JANHIT ABHIYAN: WHERE DOES IT LEAD US?

– Dhruva Gandhi*

In Janhit Abhiyan v. Union of India (2022), the Supreme Court of India upheld the constitutional validity of the Constitution (One Hundred and Third Amendment) Act, 2019 that introduced reservations for the Economically Weaker Sections (EWS) of society. First*, this Comment deviates from the existing criticisms of the judgment to argue that the judgment may pave way for expanding the scope of discrimination law by laying the groundwork for recognising 'poverty' or 'socio-economic disadvantage' or 'economic class' as a protected marker of discrimination.* Second*, it argues that the diverging opinions of Justice Pardiwala and Justice Bhat on the interpretation of Article 15(1) require clarification and raise questions on the desirability of applying the reasonable classification test to Article 15(1).* Third*, the Comment argues that the decision in Janhit Abhiyan conflicts with a previous Constitution Bench judgment in M. Nagaraj v. Union of India on whether the 50% ceiling on reservations is essential to the equal opportunity clause. This Comment thus anticipates the wider implications of the judgment on the evolution of discrimination law in general, and the constitutional doctrine on equality law in India, in particular.*

I. INTRODUCTION

In the recent case *Janhit Abhiyan v Union of India* ('*Janhit Abhiyan*'),[1] the Supreme Court of India ("SCI") was tasked with determining whether the Constitution (One Hundred and Third Amendment) Act, 2019 ('Amendment') violated the basic structure of the Constitution. This Amendment added sub-article (6) to the text of Articles 15 and 16. Through these amendments, the State is empowered to enact special provisions for the advancement of economically weaker sections ("EWS") of society. Further, the State has to reserve 10% of the seats or posts in educational institutions and employment opportunities for the EWS. The State is also empowered to exclude Schedule Castes, Scheduled Tribes, and Other Backward Classes from the purview of these measures. The SCI has upheld the validity of the Amendment by a 3:2 majority

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[1] *Janhit Abhiyan v Union of Indi*a (2023) 5 SCC 1.

The verdict has already been criticised for validating the creation of an upper-caste quota.[2] It has also been critiqued for distorting the purpose of reservations, in that reservations were historically envisaged only for socially and educationally backward classes, and not for economically poor citizens.[3] Separately, commentators have opined that by virtue of this judgement, reservations have been reduced to a welfare tool.[4] Some others have argued that the focus of affirmative action measures will now shift from the upliftment of a community to the welfare of select individuals.[5] Lastly, the methodology and the tools of interpretation adopted by some of the judges have also been critiqued.[6]

In this comment, I do not propose to dwell upon any of these observations. The arguments that a quota for the upper castes has been validated, and the focus of affirmative action measures may now shift from benefitting a group to the welfare of select individuals, are noteworthy. However, in this comment, I propose to focus on what may be the implications of this decision. It is my

[2] Abhik Bhattacharya, 'EWS Quota: Was economic condition ever the foundational principle for reservation in India?' (Outlook, 12 December 2022) <https://www.outlookindia.com/national/ews-quota-was-economic-condition-ever-the-foundational-principle-for-reservation-in-india--news-243712> accessed 1 September 2023; Shreehari Palitah, 'Economist Ashwini Deshpande on why reservations are not the right instrument to reduce poverty' (Scroll, 12 November 2022) <https://scroll.in/article/1037199/economist-ashwini-deshpande-on-why-reservations-are-not-the-right-instrument-to-reduce-poverty> accessed 1 September 2023; Alok Prasanna Kumar, 'Charity, Not Parity' (2022) 57 Economic and Political Weekly 8.

[3] Al Jazeera Staff, 'Why 10% quota for 'economically weak' in India has caused uproar' (Al Jazeera, 9 November 2022) <https://www.aljazeera.com/news/2022/11/9/why-10-quota-for-economically-weak-in-india-has-caused-uproar> accessed 1 September 2023; see also: Kailash Jengeer, 'Reservation is about adequate representation, not poverty eradication' (The Wire, 18 May 2020) <https://thewire.in/law/supreme-court-bench-reservation> accessed 1 September 2023.

[4] Ambar Kumar Ghosh, 'The new Economically Weaker Sections (EWS) Quota: The changing idea of affirmative action' (Observer Research Foundation, 23 November 2022) <https://www.orfonline.org/expert-speak/the-new-economically-weaker-sections-ews-quota/> accessed 1 September 2023.

[5] Sudhir Krishnaswamy, 'EWS Judgement fundamental shift from caste. It reshapes affirmative action as anti-poverty' (The Print, 8 November 2022), <https://theprint.in/opinion/ews-judgment-fundamental-shift-from-caste-it-reshapes-affirmative-action-as-anti-poverty/1202916/> accessed 1 September 2023.

[6] Ayan Gupta, 'Schrodinger's Substantive Equality – Conceptual Confusions and Convenient Choices in Justice Maheshwari's Plurality Opinion in the EWS Case' (*Indian Constitutional Law & Philosophy*, 11 November 2022) <https://indconlawphil.wordpress.com/2022/11/11/guest-post-schrodingers-substantive-equality-conceptual-confusions-and-convenient-choices-in-justice-maheshwaris-plurality-opinion-in-the-ews-case/> accessed 1 September 2023; Kieran Correia, 'Equality as Non-Exclusion: Justice Bhat's dissent in the EWS Case' (*Indian Constitutional Law & Philosophy*, 8 November 2022) <https://indconlawphil.wordpress.com/2022/11/08/guest-post-equality-as-non-exclusion-justice-bhats-dissent-in-the-ews-case/> accessed 1 September 2023.

submission that as far as discrimination law is concerned, the impact of *Janhit Abhiyan* may be threefold.

Firstly, it may pave the way for expanding the scope of discrimination law. This could happen because the reasoning adopted in *Janhit Abhiy*an lays the groundwork for the recognition of 'poverty' or 'socio-economic disadvantage' or 'economic class' as a protected marker in discrimination law. Secondly, it may create the need to clarify the meaning of Article 15(1) of the Constitution. The opinions of Justice Pardiwala and Justice Bhat bring to the fore a divergence in the understanding of Article 15(1) — a divergence which has historically plagued this provision. While one interpretation strengthens the protection that Article 15(1) offers, the other takes the sting out of it. Thirdly, the decision in *Janhit Abhiyan* may necessitate the resolution of an issue by a larger bench. This is because there is now a conflict between the decisions in *M. Nagaraj v Union of India* ('*Nagaraj*')[7] and *Janhit Abhiyan* on whether or not the 50% ceiling on reservations is essential to the equal opportunity clause.

To bring out this threefold impact of *Janhit Abhiyan*, in this comment, I propose to adopt the following structure. I will first set out and briefly analyse the additions made to the Constitution by the Amendment. I will then describe the points for determination framed by the SCI, and the arguments advanced by both sides on these points. In the backdrop of these arguments advanced, I will thereafter critically analyse how the SCI answered each of the points for determination framed by it. It is in the course of this analysis that I will cull out the three potential impacts spelled out above.

II. THE AMENDMENT AND WHAT IT SAYS

As mentioned previously, by virtue of the Amendment, Articles 15 and 16 of the Constitution came to be amended, and Articles 15(6) and 16(6) were inserted. Article 15(6) 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

[7] *M Nagaraj v Union of India* (2006) 8 SCC 212.

> 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.[8]

Similarly, Article 16(6) 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.[9]

It is apparent from a bare perusal of Articles 15(6) and 16(6) that they both deal with 'economically weaker sections'— a term hitherto absent from the scheme of Articles 14 to 17 of the Constitution. Notably, while the Amendment introduces this phrase 'economically weaker sections', it does not define it. No other Article in the Constitution defines it either. The explanation to Article 15(6) leaves it to the government of the day to notify a definition for this phrase. Not only does the government have the discretion to define the phrase 'economically weaker sections', it also has the power (if it so chooses to exercise it) to create a special provision, or a reservation in appointments or posts, for the EWS. As stated in the Introduction, the executive has been empowered to enact affirmative action measures in favour of the EWS.

Moreover, the drafters have also sought to shield the exercise of this power from a constitutional challenge. They have done so by deploying what is commonly known as a non-obstante clause. Both Articles 15(6) and 16(6) open with the words, "Nothing in this article shall prevent the

[8] The Constitution (One Hundred and Third Amendment) Act 2019, s 2.
[9] The Constitution (One Hundred and Third Amendment) Act, 2019, s 3.

State…". When this phrase is read in the context of Articles 15(1)[10] and 16(1) & (2),[11] it appears that the drafters anticipated a potential challenge to the affirmative action measures which the government of the day might enact in furtherance of Articles 15(6) or 16(6) on the ground that they violate Articles 15(1) or 16(1) & (2) of the Constitution. It is to preclude such a challenge — a challenge mounted on the basis that the affirmative action measures violate the injunctions contained in Articles 15(1) or 16(1) — that they appear to have used a non-obstante clause.

With this overview of the Amendment, I will now proceed to discuss the issues framed and the arguments advanced in *Janhit Abhiyan*.

III. POINTS FOR DETERMINATION AND ARGUMENTS ADVANCED

In *Janhit Abhiyan*, the SCI framed three points for determination,[12] which can succinctly be summarised as –

1. Whether reservations that are based singularly on economic criteria violate the basic structure of the Constitution?

2. Whether the exclusion of classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation violates the basic structure doctrine?

3. Whether a breach of the ceiling of 50% to create additional reservation of up to 10% for the EWS violates the basic structure of the Constitution?

On these issues, the Petitioners argued that affirmative action measures, and in particular reservations, could only be enacted to address historical inequalities.[13] They cannot be grounded in any fact other than historical injustice or stigma.[14] The Petitioners argued that by inserting Articles 15(6) and 16(6), the idea of social and educational backwardness, which formed the kernel

[10] The Constitution of India, Article 15(1) states, "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."
[11] The Constitution of India, Article 16(1) states, "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."
The Constitution of India, Article 16(2) states, "(2) 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."
[12] Janhit Abhiyan (n 1) [37].
[13] ibid [9.1].
[14] ibid [11].

of reservation policy, has been vetoed.[15] They also urged that any economic criterion is inherently transient in nature, and therefore, cannot be linked to a historical lack of adequate representation that is necessary to justify a measure of affirmative action.[16]

Not only is it transient, the idea of 'poverty' is also relative. The other markers of discrimination recognised and protected by the Constitution are not relative. Instead, they contain an element of immutability. Since 'poverty' is antithetical to immutability, it cannot form the basis of reservation.[17] The Petitioners also argued that a reservation policy cannot be converted into a poverty alleviation scheme.[18] Insofar as the second issue framed by the court was concerned, the Petitioners urged that the exclusion of socially and educationally backward classes violates the basic structure of the Constitution. This exclusion, they said, is a caste-based exclusion, and effectively creates a reservation in favour of certain forward caste groups. Thus, on this ground too, there was a violation of the basic structure.[19] Lastly, the Petitioners argued that the 50% ceiling on reservations was a part of the basic structure of the Constitution and could not be breached.[20]

According to this author, when the arguments advanced by the Petitioners are scrutinised, some of them serve not only as arguments in opposition to the constitutional validity of the Amendment, but can also be canvassed as arguments against the recognition of 'poverty' as a protected marker in discrimination law. Alternatively, they can be canvassed as arguments against affording the same degree of protection to 'poverty' as that afforded to other markers of discrimination. For instance, when it is urged that 'poverty' lacks 'immutability'— a factor often associated with the other protected markers of discrimination law[21]— what is effectively contended is that 'poverty' is not the same as markers such as gender, caste or race, and should not, therefore be protected by discrimination law. Similarly, when it is argued that 'poverty' is inherently transient, what is implicitly suggested is that persons can move in or out of 'poverty' and are therefore, not afflicted by the historical injustices or stigma which identities of caste or religion can saddle an individual with. In my opinion therefore, an adjudication by the SCI of these arguments would also implicitly be an adjudication of whether 'poverty' can be protected by discrimination law.

[15] ibid [9.3].
[16] ibid [10.4].
[17] ibid [20].
[18] ibid [14], [18.1].
[19] ibid [9.4], [19].
[20] ibid [29].
[21] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 50.

In response to the case put forth by the Petitioners, the Respondents contended that 'economic justice' is one of the constitutional goals identified in the Preamble, and that poverty is one of the root causes of social and educational backwardness. There was thus no embargo against using 'economic criteria' as the sole basis of affirmative action measures.[22] By using 'economic criteria' as the basis of framing a reservation policy, 'intersecting disadvantages' as opposed to 'generational disadvantages' are addressed.[23] It was also argued that the 'economically weaker sections' among the Scheduled Castes, Scheduled Tribes, and Other Backward Classes are already offered protection under Articles 15(4) and 16(4) of the Constitution. They were excluded to extend special provisions to those persons who are not covered by Articles 15(4) or 16(4).[24] Lastly, the Respondents stated that the precedents laid down by the SCI did not state that the ceiling of 50% was an inviolable limit. Thus, the additional 10% reservation proposed to be created, too, did not violate the basic structure.[25]

In the backdrop of these rival claims, this Comment will now proceed to analyse how the SCI dealt with the three points for determination framed by it.

IV. VALIDITY OF THE USE OF ECONOMIC CRITERION AS THE BASIS FOR RESERVATION

To adjudicate the validity of the use of economic criterion as a metric to devise reservation policies, Justice Maheshwari surveyed the text of the Preamble, the provisions of the Constitution, and precedents to conclude that in almost all references to substantive equality, economic justice had received the same attention as social justice.[26] He then took note of the definition of 'poverty' arrived at by the United Nations General Assembly, and held that deprivations arising out of economic disadvantages, "including those of discrimination and exclusion", require the attention of the State.[27] Poverty, according to him, was a point of regression, and therefore, remedying its ill effects through affirmative action measures (such as reservations) was in sync with constitutional goals.[28] To address the difference between a socially and educationally backward class and an economically poor class, Justice Maheshwari stated that the objective of the State was to ensure all-inclusive socio-economic justice, and the claim of one section of citizens to affirmative action

[22] *Janhit Abhiyan* (n 1) [30.2] (Maheshwari J).
[23] ibid [35] (Maheshwari J).
[24] ibid [30.3] (Maheshwari J).
[25] ibid [30.4] (Maheshwari J).
[26] ibid [112] (Maheshwari J).
[27] ibid [115] (Maheshwari J).
[28] ibid [117] (Maheshwari J).

measures cannot be used to deny the claim of another section.[29] He further stated that to achieve this goal, one section of the people cannot be left to struggle because of income inequalities.[30]

Justice Pardiwala agreed with the final decision arrived at by Justice Maheshwari,[31] and did not, in his separate opinion, dwell as much on the use of economic criterion as a basis of affirmative action. He simply observed that in a country where only a small percentage of the population is above the poverty line, opportunities of higher education and employment cannot be denied to those who are economically backward.[32] Neither did Justice Trivedi, who concurred with Justice Maheshwari,[33] provide additional reasons for why the use of an economic metric was valid. Like Justice Maheshwari, she too observed that the Preamble visualised the removal of economic inequalities. The enactment of affirmative action measures for the EWS only helps fulfil the ideals of Article 46 of the Constitution.[34]

Justice Bhat dissented on the overall outcome of the case. He held that the Amendment, insofar as it excludes classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation, violates the basic structure of the Constitution. Chief Justice Lalit (as he then was) did not deliver a separate opinion. He joined Justice Bhat in his opinion. On the issue pertaining to the use of an economic metric to frame an affirmative action measure though, both these judges concurred with the majority.

Justice Bhat opined that the Supreme Court had previously held the use of an economic criterion in isolation to be impermissible because the texts of Articles 15(4) and 16(4) did not allow for it.[35] However, these precedents did not foreclose the necessity to address a future need. He observed how abject poverty translates into illiteracy, marginal incomes, little access to basic amenities, and poor education, and how it is incumbent upon the State to remedy these ill-effects.[36] He observed that while there are communities who are oppressed because of their caste, there are also a substantial number of people who have not progressed due to economic deprivation.[37] Justice Bhat then went on to delineate how poverty is multidimensional and is not only a question of

[29] ibid [118] (Maheshwari J).
[30] ibid [130.2] (Maheshwari J).
[31] ibid [226] (Pardiwala J).
[32] ibid [281] (Pardiwala J).
[33] ibid [190] (Trivedi J).
[34] ibid [206]-[207] (Trivedi J).
[35] ibid [533] (Bhat J).
[36] ibid [535] (Bhat J).
[37] ibid [537] (Bhat J).

income levels.[38] On this issue, the opinion concluded by stating that economic emancipation is a facet of economic justice, and that without economic emancipation, liberty and equality are mere platitudes.[39]

A. Affirmation of a Change in Constitutional Meaning

With unanimity on the validity of the use of an economic criterion to frame an affirmative action policy, the SCI has affirmed a change in constitutional meaning. A short journey back in time elucidates how. When Article 16(4) of the Constitution came up for discussion in the Constituent Assembly, some members wanted the phrase 'backward class' to be defined.[40] They argued that if the phrase was understood to include economically backward classes, the phrase would lose meaning because it would include a vast majority of the country.[41] Dr. Ambedkar while concluding the debate though, felt that it was appropriate to leave the definition of this phrase to the government of the day.[42] A year later when draft Article 286 was discussed,[43] an amendment was proposed to define the phrase 'backward class' as any 'class or classes of citizens backward economically and educationally'.[44] The amendment was rejected.[45] One could thus infer that the Constituent Assembly resisted any attempt to draw a nexus between backwardness and economic backwardness (or poverty). However, at the same time, it did not foreclose this possibility.

The foreclosure seems to have occurred sixteen months later when the Constitution was first amended. When the Constitution (First Amendment) Act, 1951 was debated, one of the first drafts of the proposed amendment sought to empower the State to make special provisions for the economic advancement of any backward class of citizens.[46] After the Bill was referred to a Select Committee, the word 'economic' was dropped. When the Bill came up before the House for

[38] ibid [549]-[552] (Bhat J).
[39] ibid [553] (Bhat J).
[40] Constituent Assembly Debates, vol VII (30 November 1948) <https://www.constitutionofindia.net/debates/30-nov-1948/> accessed 7 November 2023.
[41] ibid [7.63.123]- [7.63.124] (Sri Ari Bahadur Gurung).
[42] Ibid [7.63.205]- [7.63.206] (Dr. B.R. Ambedkar).
[43] Constituent Assembly Debates, vol IX (23 August 1949) <https://www.constitutionofindia.net/debates/23-aug-1949/> accessed 7 November 2023.
[44] ibid [9.122.68] (Sardar Hukum Singh).
[45] ibid [9.122.177] (Sardar Hukum Singh).
[46] Parliament Debates, (17 May 1951), 105 <https://library.bjp.org/jspui/bitstream/123456789/2499/1/The-Parliamentary-Debates.pdf> accessed 17 November 2023.

discussion once again, the absence of this word was even flagged by one member.[47] Despite this being the case, the Constitution was amended without the word 'backward' being prefaced by 'economic'. Instead, it was only prefaced by 'socially and educationally'. Therefore, it can be argued that as of 1951, the Constitution did not intend poverty to be an independent basis of framing affirmative action policies.

The SCI, too, has from time to time re-affirmed this constitutional intent. When called upon to consider whether economic criteria or 'poverty' can be used as an exclusive metric to identify a protected group for the purposes of an affirmative action policy, the SCI has repeatedly answered this question in the negative.[48] According to me, economic class has only been regarded as a background characteristic or an associated factor that can be considered when determining social backwardness.[49] The emphasis has been on 'social and educational' backwardness.

It follows therefore that with the decision in *Janhit Abhiyan*, a change in constitutional meaning has been affirmed. From being excluded as a metric/basis to frame affirmative action measures, 'economic backwardness' has now been validated as a legitimate basis for reservations. 'Poverty' can now be an independent or standalone factor for enacting affirmative action measures. It need not only be a background characteristic or an associated factor.

B. New Meaning, New Ground?

What interests me though, is whether this affirmation of a changed constitutional meaning can also pave the way for striking down a law or an executive measure if it discriminates against the poor.[50] In my opinion, if a change in constitutional meaning has been affirmed, logically, this must

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[47] Parliament Debates (29 May 1951), 9641 <https://eparlib.nic.in/bitstream/123456789/760712/1/ppd_29-05-1951.pdf> accessed 17 November 2023.

[48] See *Janki Prasad Parimoo v State of Jammu and Kashmir* (1973) 1 SCC 420, [24]; *K Vasanth Kumar v State of Karnataka* 1985 Supp SCC 714, [15], [80], [83].
In *Janki Prasad Parimoo*, to arrive at its conclusion, the Supreme Court reasoned, "… But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise…"
Pertinently, the SCI was not alone in adopting this logic. In *San Antonio Independent School District v Rodriguez* [(1973) 411 U.S. 1], the Supreme Court of the United States, too, rejected a bid to recognise discrimination against the 'poor' on the ground that the 'poor' did not constitute a discrete and insular minority.

[49] See *MR Balaji v State of Mysore* 1963 Supp (1) SCR 439, [23]; *Indra Sawhney v Union of India* (2000) 1 SCC 168, [21], [22], [45].

[50] As an illustration of such a measure, one could possibly consider the regulations framed/circulars issued by the Central Government during the COVID-19 pandemic. One of these

follow as a matter of *sequitur*. If a protected class/individual can now be identified for the purposes of affirmative action on the basis of their economic wherewithal, it can plausibly be suggested that a class of citizens or an individual can be discriminated against on the basis of their economic status. It sounds illogical to suggest that the State can, on the one hand, frame measures for the benefit of the poor, but can also, on the other hand, discriminate against them. Poverty cannot be relegated to a factor or a characteristic to be considered when identifying disadvantages related to intersectional identities, if it can be an independent factor when designing an affirmative action policy.

This conclusion must also follow from the text of Articles 15(6) and 16(6), as inserted by the Amendment. Both these sub-articles open with the words "Nothing in this article shall prevent the State…". According to me, these words would not have been required if the drafters of the Amendment did not believe that but for these words, an affirmative action policy enacted in favour of the poor could potentially be struck down on the grounds that it discriminates on the basis of economic class or income levels. A recognition of 'poverty' or 'economic class' as a protected marker is thus implicit in the text of the Amendment itself.[51]

Besides deductive logic and a structural interpretation of Articles 15 and 16 of the Constitution, the opinions delivered in *Janhit Abhiyan*, too, lay a more purposive foundation for a recognition of 'poverty' or 'socio-economic disadvantage' as a protected ground in Indian discrimination law. In this regard, there are a few noteworthy features:

a. Maheshwari J, Pardiwala J, and Bhat J have all spelled out the ill-effects or adverse consequences of poverty. They have all noted how poverty leads to an exclusion from healthcare and education services, and how it translates into poor access to basic amenities.

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regulations/circulars stated that slots for getting a vaccine could only be booked on an online portal. The argument advanced against these regulations/circulars was that they discriminated indirectly against the poor, who did not possess the same degree of access to digital technology, or the same level of digital literacy, as the rich. After *Janhit Abhiyan*, this argument can even be canvassed under Articles 14 and 15 of the Constitution. It need not only be a policy argument.

[51] When taken to its logical conclusion, this argument will also reopen a debate on whether Article 15(1) contains a closed list of protected markers. This might happen because 'economic class' is not listed as an independent marker in Article 15(1). It will also ignite a debate on whether the protection offered by Article 15(1) insofar as economic class is concerned is symmetric or asymmetric in nature. This is because a *non-obstante* clause would not have been necessary if the legislators had not opined that Article 15(1) guarded against discrimination generally on the basis of economic class or income levels. A non-obstante clause would not have been needed if the legislators believed that Article 15(1) only offered asymmetric protection, i.e., only prohibited discrimination against the poor.

Bhat J, in fact, went a step further and even commented on the multidimensional nature of poverty;

b. Bhat J even observed that just like there had been communities who had been oppressed because of their caste, there were also a substantial number of people who had not progressed due to economic deprivation;

c. Maheshwari J made a note of how the State needs to pay attention to economic discrimination and exclusion;

d. Bhat J observed how equality was a mere platitude without economic emancipation. Maheshwari J observed how there was a nexus between economic justice and substantive equality.

While none of the judges squarely addressed some of the arguments advanced by the Petitioners, such as how poverty could not be protected because it lacked immutability or because it was inherently relative in nature; in my opinion, there are striking parallels between some of the reasons offered in *Janhit Abhiyan* and the reasons previously put forth for the recognition of poverty as a protected marker.

For instance, Fredman argues as to how people living in poverty often experience a lack of recognition and social exclusion.[52] The Committee on Economic, Cultural and Social Rights has observed how the pervasive discrimination and social exclusion that poverty begets leads to unequal access to education and healthcare services, and even to public places.[53] Poverty thus engenders more poverty. Moreover, this deprivation continues across generations.[54] Given these inter-generational handicaps, it has even been argued as to how the promise of substantive equality will remain meaningless unless poverty is recognised as a prohibited marker in discrimination

[52] Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Advancing Poverty' (2011) 22 Stellenbosch Law Review 566.

[53] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C. 12/GC/20 (2009). See also, Lalit Panda, 'The Fault in Our Class: A Caution on Constitutional Attitudes towards Economic Weakness', (*NLSIR Online*, 25 April 2023) <https://www.nlsir.com/post/the-fault-in-our-class-a-caution-on-constitutional-attitudes-towards-economic-weakness> accessed 9 September 2023; Surbhi Soni, 'An Anti-Discrimination Law for the Socio-Economically Disadvantaged in India', (*Socio-Legal Review Forum*, 15 April 2021) <https://www.sociolegalreview.com/post/an-anti-discrimination-law-for-the-socio-economically-disadvantaged-in-india> last accessed 9 September 2023.

[54] D E Peterman, 'Socioeconomic Status Discrimination' (2018) 104 Virginia Law Review 1283, 1328-33.

law.[55] Substantive equality commands a recognition of economic disadvantage experienced within the welfare state.[56]

Therefore, when closely compared, it becomes apparent that the SCI in *Janhit Abhiyan* has offered similar reasons to uphold the use of economic criteria as the basis of affirmative action measures to the ones offered to advocate for the recognition of 'poverty' as a prohibited marker in discrimination law. It is thus that I submit that this decision may have implications beyond upholding the constitutional validity of the Amendment. It may pave the way for the recognition of a new marker of discrimination. More importantly, the significance of this potential may lie in the fact that although sustained attempts have been made across jurisdictions to recognise poverty as a prohibited marker, these bids have enjoyed little success.[57] The decision in *Janhit Abhiyan* could potentially lend a fresh lease of life to these attempts.[58]

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[55] See Martha Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a prohibited ground of discrimination under the Canadian Charter and Human Rights Law' (1994) 2(1) Review of Constitutional Studies 76.

[56] See Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23(2) South African Journal on Human Rights 214.

[57] See Shreya Atreya, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 Human Rights Law Review 411, 413.

[58] At this juncture, it is only appropriate that I clarify that in this Comment, I do not contend that a case for the recognition of 'poverty' or 'socio-economic status' has necessarily been made out. When (and if) this proposition is eventually canvassed, there are several hurdles that will remain to be canvassed. For starters, will this ground be located in Article 14 or Article 15(1) of the Constitution, the latter being a closed list according to some. (See Gautam Bhatia, 'Round-Up: The Delhi High Court's Experiments with the Constitution' (*Indian Constitutional Law & Philosophy*, 26 June 2018) <https://indconlawphil.wordpress.com/2018/06/26/round-up-the-delhi-high-courts-experiments-with-the-constitution> accessed 9 September 2023).
Moreover, the proponents of this argument will also have to deal with criticisms that often surface in cases dealing with the enforcement of socio-economic rights. For example, the criticism of vagueness. Suppose that a portal akin to the 'Cowin' portal designed by the Government of India for booking slots for vaccinations during the Covid-19 pandemic was challenged on the ground that it indirectly discriminated against the poor who had lesser access to the internet. Should the Court order that the portal be shut down and not be used as a tool to book slots? What does an equal right to vaccination irrespective of socio-economic status include? Arising from the same example, is the problem of institutional competence and legitimacy. Is it legitimate for a court to decide whether a democratically elected executive must not use the 'Cowin' portal as the sole means for booking vaccination slots in the midst of a pandemic? Does the court have the skills or resources to weigh alternative policy choices? Lastly, what would be the fiscal cost of enforcing an order prohibiting the use of the 'Cowin' portal? These and other such criticisms may have to be addressed by a court in a suitable case. These criticisms have been summarised neatly in Mitra Ebadolahi, 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 NYU Law Review 1565. See also Avinash Govindjee, 'Adjudication of Socio-Economic Rights by the

A recognition of 'poverty' as a marker in discrimination law may even advance the objectives of substantive equality. For instance, one of the objectives of substantive equality is to facilitate or enhance the participation of relatively marginalised groups in society.[59] By recognising 'poverty' as a marker, the attention of the State can potentially be shifted to the distribution of resources in those instances when a legislative or executive measure discriminates against the poor. A better distribution of resources may in-turn enhance the ability of several social groups to participate in society. Recognising 'poverty' as a marker may even help redress the harms caused by status-based inequalities.[60] The fact that women, persons with disabilities, persons of colour, and Dalits are disproportionately represented among the poor is hardly disputable.[61] Thus, redistributive solutions, which recognising poverty as a marker may also help reduce the disadvantages suffered on account of gender, caste, religion, or race.

Circling back to the decision in *Janhit Abhiyan*, there was consensus among the judges on the first of the three points for determination, namely, whether reservations based singularly on economic criterion violates the basic structure of the Constitution. On the second question, i.e., whether the exclusion of classes covered under Articles 15(4), 15(5), and 16(4) from the benefits of EWS reservation violated the basic structure doctrine, Lalit CJ (as he then was) and Bhat J dissented. Interestingly, although Justices Maheshwari and Pardiwala arrived at the same conclusion, their reasoning differed. It is to this second question that I now turn.

V. EXCLUSION OF CLASSES PROTECTED UNDER ARTICLES 15(4) AND 16(4): A DICHOTOMY

In my opinion, the opinions of Justices Maheshwari, Pardiwala, and Bhat belong to three distinct categories in regard to the second question.

Maheshwari J observed a definite logic to the exclusion of classes covered by Articles 15(4), 15(5), and 16(4) from Articles 15(6) and 16(6). According to him, this exclusion was inevitable for the true operation and effect of an affirmative action policy designed to benefit the EWS.[62] Poverty was, in any case, a material factor to be considered when identifying groups for the purposes of

Constitutional Court of South Africa: Walking the Tightrope between Judicial Activism and Deference' (2013) 25(1) National Law School of India Review 62, 75.

[59] Sandra Fredman, 'Substantive equality revisited' (2016) 14 International Journal of Constitutional Law 712.

[60] Fredman (n 56) 218.

[61] ibid; Jackman (n 55) 77.

[62] *Janhit Abhiyan* (n 1) [137] (Maheshwari J).

Articles 15(4), 15(5), and 16(4). Therefore, if Parliament had considered it fit to not extend the benefit of measures envisaged under Articles 15(6) and 16(6) to these groups, there was no reason to question its judgement.[63] There was no reason to extend a second benefit to those classes who were already provided with affirmative action.[64] In fact, the exclusion of groups covered by Articles 15(4), 15(5), and 16(4) was vital to provide benefits to the target group.[65] Compensatory discrimination could not be enacted in favour of the EWS without excluding groups already protected.[66] Based on these reasons, Maheshwari J opined that there was no violation of the basic structure.

According to me, Maheshwari J's reasoning was motivated by the need for administrative convenience. This is because, according to him, EWS would be benefitted by designing a policy that excludes classes covered by Articles 15(4), 15(5), and 16(4). Thus, it could not be said that the basic structure was violated.[67]

Maheshwari J did not engage directly with the text of Article 15(1), i.e., the exclusion of groups protected under Articles 15(4), 15(5), and 16(4) was not tested on the anvil of Article 15(1). He also did not consider whether it would be administratively expedient to only have Articles 15(4), 15(5), and 16(4), and whether the EWS would actually be covered in the classes protected by these provisions themselves.

Pardiwala J, on the other hand, did. After citing the decision in *Kathi Raning Rawat v State of Saurashtra*,[68] he opined that Article 15(1) embodied the right to be treated equally among equals.[69] He further stated that Article 15(1) only guarded against such differential treatment as was based

[63] ibid.
[64] ibid [140].
[65] ibid [142]
[66] *Janhit Abhiyan* (n 1) [146] (Maheshwari J).
[67] There is another fallout to the opinion of Maheshwari J that needs to be tested in times to come. It is now possible for the Legislature to design an affirmative action policy in favour of persons with disabilities, by excluding classes protected under Articles 15(4), 15(5), and 16(4) from the purview of that policy on the ground that these classes are already "protected". Not only would this perpetuate stigma, it could also create a situation where intersectionality is ignored. Roughly, a person belonging to a Scheduled Tribe or a Scheduled Caste who has a disability may come to be left out of both sets of affirmative action policies. Would this not be contrary to the tenets of substantive equality, one may ask. See Rishika Sehgal, 'The Indian Supreme Court on Affirmative Action for the Upper Caste Poor' (*Oxford Human Rights Hub*, 30 January, 2023) <https://ohrh.law.ox.ac.uk/the-indian-supreme-court-on-affirmative-action-for-the-upper-caste-poor-part-i/> accessed 9 September 2023.
[68] *Kathi Raning Rawat v State of Saurashtra* 1952 SCR 435.
[69] *Janhit Abhiyan* (n 1) [400] (Pardiwala J).

on disrespect, contempt, and prejudice. It did not prohibit every difference of treatment based on religion, race, caste, sex, or place of birth.[70] A measure designed to advance the interests of the EWS which excluded Scheduled Castes and Scheduled Tribes could not be categorised as one based on prejudice, contempt, or insult.[71] Instead, it was merely a case of under-inclusiveness, which could be justified on the grounds of administrative convenience or legislative experimentation.[72]

Bhat J, too, engaged with the text of Article 15(1). However, he differed almost entirely with Pardiwala J on how Article 15(1) ought to be understood. He observed that Article 15(1) of the Constitution embodied a specific injunction against discrimination by the State on certain proscribed grounds.[73] It embodied an absolute prohibition against classification on the grounds of race, caste, sex, religion, and place of birth. None of these grounds could serve as intelligible differentia.[74] No person can be excluded by the State on these grounds.[75] To permit such exclusion by employing a test of reasonable classification would only undermine the guarantee encapsulated in Articles 15(1) and 16(2).[76] Article 15(1) formed a part of the basic structure of the Constitution, and thus, the Amendment fell afoul of the basic structure.[77]

It is thus apparent that the opinions of Pardiwala J and Bhat J lie at two ends of a spectrum. There is a fundamental disagreement between these two opinions insofar as the meaning and scope of Article 15(1) is concerned. As observed previously, Maheshwari J's opinion does not wade into the text of Article 15(1). Trivedi J concurs with Maheshwari J, but not with Pardiwala J. Lalit CJ (as he then was) concurred with Bhat J. Therefore, neither of these two opinions enjoyed the support of a majority on their interpretation of Article 15(1).

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[70] ibid.
[71] ibid [401] (Pardiwala J).
[72] *Janhit Abhiyan* (n 1) [392] (Pardiwala J). Interestingly, the citation referred to by Pardiwala J in support of this proposition is *State of Gujarat v Shri Ambica Mills Ltd., Ahmedabad* (1974) 4 SCC 656. This decision did not discuss 'under-inclusiveness' under Article 15 at all. Instead, it did not even discuss 'under-inclusiveness' in the context of any marker of discrimination. The question before the court was whether the definition of an 'establishment' in the Bombay Labour Welfare Fund Act, 1953 (as amended for the State of Gujarat) was under-inclusive, and hence, in violation of Article 14. Establishments employing less than 50 employees had been excluded from that definition. The applicability of this doctrine and the relevance of this precedent in the facts of the present case was thus questionable.
[73] *Janhit Abhiyan* (n 1) [483] (Bhat J).
[74] *Janhit Abhiyan* (n 1) [484], [515] (Bhat J).
[75] *Janhit Abhiyan* (n 1) [504] (Bhat J).
[76] *Janhit Abhiyan* (n 1) [507] (Bhat J).
[77] *Janhit Abhiyan* (n 1) [492], [504], [514], [521] (Bhat J).

What they do spell out though, is the need for a future bench to dwell on the meaning of Article 15(1). Previously, I have argued that while High Courts have consistently interpreted Article 15(1) as embodying an absolute prohibition against classification on any of the proscribed markers — an interpretation carried forward by Bhat J — the SCI has on a couple of occasions applied the 'reasonable classification' test even in the context of Article 15(1).[78] Even then, I had submitted that Article 15(1) has not been examined in as much depth as would have been desired by the SCI.[79] While Pardiwala J and Bhat J have now commented on this provision in some detail, there is a lack of consensus between them. Therefore, while *Janhit Abhiyan* paves the way for an expansion of the contours of discrimination law, it also creates the need to clarify its very foundations.

Pertinently, it is imperative for this issue to be clarified. This is because the text of Article 15(1) does not accommodate the view adopted by Pardiwala J. In fact, his interpretation only serves to dilute the protection offered by Article 15(1), and to increase the burden cast on a litigant by requiring them to also establish an animus (such as contempt or prejudice) on part of the State. Furthermore, if what Pardiwala J opines were to be correct and 'reasonable classification' on the grounds such as sex or caste were to be permissible, Articles 15(3) and (4) would be rendered redundant.[80]

Not only that, the approach of Pardiwala J would mean incorporating and entrenching within Article 15(1) a deferential standard of review, i.e., the 'rational nexus' test. It has been feared that unless this test is shelved, the promise and potency of equality would itself be denuded of meaning.[81] A formalistic vision of equality will thus be entrenched.[82] On the other hand, if the approach of Bhat J is adopted, Article 15(1) will address the stigma, stereotyping, and humiliation caused by differentiation based on certain protected characteristics. It will address recognition-based harms in that all differentiations based on race, sex, caste, religion, or place of birth will be

[78] Dhruva Gandhi, 'Locating Indirect Discrimination in India: A case for rigorous review under Article 14' (2020) 13(4) NUJS Law Review 1, 9-10.
[79] ibid 5.
[80] The downsides to the interpretation adopted by Pardiwala J have been fleshed out in further detail by me in Gandhi (n 78).
[81] Tarunabh Khaitan, 'Beyond Reasonableness: A rigorous standard of review for Article 15 infringement' (2008) 50(2) Journal of the Indian Law Institute 177, 190.
[82] Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Madhav Khosla, Sujit Choudhury and Pratap Bhanu Mehta (eds), *The Oxford Handbook of Indian Constitutional Law* (OUP 2016) 699.

prohibited.[83] In the process, one of the objectives of substantive equality will be furthered.[84] What is at stake therefore is a choice between two competing visions of equality.

VI. THE 50% CAP: A CONFLICT WITH *M. NAGARAJ*

This only leaves the third question framed by the SCI in *Janhit Abhiyan*. As the text of Article 16(6) makes apparent, the 10% reservation that the State has been empowered to create will be in addition to the reservations already in existence. With the reservations already in existence capped at 50%, what Article 16(6) implies is that it is now permissible for the State to create reservation up to 60%.

While examining this issue, Maheshwari J held that the precedents which had capped reservations at 50% had all been delivered by the SCI before the Amendment was brought into force. These precedents had to be read only in the context of Articles 15(4), 15(5), and 16(4).[85] They could not be cited to curb the powers of the Parliament to address a future need.[86] In any case, with reservations themselves not being a part of the basic structure of the Constitution, a ceiling limit of 50% could not be claimed to be a part of the basic structure either.[87] Trivedi J and Pardiwala J, who concurred with Maheshwari J, did not express a separate view on this issue.

Bhat J held that because he had found the Amendment to be violative of the basic structure, it was not necessary for him to render a specific finding on whether breaching the 50% cap also violated the basic structure.[88] He only sounded a note of caution, by saying that breaching the 50% cap should not reduce the right to equality to a right to reservation.[89] Therefore, on the third issue, the only prevailing opinion is that of Maheshwari J.

Although Maheshwari J cites the precedents where this issue was discussed; in my opinion, he wriggles out of applying these precedents by stating that they were all delivered before the Amendment came into force. The reason why I use the phrase 'wriggled out' can be discerned by a consideration of the conclusion in *Nagaraj*,[90] wherein the SCI held, "We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely backwardness,

[83] Gandhi (n 78).
[84] Fredman (n 59); Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011).
[85] *Janhit Abhiyan* (n 1) [156] (Maheshwari J).
[86] ibid [157] (Maheshwari J).
[87] ibid [172] (Maheshwari J).
[88] ibid [608] (Bhat J).
[89] ibid [610] (Bhat J).
[90] *Nagaraj* (n 7) [122].

inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."[91] (emphasis supplied)

In my opinion, this conclusion has been rendered with respect to Article 16 as a whole. Maheshwari J may be correct in holding that the requirements of 'creamy layer' and 'backwardness' would not apply to Article 16(6) because 'creamy layer' was an economic criterion, and the word 'backward' has not been used in Article 16(6). However, there is nothing in the conclusion in *Nagaraj* or in the text of Article 16(6) to suggest that the parameters of "overall administrative efficiency" or "inadequacy of representation" will not apply with equal vehemence to reservations created in favour of the EWS. These concepts are not excluded, either explicitly or by necessary implication, by the text of Article 16(6).

On the contrary, the SCI in *Nagaraj* held that these parameters are "constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse". One could argue that the parameters which are not implicitly excluded (such as "inadequacy of representation" or "overall administrative efficiency") must necessarily apply to reservations created under Article 16(6) as well. Moreover, given that the "ceiling limit of 50%" was also identified as one such parameter, in my opinion, it was incumbent upon the SCI in *Janhit Abhiyan* to discuss as to how the creation of an additional 10% reservation would not lead to the collapse of the "structure of equality of opportunity". Does this structure not collapse merely by virtue of the fact that the Parliament identifies an additional need to be addressed? Even if reservations may not be a part of the basic structure, is the principle of equality not violated if more than a majority of seats are reserved? Given that the decision in *Nagaraj* was also delivered by a Constitution Bench of five judges, these were questions which the court in *Janhit Abhiyan* necessarily had to answer.

What has now ensued is a potential conflict between *Nagaraj* and *Janhit Abhiyan*. On the one hand, the court in *Nagaraj* has held that the ceiling limit of 50% is pivotal insofar as preventing the "structure of equality of opportunity" from collapsing is concerned. On the other, the court in *Janhit Abhiyan* has held that the ceiling limit of 50% can be circumvented by identifying a new protected group and amending the Constitution.

VII. CONCLUSION

[91] ibid.

In conclusion therefore, there are three takeaways from the decision in *Janhit Abhiyan* — one for each of the three questions framed by the court. The first is that with this decision, the groundwork may have been laid for the identification of 'poverty' or 'socio-economic disadvantage' as a protected marker in discrimination law. The second is that after this decision, the need to clarify the import of Article 15(1) has been brought to the forefront. While Bhat J reaffirms the stance adopted by several High Courts over the decades, the opinion of Pardiwala J shows the pitfalls of importing the doctrine of 'reasonable classification' into Article 15(1). The third takeaway is that there is at least one issue which may need to be resolved by a larger bench, namely, the issue of the 50% ceiling. A larger bench will have to decide whether the 50% ceiling only applies to reservations created under Article 16(4), or to any reservation whatsoever. In doing so, it will have to outline what the phrase 'equality of opportunity' entails.