionalizing race through race-based affirmative action in the United States’, *Ethnic and Racial Studies*, Vol. 34, 2011, pp. 1665-1681.

obligation to achieve equality as an essential aspect of human rights.

PROGRESSIVELY REALISING EQUALITY THROUGH AFFIRMATIVE ACTION

The concept of progressive realization of Rights originates from the Article 2(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), also known as the gateway to the Covenant. Article 2(1) of ICESCR puts a peculiar obligation on states: ‘take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’²⁷ Progressive realisation stems from the idea that the full realisation of economic, social and cultural rights cannot be achieved in a short period of time.²⁸ The Rights granted depend on the varying degrees of availability of

²⁷ CESCR General Comment No. 3: The Nature of States Parties’ Obligations, art. 2, 2007, Office of the HCHR, Sess. 5, E/1991/23, available at https://www.ohchr.org/documents/issues/escr/e_2007_82_en.pdf (last accessed 21 February 2019). The CESCR in the General Comment 3 have stated that: ‘The Committee recognizes that in many instances legislation is highly desirable and, in some cases, may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.’ The provision lays emphasis on using legislation as a means to realise social, cultural or economic right but does not prevent the state from resorting to other forms so long as the object of realising the rights is being achieved. The covenant also provides for certain minimum core obligations that need to be fulfilled by the state parties. Articles 11 and 13 of the covenants have been identified among others to be minimum core obligations to be fulfilled by the state parties. Article 11 provides the right of everyone to be free from hunger and article 13 provides that primary education must be compulsory and available free to all. The inclusion of reservation for economically weaker sections by taking a legislative measure seeks to fulfil this obligation under article 2.1.

²⁸ CESCR General Comment No. 3: The Nature of States Parties’ Obligations, art. 2, 2007, Office of the HCHR, Sess. 5, E/1991/23, 3, available at https://www.ohchr.org/documents/issues/escr/e_2007_82_en.pdf (last accessed 21 February 2019).

resources²⁹ and therefore the States aim at progressive achievement. According to the Committee on Economic, Social and Cultural Rights (CESCR), for every human right under the covenant, the State has certain ‘minimum core obligations’ and ‘other obligations which are to be progressively realised’.³⁰ Eide breaks this down and expounds threefold obligations on the state to ‘respect, protect and fulfil’ these rights.³¹

Traditionally, equality is understood as a civil and a political right rather than an economic, social and cultural right. However, Article 2(2)³² of ICESCR and Article 2(1)³³ of International Covenant on Civil and Political Rights (ICCPR) emphasise on non-discrimination and equality as the key to implementation of the Rights under the Covenant. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 declares that “all human rights are universal, indivisible and interdependent and interrelated....[and] it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”³⁴ Therefore, the State’s obligation to *progressively realise rights* must be understood with a combined reading of ICCPR and ICESCR,

²⁹ Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol.9, 1987, pp. 156.

³⁰ Developed by General Comments by CESCR, especially General Comment 3 on Nature on State’s Obligations. One of Nussbaum’s criticisms of Sen’s theory is that he doesn’t identify what he includes in ‘central capabilities’; Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge University Press, (2000); The CESCR identifies the core obligations of a state within a human right, which can be said to be an expansion of this conception of ‘central capabilities.’

³¹ The Right to Adequate Food, Art. 11, 2012, CESCR, Sess.12, E/C.12/1999/5, available at- <https://www.law.umich.edu/facultyhome/drwcasesbook/Documents/Documents/Committee%20on%20Economic,%20Social,%20and%20Cultural%20Rights%20General%20Comment%2012.pdf> (last accessed 24 February 2019).

³² The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³³ Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁴ *Vienna Convention on the Law of Treaties*, May 23, 1969, U.N.T.S, vol. 1155, p. 331, ¶ 5, available at- <https://www.refworld.org/docid/3ae6b3a10.html> (last accessed 25 February 2019).

both of which India has ratified. The state is obliged to make policies, plans and strategies to enforce the right to equality and equality of opportunity.³⁵

Corus et. al point out that ‘policy making still lags in thinking about how individuals experience poverty as overlapping sources of disadvantage’.³⁶ Where Indira Sawhney, Mandal Commission and other Supreme Court decisions classify backwardness on basis of social and educational disadvantage, they fail to recognise that the biggest threat to development of the standard of living and equality in India is poverty. While Corus et. al may agree with the intersectionality³⁷ taken into account by these bodies, one cannot ignore that poverty still remains the biggest threat to development.³⁸ Sen also prompts one to think in terms of capabilities,³⁹ which when boiled down to accessibility of resources, becomes a question of economic capacity. The normative framework created by CESCR on the Rights under the Covenant highlights ‘economic accessibility’ as an aspect to assess the progress by a State on a particular Right.⁴⁰

One such step taken by India and many other countries to achieve equality is affirmative action. However, when one talks of affirmative action, first it must

³⁵ The General Comment 20 by CESCR on non-discrimination in economic, social and cultural rights states: “Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged...to accelerate *the achievement of equality*.” [emphasis added]

³⁶ Canan Corus, Bige Saatcioglu, et. al., “Transforming Poverty-Related Policy with Intersectionality”, *Journal of Public-Policy and Marketing*, Vol. 35, 2016, pp. 211-222.

³⁷ Intersectionality is a theoretical argument and an empirical approach that emphasizes the synergistic effect of categories of difference. The term “intersectionality” was initially coined to articulate how race and gender interact to shape black women’s experiences; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, *Stanford Law Review*, Vol. 43, 1991, pp. 1241–99; Ange-Marie Hancock, “When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm”, *Perspectives on Politics*, Vol. 5, 2007, pp. 63–79.

³⁸ Poverty Remains World’s Biggest Challenge, Social Development Commission Chair Says as Session Concludes with Approval of 3 Texts, Election of New Vice-Chairs’ (2016) United Nations, available at- <https://www.un.org/press/en/2016/soc4837.doc.htm> (last accessed 25 February 2019).

³⁹ Amartya Sen, *Commodities and capabilities*, Oxford University Press, 1987; See Martha Nussbaum, *Creating Capabilities: The Human Development Approach*, Cambridge University Press, 2011.

⁴⁰ The CESCR in General Comments 4, 12, 13, 14, 15, 18, 19, 21 has laid down a normative framework for a variety of rights; most of them on the lines of the AAAQ model: Availability, Accessibility, Adaptability and Quality.

be understood what is being affirmed. Sharma argues that there are religious, moral, ethical and human rights components to this affirmation.⁴¹ In India, reservation serves a Moral and Human Rights method of social integration. Under the ICCPR, the Human Rights Committee (HRC) in its General Comment 18 on non-discrimination states:

“[T]he principle of equality sometimes requires States parties to take *affirmative action* in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant...Such action may involve granting for a time to the part of the *population concerned certain preferential treatment* in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of *legitimate differentiation* under the Covenant.” [Emphasis added]⁴²

Therefore, a differentiation on the basis of economic weakness is neither illegitimate under the Constitution nor under the Covenant. With respect to the EWS amendment, some argue that ‘unlike the disadvantage faced by SC/ST/OBCs, economic disadvantage of upper caste persons is not caused by systematic discriminatory treatment by other members of society’.⁴³ However, it must be pointed out here that the Constitution of India guarantees equality of opportunity to *all its citizens without discrimination*, and not only to those who are systematically discriminated. Moreover, the CESCR in its General Comment 20 states ‘economic and social situation’ as a prohibited ground for discrimination:

“A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or

⁴¹ Arvind Sharma, *Reservation and Affirmative Action: Models of Social Integration in India*, Sage Publications, New Delhi, 2005.

⁴² CCPR General Comment No. 18: Non-discrimination, CESCR, Sess.37, 3, available at- <https://www.refworld.org/docid/453883fa8.html> (last accessed 24 February 2019).

⁴³ Malavika Prasad, “Perverting the Constitution’: The Case Against 10% Reservation” (2019) The Wire, available at- <https://thewire.in/law/economic-quota-bill-case-against-reservation> (last accessed 24 February 2019).

unequal access to public places.”⁴⁴

Keeping in mind accessibility as a requirement for fulfilment of a Right, the Indian government had taken a progressive step and added the right to primary education as a Fundamental Right under Article 21-A of the Constitution through the 86th Constitutional Amendment. The Right of Children to Free and Compulsory Education Act (RTE Act) was enacted in 2009 to give effect to this commitment. Section 12 of the RTE Act states that private schools must make a reservation of 25% for the children belonging to the disadvantaged and weaker sections.⁴⁵ The reservation provides access to education to those who belong to an economically weaker section and are not entitled to claim under any of the existing reservations. This legislative measure was one which ensured access to primary education to everyone equally, irrespective of their societal and economic status to progress towards full realisation of the right to education which can only be attained by providing access to all.⁴⁶ The main basis of criticising the EWS amendment is that it creates a separate unwanted ‘class’ out of the EWS, however, it also seems quite ironic that the RTE Act works on the very same idea and was not criticised as much as this amendment. This urges one to introspect of what would be the reason behind such divided opinions on the same issue.

CONCLUDING REMARKS

Galanter rightly enquires whether a democratic society can pursue a policy of compensatory discrimination without forsaking equality or sliding into a system of group quotas.⁴⁷ One way to look at the EWS Amendment would be

⁴⁴ General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, art. 2, ¶ 2, CESCR, Sess. 42, ¶ 35, available at <http://hrlibrary.umn.edu/gencomm/escgencom20.html> (last accessed 24 February 2019).

⁴⁵ Section 2(e) of the Act has defined a child belonging to weaker section to mean ‘a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate government’. The EWS amendment has a similar provision and leaves the decision on the government to determine who falls within the EWS category.

⁴⁶ Mani Verma, “Right to Education Act, 2009 - History and Salient Features”, *International Journal of Multidisciplinary Advanced Research Trends*, Vol. 1, 2014, pp. 160-167.

⁴⁷ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Oxford University Press, 1991.

that the reservation system has culminated into a system of group quotas, leaving behind the original purpose of the policy. Another way to look at it would be on pure semantics: that the reservation policy is now achieving its true purpose of a 'class' based positive discrimination as warranted by the Constitution of India. Whichever way one chooses to look at it, the ultimate result is that it is achieving equality from a new dimension which had been ignored during the framing of the Constitution. The fact that the Indian Constitution is able to sustain through so many changes to its interpretation and form holds testimony to the fact that it is indeed the epitome of transformative constitutionalism.