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# THE COURTS AND THE CONSTITUTION, 2020

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*Past, Present and Future Directions*

**2019 IN REVIEW  
CONFERENCE PUBLICATION**

25-26 January, 2020

NALSAR University of Law



Azim Premji  
University

# THE COURTS AND THE CONSTITUTION

## ACKNOWLEDGEMENTS

NALSAR  
University of Law

Prof. Faizan Mustafa  
Vice Chancellor

Prof. N. Vasanthi

Head, Centre for Constitutional Law,  
Public Policy & Good Governance

Prof. Sidharth Chauhan  
Faculty Advisor

Azim Premji  
University

Prof. Sitharamam Kakarala  
Director, School of Policy & Governance

Prof. Arun Thiruvengadam  
Faculty Advisor

Prof. Neeraj Grover  
Programme Coordinator, LL.M in Law and  
Development

Law and Other  
Things

Vikram Raghavan  
Lead Counsel, World Bank

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Raagini Ramachandran  
Ritika Meena  
Ruchika Prabhu  
Sai Preetham  
Tanmay Gupta

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2019 IN  
REVIEW





## EDITORIAL NOTE

It is with great pleasure that we release this publication developed from the proceedings of the second edition of *The Courts and the Constitution Conference*. The Conference was organised by the NALSAR University of Law, Hyderabad, in association with the School of Policy and Governance, Azim Premji University and the editorial team of the [Law and Other Things](#) Blog from 25-26 January, 2020.

The idea behind this annual conference is to take the opportunity of the Republic Day weekend to have a *Year-in-Review* exercise to analyze some of the key constitutional law judgments delivered in the preceding year and discuss their long-term impact. The Conference also provides an opportunity to bring members of academia, bar and the bench together to discuss and deliberate upon these decisions which have a bearing upon the future of the Republic, its citizens and its governance.

In this year's editions, the Conference had seven substantive sessions which thematically discussed the judicial developments in 2019.

The Opening Session on 25<sup>th</sup> January was a tribute to the memory of Dr. N.R. Madhava Menon, whom we lost in 2019. Prof. Faizan Mustafa, the Vice-Chancellor of NALSAR welcomed everyone to NALSAR and declared the Conference open. He expressed his disappointment that the year 2019 will not be remembered for what the Court *did do*, but for what all it *did not do*. Prof. N. Vasanthi gave an overview of the conference agenda. Prof. Sitharamam Kakarala, Director, School of Policy and Governance, Azim Premji University then took the opportunity to share his anecdotal experiences of having worked alongside Dr. N.R. Madhava Menon. He exhorted the need to move from Legal Education 2.0 to Legal Education 3.0 where NLUs must start paying more attention to their postgraduate programmes. Finally, Vikram Raghavan informed the audience of the objective behind the Law and Other Things Blog and the Conference to facilitate judges, lawyers, litigants, academics and students from across India to engage with the courts and the constitution.

The first substantive panel on the *Institutional Developments in the Judiciary* was opened by its moderator Sidharth Chauhan. Dr. Arghya Sengupta touched upon questions of accountability and independence in the form of appointments, in-tenure transfers, and post-tenure retirement appointments in the higher judiciary. Apurva Vishwanath narrated in detail

the Supreme Court's failure to secure justice to one of its staffer who had accused the former Chief Justice of India of sexual harassment. She discussed how the higher courts have failed at addressing issues of sexual harassment not just in this case but similarly in the past and noted that this must be addressed as a failure in the responsibility of not just those involved but the institution as a whole. Venkat Venkatesan expounded on the role of a legal journalist in holding the judiciary accountable and Anuj Bhuwania talked about how the Supreme Court was merely granting rights without remedies in 2019.

The second panel, moderated by Prof. Arun Kumar Thiruvengadam, dealt with *Federalism* where the focus shifted from courts to other constitutional actors. Prof. Anthony Blackshield AO, Emeritus Professor, Macquarie Law School opened the discussion by explaining unique features of federalism in different jurisdictions. Alok Prasanna Kumar explained the issues with fiscal federalism in India and discussed the issues with the functioning of the GST Council. Malavika Prasad took the session's attention to the issue of de-operationalization of Article 370 of the Constitution *vis-à-vis* Jammu and Kashmir's special status. Suchindran Baskar discussed about the complicated role of governors in a quasi-federal country like India. Lastly, Prof. Rohit De gave a historical context to federalism in India since 1940s and explained the political reluctance to federalism.

The third panel chaired by Prof. Amita Dhanda was devoted to Prof. Shamnad Basheer, another luminary whom we lost in 2019. She opened with a poignant account of her memory of Prof. Basheer. The panel was titled *Emerging Voices* where some of the work carried out by young and emerging scholars was presented. The panel consisted of Dr. Chintan Chandrachud, Kanika Gauba and Manav Kapur, all of whom spoke on the theme of the current tides against the Citizenship Amendment Act, 2019 with a focus on the history of India and its partition in 1947. Dr. Chandrachud analysed the TADA Act through the *Kartar Singh* case and brought out the importance of scholarship that takes a step farther from just focusing on the text and instead looks at the performance.

Day two of the conference witnessed four panels. The first one pertained to *Citizenship* and was opened by the moderator Arvind Narrain. Justice Swaminathan commented upon the importance of engaging with people in order to facilitate a conversation. Aymen Mohammad discussed the refusal of states to enforce union laws. He drew upon federalism and Article 355 of the Constitution so as to point out how the Union was wrongly justifying its protection of the federal units. Dr. Mohsin Alam Bhat drew upon his experiences from Assam so as to

enlighten the audience about the *twilight of citizenship* by explaining the inhumane functioning of foreigners' tribunals. Thereafter, Nizam Pasha stressed upon the need to examine citizenship, the right to rights, in the larger constitutional framework.

The panel on *Law and Religion* saw Professor Faizan Mustafa critiquing the Supreme Court's judgment in the Ayodhya dispute. Sruthisagar Yamunan highlighted the inconsistencies in courts' attempt to strike a balance between social reforms and religious rights of communities. Suhrith Parthasarthy drew the audience's attention to the problematic nature of the Supreme Court's order to review its judgment in the *Sabrimala* case. Professor N. Vasanthi, who was moderating the session concluded by emphasizing the need to have a proper relationship between law and religion.

The panel on *Developments in Equality Jurisprudence* was moderated by Dr. Sudhir Krishnaswamy who posited some grilling questions to the panelists. Arundhati Katju discussed the strategy behind shifting the conversation through *Navtej Johar* and for the bringing out the need on looking at the equality jurisprudence in a broader manner than the Courts have been currently able to do. Dr. Anup Surendranath pointed out how the Supreme Court failed in its application of the test of manifest arbitrariness in the *Bombay Dance Bar Case* and discussed the issue of importing creamy layer into SC/ST reservation jurisprudence. Alok Prasanna Kumar sought to explain how the 103<sup>rd</sup> Constitutional Amendment fell afoul of the Basic Structure doctrine and confused the objective of reservations as one of handing out charity.

The last session on *Reforming Tribunals* was moderated by Vivek Reddy. He prompted the speakers to speak on the possibility of removing tribunals, instead of reforming them. T. Prashant Reddy and Arun Thiruvengadam discussed the existing inefficiency of tribunals and the Court's decision in *Roger Mathew* case. The conference ended with a vote of thanks by Sidharth Chauhan.

We found immense value in the ideas discussed during the panels held at the Conference and felt that they must be made available to a larger audience, hence this publication. We hope you enjoy reading this report, which seeks to share the collated learnings from the conference with law students and legal fraternity in order to further the discourse on major legal developments taking place in India and the role played by the Indian judiciary.

We are currently releasing this report Panel by Panel and will soon make available the compiled version. We also plan to release a special publication expanding upon the themes

which were discussed during the Conference. We hope you find this publication as a useful resource.

This Publication would have obviously been impossible without those who made the Conference possible in the first place. The dedicated team of student volunteers that we have is the backbone of our organizing team. Beyond us students and our faculty, what really makes this Conference possible is the dedicated staff at NALSAR to whom we are extremely grateful. We would like to particularly thank the IT Department led by B Md Irfan Sir for their constant support.

We are grateful to our dedicated team of rapporteurs without whose assistance and excellent transcribing this publication could not have been developed. We would also like to acknowledge Gitika Lahiri for her assistance in the design of this publication and Vishal Rakhecha for his technical assistance towards the digital release of this report.

We are also extremely grateful to our speakers who took the time out of their schedules to go over these transcripts and dealt with our multiple emails. Finally, we would like to acknowledge the constant support and encouragement of Prof. Arun Kumar Thiruvengadam, Prof. Sidharth Chauhan, Vikram Raghavan and our Vice Chancellor, Prof. Faizan Mustafa without whom neither the Conference nor this publication would have been possible.

Any errors are of course, ours and ours alone.

Best,

Dayaar Singla and Gayatri Gupta

*Editors*

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# THE COURTS AND THE CONSTITUTION

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## DEVELOPMENTS IN EQUALITY JURISPRUDENCE

### Moderator

Dr. Sudhir Krishnaswamy  
Vice Chancellor, NLSIU



### Arundhati Katju

Advocate,  
Supreme Court of India & High Court of Delhi



Dr. Anup Surendranath  
Assistant Professor, NLU Delhi



Alok Prasanna Kumar  
Vidhi Centre for Legal Policy



2019 IN  
REVIEW



## INTRODUCTION

The penultimate panel for the 2<sup>nd</sup> edition of *The Courts & The Constitution*, focused on reviewing the developments in equality jurisprudence over 2019. The panel was moderated by Professor Sudhir Krishnaswamy, Vice-Chancellor, NLSIU.

[Arundhati Katju opened the conversation](#) and discussed the strategy behind shifting the conversation from privacy to equality so that equality rights are given primacy through *Navtej Johar*. Through this conversation, she discussed the need for looking at the equality jurisprudence in a broader manner and with a greater focus than the Courts have been able to do in the *Sabarimala* or *Ayodhya* judgments.

[Dr. Anup Surendranath, in his speech](#), touched upon the doctrine of manifest arbitrariness and the issue of importing creamy layer into SC/ST reservation jurisprudence. In the first part of his speech, he brought out the irony of arbitrariness in the manifest arbitrariness doctrine through the *Bar Dancers*' decision and the prohibition matter. He argued that it has failed to serve as a test of equality under Article 14 of the Constitution. Instead it seems to have become an inroad for judges to wade into a policy-rowing exercise in the garb of manifest arbitrariness. In the second section, he discussed the conceptual error in importing creamy layer into SC/ST reservation jurisprudence through a discussion of the *B.K. Pavitra* and *Jarnail Singh* judgments.

[Alok Prasanna Kumar](#) picked up from Dr. Anup Surendranath's speech and reiterated the purpose of reservation by discussing J. Chinnappa Reddy's decision from *KC Vasanth Kumar* and a passage from D.R. Nagaraj's '*Misplaced Anger, Shrunk Expectations*'. Then on the basis of this context, he explained how the 10% reservation, brought about for economically weaker sections of the society through the 103<sup>rd</sup> Amendment fell afoul of the basic structure doctrine. He also noted that this reveals a confusion regarding the understanding of the objective and purpose of reservations on part of the Union government.

The session was followed by a very interesting [Question and Answer Session](#) starting with a round of questions from Prof. Sudhir Krishnaswamy that was taken further by the audience. In this report we have tried to rearrange portions of this discussion on the basis of themes that they have touched upon for purposes of readability. The Q&A session revolved



around the EWS reservation amendment, the alternatives around it, variants of the manifest arbitrariness doctrine and sub-classification as discussed in *Chinnaiah*.

We hope that you enjoy reading through these insightful speeches! We would like to acknowledge the assistance of Khushi Mittal & Tanmay Gupta in performing an excellent job in transcribing the proceedings for this panel. You may also access the video of this panel discussion on the NALSAR University of Law [YouTube channel](#).

## ARUNDHATI KATJU<sup>1</sup>

Thank you all for having me here. I could not be here last year, so it is really a pleasure to be here today in a discussion on Courts and the Constitution and where we are headed. I want to start by saying that it is also lovely to be here in a panel chaired by Sudhir. I was last night desperately going through my cases and notes and then I woke up early this morning to put this note together and also coming back to a law school, I was reminded of the fact that Sudhir taught me property law and there were many times when I was in college when I would go to sleep late and wake up early because I was preparing for something – an exam or a test that was going to happen sometime in the afternoon which I was desperately unprepared for. So, it seems like being back in college.

But what is also wonderful about having come on to this campus today is that as soon as I came in, there were a bunch of mattresses. When I asked about them, I was told that they are a part of the student's own protest around CAA going on from 8 pm at night to 8 am in the morning as students themselves also participate in the protests that are going on all over our country today. There are also student-led protests.

To get into my comments for today, I want to think about equality jurisprudence a little more broadly in terms of what has happened in the last year and perhaps, also what has not happened in terms of the judgments that the Court has delivered in 2019 as well as those that we have on the Courts' board in this coming term in terms of [Sabarimala Review](#) and CAA.

When we were doing the [Johar case](#) in 2018 and as we were drafting it before that in 2016, one of the big questions that we had as lawyers drafting this petition and putting it together, was that how do we shift a conversation triggering a certain conversation about rights up, front and centre in this petition and hopefully have that refracted into a national conversation about LGBT rights.

I would say that till the 2009 judgment given by Muralidhar J. and Shah J. in [Naz Foundation](#), there had been an emphasis on privacy. How do we shift that to a conversation where equality is up, front and centre, where equality rights are really given primacy in terms of how we conceive the rights of LGBT people? Because equality rights in terms of a

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<sup>1</sup> Cite as Arundhati Katju, *Developments in Equality Jurisprudence*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26<sup>th</sup> January, 2020.

\* Transcribed by Khushi Mittal, Edited by Dayaar Singla.

conversation under the Constitution gives you a platform to then develop beyond, in that case in *Johar*, decriminalisation of Section 377 to then think about questions of marriage equality, civil and political rights for LGBT people. So, there is a kind of platform and resonance that equality jurisprudence under Article 14 has that other conversations about rights may not have, whether it is privacy which naturally limits you to the rhetoric of the privacy rights being reflected in whatever people do in their bedrooms being upto them, to a conversation about how we engage with each other in the public sphere.

So, that was the shift that we tried to make in the *Johar* case from privacy to equality to also an idea of citizenship that might be undifferentiated, that looked to tap into the conversations under the Constitution and to see how LGBT people would be a rights-bearing community. The kind of rights-bearing citizens that you generally see under the Constitution are religious minorities and historically discriminated groups, so how would you introduce LGBT people into that conversation? It was through the paradigm of equality and therefore putting Article 14 up, front and centre in those arguments.

If we look at the two big judgments – *Sabarimala* and [Ayodhya](#) in 2019, I think what you see in those cases is the Court grappling with this idea of equality in terms of religious communities and equality within faith but not being able to address that question front and centre. I am going to start with the *Ayodhya* judgment and the tension that is there in the judgment. Essentially, here is a case that for all practical purposes is a property dispute or simply a title dispute. But what is actually going on is that the Court is arbitrating a dispute that it itself frames not in terms of just a title dispute but a dispute between two religious communities. The first thing that strikes you when you read the judgment is that the Court is not talking about the plaintiffs or the defendants but consistently talking about Hindus and Muslims – Hindu witnesses and Muslim witnesses – which would never happen in an ordinary title dispute - the idea that parties to a dispute or the witnesses can be collapsed to represent two religious communities.

Also if you have a close reading of the language used in the *Ayodhya* case, at various points in the judgment, you see the Court really looking at the tension between the faith on one hand (and the primacy that it is going to give faith in arriving at its conclusion) and what could ostensibly be just a title dispute on the other. But also it is looking at how it is going to arrive at a model of secularism for the judgments that it has in 2019.

So I am just going to quote parts and paragraphs from the judgment.

In para 204 of the judgment, where the Court is talking about secularism, it emphasises the role of equality in secularism. So, Article 25 itself says that our model of secularism is that the state will treat all faiths equally.

*“Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”*

The judgment in *Ayodhya* first reiterates that model of secularism, that in its heart, it reiterates what the constitution always respected and accepted – the equality of all faiths. It then says when it comes to its conclusions in para 795,

*“...The law forms the ground upon which, multiple strands of history, ideology and religion can compete. By determining their limits, this Court as the final arbiter must preserve the sense of balance that the beliefs of one citizen do not interfere with or dominate the freedoms and beliefs of another. On 15 August 1947, India as a nation realised the vision of self-determination. On 26 January 1950 we gave ourselves the Constitution of India, as an unwavering commitment to the values which define our society. At the heart of the Constitution is a commitment to equality upheld and enforced by the rule of law. Under our Constitution, citizens of all faiths, beliefs and creeds seeking divine provenance are both subject to the law and equal before the law. Every judge of this Court is not merely tasked with but sworn to uphold the Constitution and its values. The Constitution does not make a distinction between the faith and belief of one religion and another. All forms of belief, worship and prayer are equal. Those whose duty it is to interpret the Constitution, enforce it and engage with it can ignore this only to the peril of our society and nation...”*

And then, of course, it goes on with its ultimate findings and the relief which it finally gives, which is to set aside the High Court’s trifurcation of the property on the disputed premises and to award them only to the Hindus.

My point is that, in this judgment, what we are lacking and what the Court is side-stepping is a clear enunciation of equality. What it is struggling to say and the real question here is: how equality is going to play out between religious communities, when these questions are coming to it under the guise of title disputes, in terms of questions of who can enter the temple?



Again, in *Sabarimala*, the question of whether or not women are equal citizens and Article 14 does not get addressed straight on. But the whole question becomes about Article 25, such that when there are two communities with competing interests under Article 25, and how those will be addressed? Chandrachud J.'s judgment in *Sabarimala* comes closest to this, in para 184, where he talks of the freedom of religion not being absolute but being subject to Article 14, 15, 19 and 21. Quoting Chandrachud J.—

*“While guaranteeing equality and the equal protection of laws in Article 14 and its emanation, in Article 15, which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, the Constitution does not condition these basic norms of equality to the other provisions of Part III. Similar is the case with the freedoms guaranteed by Article 19(1) or the right to life under Article 21. The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content. Evidently, in the constitutional order of priorities, the individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III.”*

When we know the reality of the Courts today which is that I think when it comes to CAA, being postulated straight up as a question of two major lines of jurisprudence – one is secularism and the other is Article 14. And thus, in CAA, you have straight up Article 14 analysis of the Amendment Act of 2019, both in terms of rational nexus and arbitrariness doctrine. So, my question is, when we have these challenges before us, as lawyers who are practicing in the Court, how do we shift these conversations from a question of religious rights and religious freedoms to a question of straight up equality and free and equal citizenship?

If the ideal of the Constitution is to have a normative rights-bearing citizen who is able to contend equally on a plane of rights, is it possible at all to move these conversations to a conversation that could be about equality doctrines and Article 14 and not just about Article 25 and how do we really bring primacy back to Article 25.

## DR ANUP SURENDRANATH<sup>1</sup>

Thank you, Prof. Mustafa, Sidharth and Vasanthi Ma'am for having me here. It is always good to be back home!

I am interested today in looking at what has happened to manifest arbitrariness in 2019. I am also going to revisit that conversation of 2018 and look at what has happened to the [Bar Dancers' Case](#) that was decided early this year on the regulation of bar dancers and of course, the prohibition matter that was decided earlier, and what has happened to the matter of how bar dancers are to be regulated. But before I get to that case, I want to set up the conversation on manifest arbitrariness. After the conversation on manifest arbitrariness, I want to discuss the decision in [B.K. Pavitra](#) on consequential seniority and reservation in promotions and extensions, with [Jarnail Singh](#) and [Nagaraj](#). Then, I will round off with a comment on an issue affecting law schools, that is, reservations on domicile.<sup>2</sup>

### I. ON MANIFEST ARBITRARINESS

I think of the judgement in [Swiss Ribbons](#) that Nariman J. authored on the constitutionality of the Insolvency and Bankruptcy Code, 2016 and Section 87 of the Arbitration and Conciliation Act, 1996. While he upheld the Insolvency and Bankruptcy Code, 2016, he struck down Section 87 of the Arbitration and Conciliation Act, 1996 on grounds of manifest arbitrariness. And the conversation revolves around the question whether manifest arbitrariness can be used as valid ground to strike down legislations. When Nariman J. got an opportunity in [Shayara Bano](#) in 2018, he established that arbitrariness as a doctrine could be used to strike down legislation and literally overruled Jeevan Reddy J.'s opinion in [Mcdowell](#) where Nariman J. was a lawyer and had argued that manifest arbitrariness can be used to strike down legislation and Jeevan Reddy J. had explicitly disagreed, and said that you could not do so.

And I think, and I will attempt to demonstrate for good reason, the way Jeevan Reddy J. characterized it in *Mcdowell*, that there is a difference between two things. On one hand, there is

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<sup>1</sup> Cite as Anup Surendranath, *Developments in Equality Jurisprudence*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26<sup>th</sup> January, 2020.

\* Transcribed by Tanmay Gupta, Edited by Dayaar Singla.

<sup>2</sup> [Ed Note] The comment regarding law schools can be found in the Question & Answer Session

a determination of whether an infringement of right is unreasonable, excessive or disproportionate. That is one conversation you can have on arbitrariness or proportionality. And he said, it is quite another to say that a judge can say or come to a conclusion, in exercise of judicial review powers, that a legislation is unreasonable, unnecessary or unwarranted.

So, the judicial exercise, according to Jeevan Reddy J. was very different and I think there are very important differences that we should think about. And I disagree with certain views that people have written in response to the manifest arbitrariness doctrine that it is a proportionality investigation because I do not think it is, not in a manner in which Nariman J. constructs it. I do not think it is a proportionality review of a rights infringement. What Jeevan Reddy J. was talking of in *Mcdowell* was that if there is a rights infringement and you want to get into the proportionality of that, that is one conversation you could get into and I would not have a quarrel with it but the way Nariman J. frames it in *Shayara Bano* is not that. Rather, I will attempt to show how all the concerns with those broad judicial review powers that he gives to judges played out in the *Bar Dancers'* case, which was decided in January 2019. And please allow me to read out so that we can just be careful about what we think:

*“Constitutional infirmity in Article 14 itself happens when a legislation is manifestly arbitrary, that is, when it is not fair, not reasonable and when it is discriminatory, not transparent, when it is capricious, based on favouritism, nepotism and not in pursuit of promotion of healthy competition and equitable treatment.”*

This framing of the manifest arbitrariness doctrine gives judges to get into what exactly courts have been saying time and time again they should not, that is, that the judges cannot substitute their policy judgement for that of what legislatures make.

As generations of law students have studied through the critique of [Nergesh Meerza](#), we will see how this framing of manifest arbitrariness doctrine essentially leads to it not being anymore a judicial review of the extent and justification of the rights infringement. But rather it has very often become a tool for judges to bring about a policy disagreement and uphold their view on a certain policy. Now, let us see what has happened in the *Indian Hotel & Restaurant Association* case, the second case. The first case, as I said, was on the complete ban of bar dancing.

What Maharashtra then does is to bring in a legislation to, what it says is to, regulate the conditions of the bar dancers. This is then litigated and parts of it are upheld and parts of it are struck down. I just want to lay out what the provisions of this Act said and how Sikri J. plays out all the dangers of manifest arbitrariness. And please bear with me as I take you through some of the provisions that I have identified.

One is “*what is the definition of obscene dance?*” Now they have said you can dance but there cannot be obscene dance. Now, for what is obscene dance, they refer it back to Section 294 of the IPC and then also go on to say, in addition to S. 294, any dance that is designed only to arouse prurient interest of the audience. Sikri J. avers that as this is a standard used everywhere else in our jurisprudence, and has been upheld, it is okay. The argument was on what does it mean to say, in addition to S. 294 requirement, another clause which says, dance that is designed only to arouse prurient interest. But he just says obscenity is something we have recognized in law, so it is alright.

The provisions that he explicitly subjects to the equality challenge, are that the law says discotheques and orchestras will not be allowed if there is a dance bar, and dance bars cannot have discotheques and orchestras. Here, there is no discussion, the only discussion that Sikri J. engages in is on why this is violative of equality or as to why dancing bars cannot have orchestras or discotheques, is primarily just a very bland policy disagreement. There is very little else in his judgement that says as to what is the equality analysis or what is the rights infringement that bring in the question of arbitrariness. It is a straight out policy disagreement that he does not think to make any sense.

Similarly, a very interesting provision on throwing of currency and tipping. The provision says that you cannot throw currency at bar dancers, you cannot even hand over the money to them directly, and the only way is to have it included in the bill. Sikri J. used the doctrine of manifest arbitrariness, which basically translates to what he thinks is okay or not okay. He said that yeah this throwing bit is very bad, you cannot throw coins and currencies but this whole requirement to include in the bill is unacceptable.

Why? Because he believes, and there is no basis in the judgement as to why he believes so, and I am not taking a position either way, that if you include it in the bill, sometimes, people who



you to intend to tip will not get that. If one gives a Rs 100 tip in the bill, it will not go to the dancer for whom it is meant. Again, there is no basis for why the judge arrives at this conclusion and what the rights' infringement is. It is a plain policy discussion saying that "*if I include it in the bill, the tip will not go to the person who I intend to give the tip to*". So, he upholds the part that prohibits throwing but says you can give it directly.

Second, the rules say that the establishment has to have a contract with the bar dancers, remuneration has to be paid only into a bank account, the contract has to be submitted with a licensing authority, and it has to be only monthly payments. Again, Sikri J. upholds everything except the monthly payments bit saying that they might want to move from one bar to another and they might want to be paid per performance. Again, I do not see any rights analysis happening here. I do not see any equality analysis happening here. Is this an interesting policy discussion on how bar dancing happens in Bombay? Sure, it is fascinating for me as a policy discussion, but as a test of equality, I do not really see the test playing out!

Therefore, the use and this strong establishment of manifest arbitrariness through [Navtej Johar](#) and [Joseph Shine](#), while we might like it in some cases, there is an inherent danger that we really need to think about and seriously streamline if judges are not going to go into one policy-rowing exercise in the garb of manifest arbitrariness.

### II. ON CREAMY LAYER IMPORTATION INTO SC/ST JURISPRUDENCE

Coming to [B.K. Pavitra](#), now what does it mean in [Jarnail Singh](#) to say that the creamy layer is necessary to be imported into Scheduled Castes (hereinafter, referred to as SCs) and Scheduled Tribes (hereinafter, referred to as STs) reservations? I think it is of grave conceptual error to import the creamy layer into SC/ST reservation jurisprudence. It misunderstands what you are attempting with SC/ST reservation and that doctrinal incoherence is at the core of much of the confusion on reservations discourse in India. What we are doing with OBC reservations and what we are doing with SC/ST reservations are two fundamentally different things. Why we have reservation in employment and why we have reservation in education are two different things.

This confusion that somehow there is this abstract notion of equality that can be imported from OBC jurisprudence to SC/ST jurisprudence is very problematic in *Jarnail Singh*. In *B.K. Pavitra*, Chandrachud J., writing for him and Lalit J., tries to gloss over all the problems that

*Jarnail Singh* has created. In *B.K. Pavitra*, in the first round of litigation the whole point was that, there was no quantitative proof that such a thing was required, a requirement arising from [Nagaraj](#). I do not want to get into the critique of *Nagaraj* right now. So after that round of litigation there is a Ratna Prabha Committee report that the Karnataka government does, and the issue in *Pavitra* post that is to what extent a court can judicially review this quantitative exercise of inadequate representation. To what extent can the court judicially review the methodology being used?

Chandrachud J. adopts a highly deferential approach that might be good in this case and we should think about what is the consequence of that deferential approach in other areas of litigation where empirical proof is going to be brought forward. He says that, it is a very administrative law standard, we will only look into where irrelevant materials were considered. Just that there is a better way of doing this is no ground to get into this judicial review and say that the fact-finding committee should have adopted a better methodological approach and therefore, accepts the methodology adopted by the Ratna Prabha committee.

On efficiency, a very good attempt to frame the efficiency conversation on Article 335, a very problematic provision, and I think there is a much deeper conversation required on it. Article 335 says that claims of SC/STs must be acknowledged and efficiency must be taken into account. It has a problematic drafting history and I do not want to get into that. But here, Chandrachud J. says that the meaning of efficiency depends on what are the constitutional goals that we set up. He attacks the argument that admission or recruitment purely on merit would mean automatic efficiency. He said that if we set up the constitutional goals as inclusivity or participation in public employment, then automatically efficiency would have a very different meaning rather than a purely instrumentalist one of saying highest marks means better performance. He makes a brave attempt and I think that is the direction in which the conversation of efficiency should go.

But on creamy layer, I think there is a certain copout that he does. He faces the *Jarnail Singh* problem. Karnataka has not excluded creamy layer from promotion and consequential seniority. So he says this is a case only of protecting consequential seniority and since it is only a case of protecting consequential seniority, the question of creamy layer does not arise in this case. But who are you *consequentially seniorizing*, so it ends up being a copout.

*Jarnail Singh* is a problematic judgement that should have referred to a larger bench given the inconsistency of what they were holding in line with what [\*E.V.Chinnaiah\*](#) says, which is that sub-classification of SC/STs is not possible. Now even though that was purely on identity basis but this creamy layer business is also a type of sub-classification that runs into *Chinnaiah* problem. Is *Chinnaiah* correct? That is another conversation but that is where we stand.

## ALOK PRASANNA KUMAR<sup>1</sup>

Good afternoon everyone, I had intended originally to speak about reservations and promotions but Anup has covered the territory so fantastically that I have absolutely nothing much to add. But, I will try to add a little bit of context to help us make sense of another major development that happened early on in the year - the introduction of the 103<sup>rd</sup> Amendment to the Constitution - which allowed the governments, Centre and State, to provide for *upto* 10 percent reservations for economically weaker sections. I do have some issues with that, but I know Anup will of course respond to it. They always say “*always have the last word*” but this one is not mine.

But anyway, I want to place my criticism of the particular amendment in a slightly larger context, dealing with reservations and issues with that. I will start off by reading two quotes. The first one is from [\*K C Vasanth Kumar v State of Karnataka\*](#) by Chinnappa Reddy J.:

*“The Scheduled Castes, the Scheduled Tribes and other socially and educationally backward classes, all of whom have been compendiously described as 'the weaker sections of the people', have long journeys to make in society. They need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity, and not charity. They claim their constitutional right to equality of status and of opportunity and economic and social justice. Several bridges have to be erected, so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges. Hence the special provision for advancement and for reservation under Articles 15(4) and 16(4) of the Constitution.”*

If you could ever find a more precise encompassment of what reservations do, what they are for, who they are for and why, I have not come across a better statement than this. This was in 1985.

Now I will read out a passage from my favourite author, D.R. Nagaraj. He has written this fantastic collection of essays called ‘*The Flaming Feet*’. He is not a lawyer, he is a cultural theorist,

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<sup>1</sup> Cite as Alok Prasanna Kumar, *Developments in Equality Jurisprudence*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26<sup>th</sup> January, 2020.

\* Transcribed by Khushi Mittal, Edited by Dayaar Singla.



political scientist and possibly one of the five best thinkers this country has produced. He wrote this essay in 1995. It is called ‘*Misplaced Anger, Shrunken Expectations*’. It was immediately after the OBC reservations and the [\*Indra Sawhney\*](#) judgment.

*“If the gods decide to withdraw from the strife ridden nation called India, it will not bother the classes and castes warring on the issue of reservations in the least. Since material interest is the only driving religious force of both the old and the new middle classes and is quite fundamentalist at that, the programme of positive discrimination has evoked frenzied reaction. As a result, the debate has turned fiercely ideological with little space for self-doubt. In any case, as Rajani Kothari points out, the valid intensification of controversy surrounding Rama’s birthplace, the Ayodhya agitation, is linked to the militant assertion of social and political identity of the lower caste using the recommendations as well as the implementation of the Mandal Commission as a rallying point. Radical political thinkers, including Kothari, argue that Rama was used to split the newly emerging unity of the lower castes in Northern India. That was how the tumultuous 1990s began.”*

Co-incidentally, it also matches with what Arundhati was speaking just now. If you compare the underlying sentiment of these passages that I read out, they could not be more opposite. Where Chinnappa Reddy J. has this strong belief and passion for social justice, D.R. Nagaraj didn’t have any less of that belief. He was also someone who worked with the Dalit Sangharsh Samiti in Karnataka, was an activist, a fantastic writer, has written some of the most nuanced pieces on caste in Karnataka and perhaps, anywhere in India. But you see a sense of defeatism and pessimism in the way he approaches reservations. You can see that from the title of the essay itself – “*Misplaced Anger, Shrunken Expectations*”.

What I want to point out is that far from Chinnappa Reddy J.’s lofty goal or idea that reservations are supposed to be for parity and not charity, the developments of last few years and specifically, which is where I want to place both the reservations and promotions and economically weaker sections reservations in context, they have become for charity even if they do not result in parity. Just to take a point that Anup mentioned with the *Jarnail Singh* case, in as much as you should read through Nariman J.’s main judgment, you hardly find the language of social justice that animates the kind of judgments that Krishna Iyer J. or Chinnappa Reddy J. write. All of these

are landmark judgments on reservations but it is more of a legal or forensic analysis of the judgments – they said this, they said that, but I think this is the correct position.

In as much as what *Jarnail Singh* ends up doing by saying you do not need to show the backwardness requirement, I think, by wrongly including the requirement of creamy layer to stay within the reservations or promotions, it makes it seem that reservation and promotion is being granted as charity and not really to ensure parity. I want to make a point that perhaps, Chandrachud J. realises that I want to claw back from this and point out the social justice goals of reservations in India but because he is sitting on a smaller bench and cannot go against a constitutional bench, he does his own way of addressing it. It may work or it may not work, we will see. There are more cases coming up in the context of reservations and promotions. As far as I am aware, there are two cases pending in Supreme Court – Maharashtra and Tripura if I am not mistaken. So, we will have to see how the Supreme Court will take it forward.

But, the point that I want to make about reservations being reduced to charity and not parity comes through most strongly in the way in which the whole discourse over the reservations for economically weaker sections has been framed and how it happened. A confession here, like many people, when I was much younger, I used to believe that reservations should only be for people of economically weaker sections and I am sure I have been beaten up by Anup on this in many debates and arguments. It was what you were passionately taught to believe if you belonged to a certain socio-economic class in this country that reservations should really be only for poor people. But, and I will credit Prof. Dhanda's law and poverty classes, it takes learning to understand that poverty has structural causes and not just bad luck. It is about structural causes in society that lead to poverty perpetuating over generations which lead to deprivation, which lead to people being underprivileged. And unless you tackle those underlying structural causes, simply treating the symptoms of it does not mean much.

What the Supreme Court's justification or rather the reasoning that it has used to talk about caste-based reservations has always been is that caste has been the reason for social and economic backwardness and unless caste is the basis of reservation, you are not going to be able tackle it. What we have now is the turning of this logic on its head.

If you think back to what the 103<sup>rd</sup> Constitutional Amendment does, it is somewhat interesting, it adds Art. 15(6) and Art. 16(6) –

For educational institutions -“(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5);”

Likewise, in Article 16 – “(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.”

Here, it is a classic case of over-determination in the first place, in the sense that nowhere in the Constitution does it say that this has to be the exact percentage of reservation for Scheduled Castes, Scheduled Tribes and socially and educationally backward classes but for economically weaker sections, it is exactly stuck at 10 percent. What are we supposed to take from this?

First, there is an absence of quantifiable data and we still have not seen the results of the Socio-Economic and Caste Census Survey to see how many people actually need reservations and what is the level of representation, is it anywhere close to being ‘proportionate’, let alone ‘adequate’.

There is a confusion between the terms ‘proportionate’ and ‘adequate’. The court seems to think that ‘adequate’ is somewhat lesser than ‘proportionate’. That is not necessarily true. If you see *Indra Sawhney*, it does not say it directly, at some places it uses ‘adequate representation’ and at others ‘proportionate representation’. The underlying theme seems to be that adequate is somewhere lesser than proportionate, so be happy with what you get.

But here, Parliament is not only so confident that economically weaker sections need such reservations, but they need it exactly to the extent of 10 percent. While for socially and educationally backward classes and of course, subject to any judgments coming through, quantifiable data needs to be there and you need to have a Backward Classes Commission to show that these are the classes that are under-represented, this is how much they are under-represented

by, this is who those classes are; for economically weaker sections, it is assumed that they are there and everybody knows who they are and 10 percent reservations is what they should get.

To me, the way this is structured, the fact that there is no clear identification of these classes raises so many questions. There is a definition that says,

*“for the purpose of this Article and Article 16, economically weaker sections may be as such as may be notified by the state from time to time on the basis of family income and other indicators of economic disadvantage”.*

Again, this just tells you the criteria but does not tell you who these classes are because you know by exclusion that they do not include Scheduled Castes, Scheduled Tribes and those in Other Backward Classes. Obviously, they should be interpreted to mean Upper Castes and generally Muslim Dalits and Christian Dalits who are not included in SCs, STs and so on.

But on what basis do we say that these are identifiable groups of people who are entitled to reservations. Does an upper caste person who has a family income of x, are they in the same social, economic and other category as a Dalit person or an Adivasi person with same income? There is some kind of assumption here that poverty which is just linked to family income is something that creates an identifiable class in and of itself.

I have [argued in another piece in Scroll](#) about how I believe that these reservations are against the basic features of the Constitution. Nobody is saying that the government should not do anything for those who suffer low family income or other economic criteria, nobody is denying that. I do think, however, what this particular provision does is overturn the logic of reservations or rather turn the logic of reservations on its head to say that now posts in educational institutions and jobs by the government will be handed out as charity, rather than try and meet the larger goal of social justice or economic justice and so on. And this is a fundamental break in the way reservations were supposed to work under the Constitutional scheme.

There is one another point I want to quickly make - 50 percent cap. Nowhere in the Constitutional Amendment does it actually say that it is allowed to breach the 50 percent cap. In fact, the 50 percent cap is a creation of the judiciary itself. It was started in the [State of Mysore](#) judgment, then continued in [Devadasan](#), and the *Indra Sawhney* judgment sort of affirms that. There is a dispute – there is the [N M Thomas](#) case where serious doubts were raised on whether



you can even have a 50 percent cap - but the *Indra Sawhney* judgment tries to put it to rest by saying that no, in all circumstances, there should at least be 50 percent cap in jobs but in certain super-specific, exceptional circumstances, you may go over 50 percent.

Now, very interestingly, the actual talk about 50 percent in the context of economically weaker sections happens only in the statements made by Arun Jaitley, the late minister of the NDA government, who was asked about this in parliament and he says, which is a very interesting reading of *Indra Sawhney*, the 50 percent cap only applies to SC, ST and OBC reservations but we can create brand new categories which can go beyond 50 percent. This, to me, does not make sense, because two years ago, in response to Hardik Patel's claim that Patels in Gujarat should be given 50 percent, Arun Jaitley in Gujarat says that no, no, 50 percent cap is absolutely sacrosanct, we cannot exceed it.

So, there is a lot about this particular discourse over the reservations for economically weaker sections that does not particularly make sense to me. At its core, there seems to me to be a duplicity about what it is trying to achieve, what it is going to end up achieving. And we need to be very suspicious of the motives of this and perhaps, maybe, D.R. Nagaraj's pessimism and some level of scepticism about the purposes of this particular reservation needs to be taken.

Thank you.

## QUESTION & ANSWER SESSION<sup>1</sup>

**Q. [Sudhir Krishnaswamy]** *Would you be able to locate where the Constitution speaks for equality among religious groups? Because if that dimension exists, where is that located because I cannot find it.*

**A. [Arundhati Katju]** Thank you for that. I think the first provision that I would point to, is by actually going back, is Article 25 which does promise an equal right to profess, propagate religion. But what I am also thinking about, as we go into, hopefully, eventually arguments on CAA, is that if we think of Articles 14, 19 and 21 as a golden triangle where we must consider those Articles at work together, whether we must also then argue that Article 25 and 14 are intrinsically linked together. And that therefore, when the Act infringes a right of those minorities who are excluded from the ambit of the Act under Article 25 and we are thinking separately of Article 21 violations in terms of the rational nexus test and arbitrariness, then is it also possible to make an argument that those two articles have to be read together. The could be read together to argue that there is also a promise under the constitution that religious minorities will be treated equally with the majority and that the promise of the Constitution is not just in terms of the ability to practice and propagate religion but also in terms of equal citizenship.

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**Q. [Sudhir Krishnaswamy]** *Given the consideration that you have given to manifest arbitrariness, do you think that it should be taken that seriously? If you think it is a more widespread and well-settled doctrine, who else are its adherents? It seems to have limited traction in court and given that our judges change all the time, should we be bothered by it?*

**A. [Anup Surendranath]** On the question of should we worry about it and if there is an adoption of the manifest arbitrariness standard, what has happened in *Navtej Johar* and *Joseph Shine* is

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<sup>1</sup> Cite as *Speaker Name*, Q&A Session, *Developments in Equality Jurisprudence*, The Courts & The Constitution-2019 in Review, NALSAR University of Law, 26<sup>th</sup> January, 2020.

indicative of where this is going. I get the sense that if we thought that the older Article 14 test was somehow deferential and was not rigorous enough, this is even less so because it actually takes away from that kind of proportionality analysis, and with much wider judicial review powers. While I agree with all the criticism of the rational nexus test, I do not think this is, in any way, curing that, and ends up giving much wider and unchecked judicial review powers. So, I observe the attraction to this standard and the signs from *Navtej Johar* and *Joseph Shine* are indicative of the adoption of this standard.

**[Sudhir Krishnaswamy] to Anup Surendranath:** The manifest arbitrariness substantive argument is a fair one and you say that manifest arbitrariness is, I take it, worse than [Royappa](#) and the early 70s Article 14 jurisprudence. But will it survive? Because do you think it has adherence in the court? It seems in recent retirements if you look at the last four years, and look at the Chief Justices writing rather hectically just before their retirements, does their doctrine survive? It almost does not seem to matter. Everyone seems to be waiting for their retirement so that they can write new doctrines but there is something about that judicial discipline that might make us think about Nariman J.'s particular concern with manifest arbitrariness. To be important in a structural sense but may not be long-lasting.

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**Q. [Sudhir Krishnaswamy]** *I think the intuition that EWS is different from other reservations is a fair one but what if we followed through on that? Maybe it is about individuals so why should we be looking around for classes? Is there something inherent about the structure of reservation or affirmative action policy that it has to be about classes or is that just a doctrinal structural requirement of the way in which it was originally drafted?*

**A. [Alok Prasanna Kumar]** Just to draw the context, it is probably wrong to call India's reservation as an "affirmative action policy" because affirmative action does not necessarily deal in groups in the same way in which reservations are meant for individuals belonging to certain groups. Affirmative action is quite different and fits within a particular constitutional-legal context which is probably relevant in the US and there is a significant difference in the way the two work. To me

it does not make sense if we want to call it reservations, to call it that there will be certain quotas for certain classes of people to take the benefit of this.

Again, to make the point I am not saying that people belonging to EWS should not receive any help whatsoever from the government. It is possible, if it were to be, say, a scholarship for EWS for as long as they are in that category. Sure, that would be perfectly fine. But something about the two does not fit. It is a force fitting of two things that may break. And that is where my concern with it comes. There are, of course, larger problems but just to say that reservations are meant for groups and perhaps, affirmative action is. This is trying to smash two things together. The result may be not be the best.

*Q. [Sudhir Krishnaswamy] to Alok Prasanna Kumar: Maybe some provisions of the Constitution deal with social and historical disadvantages, and others deal with the problem of moral luck, which implies that you are just badly off in life. So, the language of the Constitution is not affirmative action and it is not reservation but it is special provision. So, even if we do not quibble upon whether it is affirmative action or reservation, certainly neither as far as the text of the Constitution is concerned. But it is plausible that the 103<sup>rd</sup> Constitutional Amendment Act deals with a different problem. I am not saying it is constitutionally valid or caters to the basic features but I am just saying that we could just understand the provision differently.*

*Q. I had a similar concern as Sudhir, but I will come from another direction. I also believe that there are some elements in the 103rd Constitutional Amendment Act and its operationalization that are patently illegal. I think the exclusion of SC/STs and OBCs from it seems to be quite obviously illegal. By only linking EWS to income also seems rather odd. My proposal is maybe it is not. Because one can find elements of constructing a EWS jurisprudence from what we have already seen in the OBC. Considering that SC/ST regime is distinct in comparison to OBC and when we look at the Mandal discourse, there was a long debate about what are the components of socio-economic backwardness. If those elements which contribute to perpetual trans-generational backwardness, if that is what we take out of Mandal, then it is possible to look at EWS to also push for an empirical enquiry into finding those non-caste related, which can include caste, but economic grounds for identifying those elements. What I am thinking of is not just income but*

*property ownership, where people live, what kind of access they have to a whole range of credit etc. It may be difficult but Mandal was also very difficult.*

**A. [Alok Prasanna Kumar]** I am not so sure if we can fix through implementation what is flawed in principle. Personally, I do not think it is possible. It is also a dubious work around because tomorrow that very same matrix could be used to tighten or narrow down the scope of even OBC reservations. There are, of course, larger problems with the way in which the idea of OBC reservations have also concluded. And I would again recommend everyone please read D.R. Nagaraj's essay on '*Misplaced Anger*' because he goes into the idea of what has gone wrong with the way we have defined the category of OBC and all these things that the Supreme Court has had to do with its *Indra Sawhney* judgment and creamy layer and what not. Perhaps, his critique still holds that we have fundamentally made a mistake in which the category was defined. So, I am not so sure that through picking the right category we can resolve what is a fundamental flaw in this.

**A. [Anup Surendranath]** As regards the first question, it all comes down to "are the poor a group or is there a group characteristic to being poor?" I think that the basic structure challenge to the 103rd Constitutional Amendment Act would be that special measures are meant to be group-based. And there has been some bit of writing on this that the poor are also a group but the problem with the 103rd Constitutional Amendment Act is also in its implementation. By setting those kind of income limits, it destroys any possible group characteristic. And it is not an easy argument to make that the poor are a group. How do you look at poverty? Do you look at it as an individual experience or a common experience that ties people of a certain background? Regardless of how you define it and whatever metric that you use, are there common threads which create a class? And I think that would be the most difficult question.

**Q.** *I do think that the exclusion of SC/ST is just constitutionally sanctioned untouchability. But on the other aspect of the 103<sup>rd</sup> Amendment which is that it is essentially conferring special provisions, including reservations, on what might end up being individuals, I wanted to invite your comments on what would be a constitutional variant of this amendment look like, assuming that the exclusion of the SC/ST was off the table? If you were to enact the 103<sup>rd</sup> amendment constitutionally, what would it look like?*

## The Courts & The Constitution

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**A. [Alok Prasanna Kumar]** About how I would draft, I would ask why was it even a constitutional amendment. The short answer is perhaps because the *Indra Sawhney* ruling said that you cannot have reservations purely on an economic basis or only for somebody who is poor and therefore, you cannot help poor Brahmins, I would simply say that go ahead give scholarships, go ahead give free-ships, cover their fees, whatever. Why do you need a constitutional amendment? If you genuinely want to help someone who is temporarily down on their luck for whatever purpose, there are many other mechanisms that address their particular need rather than saying that we will try and offer a structural solution. This to me seems like, and it is been called, an upper caste reservations in a lot of circles. And it is hard to question that framing when you have the specific exclusions that you mention and the fact that it treats the persons from opposite ends of social spectrum the same just because numerically you can say family income is x, which is where I think I would start by questioning the need for such a constitutional amendment, though I would not disagree that perhaps somebody down on their luck will need assistance, perhaps in whatever circumstance, that you want to help.

Like one way this happens willingly is by compassionate appointment. Compassionate appointment is not unconstitutional. There are actual legal provisions which allow that irrespective of caste, family, creed and so on when a family loses a person in government service due to some unfortunate accident and so on, the law allows you to offer a job to a person in that family. It is something that you can offer to someone in that family provided they meet a certain few basic requirements in the nature of the job. There are measures in the law, may not be constitutional measures, but they are all constitutionally valid measures. So, I would suggest that if we need to address a group of people, I would not call them a class, who are down on their luck, there are enough measures to do so and even legally it is possible to do so. I just question the need for a constitutional amendment that says that this is exactly the way it should be.

**A. [Sudhir Krishnaswamy]** On a similar vein,<sup>2</sup> would it not be ironic if the 103<sup>rd</sup> Constitutional Amendment would be a Muslim-reservation quota? They are ostensibly not excluded. We know that their social demographics places them in the bottom third of population in most states. What if five years later we found that the most people who claim 10% EWS were Muslims? That would

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<sup>2</sup> [Ed Note] The response to this question continued from Dr. Krishnaswamy's response to the question in reference to *Chinnaiah* case which is a few questions below.



be ironic and interesting and if it were to happen, important. So I take the constitutional argument seriously except to say that we do not know how this is going to pan out. I think Alok was right, nobody did the groundwork before they passed the amendment. Now, we will have to implement and see what it shows up. But it would be ironic and welcome if it actually showed up like this. As such, it is not group-oriented but given that some groups are more disadvantaged than others, given a certain configuration, this might happen. How would we do it normatively? I do not think one would go down this path. JNU, the university that shall not be named, has a very complicated diversity formula and that does not use quotas. They have a system of weights and they ensure a certain kind of demographic distribution. So you do not need a quota. But it seems that this form, the quota form, has become the standard form of making political and constitutional demands, and we all work ourselves into it.

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***Q. To Anup Surendranath:** Do you think manifest arbitrariness is more attractive if tied better with equality as we saw in *Navtej Johar* and *Joseph Shine* as part of an assessment of purpose, as part of an assessment of classification? I do not know how it would look as a doctrinal matter necessarily but I just wanted to know what you think about it.*

***Q. To Anup Surendranath:** There was this case of [Javed v. State of Haryana](#) where the Haryana Panchayati Raj Act was challenged under Article 175 and Article 177 and the number of children the members could have was capped to two. And then came along the case of [Rajbala v. State of Haryana](#). Again, the verdict in this case was also based upon the same reasoning as the *Javed* case. This clearly is in violation of the fundamental right to reproductive choice of women. Do not you believe that there is manifest arbitrariness but the Court hailed the legislative wisdom of the State government and stood by their verdict?*

**A. [Anup Surendranath]** On the question of manifest arbitrariness and is it better if we tie it to the kind of equality jurisprudence in *Navtej*, let me combine it with the other question about *Javed* and *Rajbala*. I would think that what Jeevan Reddy J. said in *Mcdowell* is the way to overcome the older tests in terms of saying what the nature of the infringement is, what the extent of the infringement is and what the justification for that extent of infringement is. I would think that doctrinally, that is where it would lie. Can manifest arbitrariness be used to reach good outcomes

that we agree with? Sure. And that is where I would view its use in *Navtej* and *Joseph Shine*. But could it have been used to reach another outcome in *Rajbala* and *Javed*? Sure, it could have been used but problem is it necessarily does not ensure rigorous judicial review. It really depends on that individual judge. What meaning is given? What is the test? I do not think in and of itself manifest arbitrariness would have led to a better outcome in *Rajbala* and *Javed*.

*Q. So, my question is to any of the panellists, considering that equality – Article 14, itself has so many overarching doctrines which are kind of really vague and give a lot of power to the judiciary. Like, for example, manifest arbitrariness – Sikri J. comes and writes one thing and then Nariman J. comes and then he says “No no, I do not agree with this, so, I am the judge now, I will write a different interpretation and overrule that”. So considering all of these inconsistencies, even in the law and religion one [panel], the speakers pointed out so many inconsistencies in terms of what the SC is doing, according to you as advocates, policy thinkers and academicians, do you think it is time for judiciary to maybe focus on their judgments in a more textual approach in the interest of law and justice, in order to provide more of a streamlined approach to the law. And by textual I mean, focusing more on the interpretation of what the law itself says as opposed to all of these doctrines and judicial interpretations?*

**A. [Anup Surendranath]** And quickly to respond to your question on textual, the problem is that the text does not really guide you too much, you have to develop a doctrine. If the text is what it is in Art. 14, 15 and 16, you are going to need a doctrinal framework to say, what sort of questions do we need to ask and how we go about judicial review therein.

**A. [Alok Prasanna Kumar]** I just want to add one last point, the sentiment was that there are as many Supreme Courts as there are benches of Supreme Court. It is a structural problem but serious point being that if our Supreme Court is going to sit in a two-judge benches, keep going to change consistently and not discuss it, it fails the idea – the point of having more judges on a bench is not that four heads are better than three, or five are better than four, the idea is to have a certain kind of discussion and debate inter se among the judges, it is not to say that Nariman J. is superior or any other judge is necessarily inferior. The point is to say, can they discuss and find some common basis to be able to write a judgment where we can tell why this guy perhaps makes more sense and

why that person makes less sense, rather than having them have totally parallel conversations, with us being forced to try to figure out what do they mean, what does the Court mean as an institution as opposed to what this particular judge means as a judge.

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*Q. In reference to Chinnaiah Case, the case groups all SCs into a single homogenous bracket. But, for example, in Tamil Nadu there are host of communities within the SCs and there is a hierarchy within this group of communities and the communities placed higher corner all the benefits. When Karunanidhi brought in a law providing for sub-reservation, it was under challenge. So what is your take on Chinnaiah?*

**A. [Anup Surendranath]** I do not think sociologically SC/STs are a homogenous group, the law assumes them to be. But I do not think the answer to addressing the diversity within that group is the kind of thing that was tried in Andhra Pradesh or Punjab, i.e., to say that we will group sub-castes and give them 5%, 2% etc. I do not think that is the answer but neither is the creamy layer. Just because there are SCs who, on the basis of income or property, might be better off within the group, there is still a thread of social discrimination that runs through the group. So, while there is that internal discrimination, it cannot mean that the better off schedule caste have achieved equality with the rest of society. Should there be a prioritization within the group? Yes, surely, but it cannot be that a Dalit IAS officer is now considered similarly scheduled to upper-castes. That equalization is problematic. The conversation has to be how do we then prioritize distribution of benefits within the group, and a purely identity based thing does not seem to be working and a more inter-sectional approach might be the answer within the group.

**A. [Sudhir Krishnaswamy]** On the question of *Chinnaiah*, I think Anup has responded. I would just add that basic caste identification should only be the start of the way we administer reservation policy. We must add criterion in addition to that and those criterion need not be a further specification of caste identity. There could be other criterion as well, and that would lead you invariably to some form of an intersectional index. That is the only way to go- that we need some kind of cross-contained socio-economic criteria, maybe even religious because the big elephant in the room is to talk about what happens to religion-based reservation given our socio-economic demographics and a significant, now vocal, minority but otherwise hugely underrepresented

religious minority. So we must be willing to take the constitutional rubric as the starting point and the Court must have the maturity to recognize and understand that the executive government and the political branches are responding to legitimate political pressures when they try and spread the benefits of reservation. So, the sub-classification position in *Chinnaiah* is odd and there is good reason to revisit these questions.

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*[Sudhir Krishnaswamy] Please mention your bit about the law school domicile reservations as well.*

**A. [Anup Surendranath]** On domicile I think, it is an interesting conversation. If you look at judgments on it, most of it is on medical admissions and it is going to raise an interesting question of: *Can Delhi claim equal need for domicile based reservation as Telangana does?* Because a lot of conversation is about need for the State, in case of doctors there is a certain narrative about how maybe the region needs doctors. There are not enough doctors and hence the need for doctors within the State. The jurisprudence has been in that direction and now if you apply that to legal education, well!

I just think we need to be very careful about narratives that law schools build around questioning domicile question. There is a certain thread about this too much of a *merit* question. It might be important to look at the judgments and say, look at these terms on which they are justified and they are not applicable in terms of law schools instead of harping upon admissions must be purely meritorious and undo things we have achieved in other areas.

**A. [Alok Prasanna Kumar]** On the law schools bit, a small point I want to add. This is one of the things I have changed my point about. I do think law schools need to more firmly locate themselves in the community or the States they are located in. Maybe there is a case to be made, perhaps not for Delhi, but it is something that bothers me as someone who now lives in Bangalore, that there is a sense of alienation between certain institutions as they do not feature people who speak the same language, are from a very different socio-economic class than the people in the community around them. And I think that can cause a lot of problems going ahead. And given that the law is

something that is embedded within society and societal structures, I seriously think this is a move that done in the right way, in the right context, can prove to be beneficial for the law schools.

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**Q. [Sudhir Krishnaswamy] to Arundhati Katju:** *It might be useful for us, especially when it comes to provisions related to religion, to see who the bearer of the rights is. We have a carefully drafted Constitution that is quite different from almost any other Constitution of its time on the question of religion. And the Constitution uses groups very sparingly and maybe, it might be useful for us to start there in keeping separate what individuals have and what groups have. And the short answer to that is that groups have very little in the Constitution.*

**Q. To Arundhati Katju:** *The point which Sudhir brought up about Art. 25 and 26, I agree with him that jurisprudentially it is true that the freedom of religion is vested in individuals but the judgment in [SP Mittal](#) has vested it in groups. So, it is a religious denomination and Chinnappa Reddy J. dissented. I have long argued that he was right and it would have solved a lot of the future problems which are going to arise in the next 10 years I think if we go to that dissent.*

**A. [Arundhati Katju]** Sudhir, I take your point about the distinction between individual rights and group rights under the Constitution, I wonder on the bare reading of the text that distinction can actually be said to be drawn so tightly, looking at Articles 15 and 16, and also Articles 25 and 26, I think there is a certain degree of overlap there. I think that this kind of rigorous discussion on Constitution is really valuable. The stakes are really high at this point because again with CAA, you have the exclusion of groups from a claim to the most basic of individual right to rights, which is right to citizenship itself. So, I will take whatever arguments that I can claim to at this point.

**A. [Sudhir Krishnaswamy]** On the last point, and I am coming to Arundhati and the question that Suchindran asked about what the court has said. I think that the point of a panel like this is that we do not need to engage in hagiography of course. We can ask serious questions. And we must ask, and I take Arundhati's caution that we must work with what we have and we must understand what is at stake but paying that careful attention might actually unlock more potential. It might help us figure out some missteps that might have been taken in the 70s or the 80s and turn back the clock. So long as we have interested clients and willing lawyers, who knows? Maybe there will be responsive judges who would say that, look, you do not have so many religious group rights in this Constitution. That is not how the Constitution was written in 1950. So if you want to argue all these group rights, you will have to argue them somewhere else, maybe in the political sphere but

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there is no constitutional argument here because the Constitution is not interested in religious groups. It is interested in religious groups in a very minor way and stating that and restating that might be useful.

Thank you!