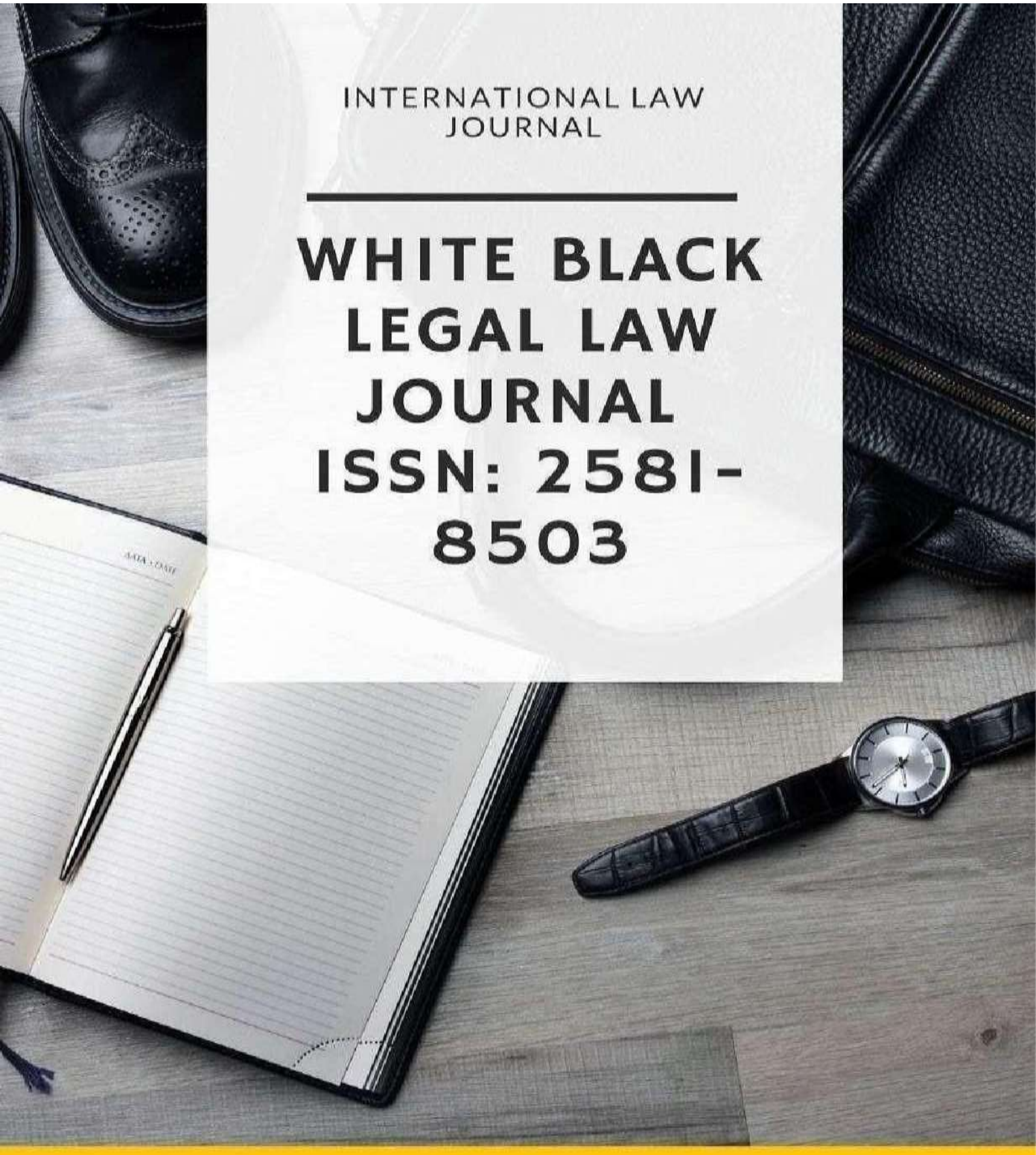

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

RESERVATION: A STEP TOWARDS SUBSTANTIVE EQUALITY

AUTHORED BY - UBAID AHMAD

Introduction

Affirmative action ―is not a conventional redistributive measure, in the sense that it does not lead to a redistribution of wealth or assets in the same way that, say a policy of land reforms, would achieve. It simply alters the composition of elite position in the society‖.[1] It is not meant to be an anti poverty measure, nor an employment generation measure. The object behind Affirmative Action is that ―given systematic and multifaceted discrimination against certain groups , the normal process of development might not automatically close the gaps between the marginalised and dominant groups because dominant groups will disproportionately corner the fruits of development‖.46 Thus Affirmative Action includes policies and programmes for reducing the problems of the ―historically and socially deprived sections of society‖. Through these programmes, the access of these sections to education or employment are promoted. Affirmative Action programmes aim to ―redress the effects of past and current discrimination, which are regarded as unfair‖. Affirmative action can also be defined as "public or private actions or programs, which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups.[2]" ―According to Professor David Benjamin Oppenheimer, the practice of affirmative action is comprised of five methods: quotas, preferences, self-studies, outreach and counselling, and anti-discrimination‖.[3] Professor Oppenheimer ―classifies these methods under hard and soft affirmative action, with the former consisting of quotas and preferences and the latter encompassing various outreach programmes, self-evaluations, marketing, and labour market developments‖.

Affirmative Action Programmes in India can be classified into : ―the different kinds of Reservations

[1] Supra note 1 at 9 46 ibid.

[2] A. P. Singh, ―Affirmative Action Programme in India: The Road Ahead‖, 1 J. INDIAN L. & Soc'y 153 (2009).

[3] Jed Rubenfeld, ―Affirmative Action‖, 107 Yale L.J. 427 (1997).

prevalent allot or facilitate access to valued positions or resources, such as reservations in legislatures, reservations in government services and reservations in educational institutions‖.

Secondly, there are protective measures like ―land allotment schemes, housing schemes, scholarships, grants, loans, health care‖. The third type of measures is ―specific kinds of action plans to remove untouchability, prohibition of forced labour‖. According to Professor David Benjamin Oppenheimer, the first type would be a ―hard affirmative action‖. The second and third types would be examples of ―soft affirmative action‖. 49 In India , reservations are the most discussed and sought after affirmative action. In this chapter the theoretical foundations and nature of reservation as a facet of Equality under the Constitution would be analysed.

3.2 Affirmative Action : Theoretical Foundations

Theoretical Foundations for Affirmative Action programme can be provided in the Principles Of Distributive Justice. In Nicomachean Ethics, Aristotle believes that ―goods should be distributed to individuals based on their relative claims‖. Principles of distributive justice are ―normative principles designed to guide the allocation of the benefits and burdens of economic activity‖.50 The principles of distributive justice place forward the idea of substantive equality rather than formal equality. The Rawlsian theories of Justice and Equality have been used to legitimise various forms of affirmative action. Justice Reddy in Akhil Bharatiya Soshit Karamchari Sangh (railway) vs.Union of India and ors51. quoted with approval the application of Rawls theory of justice to the Indian affirmative action.According to J.Reddy, ―John Rawls in A Theory of Justice demands the priority of equality in a distributive sense and the setting up of the Social System so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return. His basic principle of social justice is All social primary goods-liberty and opportunity, income and wealth, and the bases of self-respect-are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured. One of the essential elements of his conception of social justice is what he calls the principle of redress: This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that Equality of opportunity must yield Equality of Results' and if the fulfillment of Articles 16(1) in Art. 16(4) ever needed a

philosophical foundation it is furnished by Rawls' Theory of Justice and the Redress Principle.‖

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49 Supra note 47 at 155.

50 Distributive Justice available at https://plato.stanford.edu/entries/justice-distributive/ (last visited on June 13, 2021) 51 AIR 1981 SC 29

The conception of justice for which Rawls argues demands52 :

◆ ―The maximisation of liberty, subject only to such constraints that are essential for the protection of liberty itself"

◆ ―Equality for all, both in the basic liberties of social life and also in the distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality"

◆ ― fair equality of opportunity and the elimination of all inequalities of opportunity based on wealth or birth‖.

Rawl has developed his theory in contrast to the utilitarians. Utilitarians accept inequalities and limitations on liberty and restrictions on political rights, provided such arrangement would promote greater well being. Rawl‘s greatest criticism of utilitarianism was that by focusing on the greater social good, utilitarians failed to consider the needs of individuals and distinctions between persons or groups of persons. However, Rawls considers the differences of individuals and believes ―that a just society will not subject the rights of an individual to the calculus of social interests.‖53

The second and third principles of Rawl‘s advocate that ―it is not sufficient that positions are left open to all but they must be arranged in such a manner that all are afforded an equal opportunity to attain them‖. Thus his idea of fair equality of opportunity ―falls between the extremes of formal equality and equality of result‖.54 Rawls, while acknowledging the need for substantive equality, does not neglect the role of merit in attaining positions. The model of Equality of opportunity that rawls presents considers "the initial social and cultural handicaps of an individual‖. Rawls ground his theory in the fact that ― the arbitrariness of birth and the problem of natural lottery take away the

chance of individuals to have an equal start in life‖.55 The primary goal of Rawls Equality principles ―is to negate the social and cultural disadvantages that a person is under by virtues of being born into a particular social stratum and provide all with an equal start so that a person‘s social standing is not a hindrance in reaching the open posts and positions‖56.

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52 Michael Freeman, Lloyd‘s Introduction to Jurisprudence 481 (Sweet and Maxwell. South Asia, 9th Edition, 2021)

53 Sameer Pandit, ―Marginalisation and Reservation in India: An Analysis in the Light of Rawlsian Theories of Justice and Equality‖, 1 Socio-LEGAL REV. 42 (2005).

54 ibid. at 43 55 ibid at 44

56 ibid

In furtherance of fair equality of opportunity, he develops the difference principle, which does not seek to eliminate inequalities completely but only rearranges them to benefit the least advantaged classes. The Difference principle is based on the assumption that a person is not the sole proprietor of the natural advantages that he is vested with. He is merely the guardian of these abilities and capacities. Rawls consider these as common societal assets.[4] The difference principle justifies reservations by showing that in the absence of reservations justice and fairness will not be met. Reservations arrange the inequalities in a way that benefits the least advantaged. The lower classes that have been marginalised due to historical discrimination are given preferential treatment in order to create a level playing field. ―Justifications for affirmative action lie in the need either to remove the grossly unjust inequalities in the system or to raise particular sections of the society to the level of human existence and to assure them the dignity due to them‖.

Rawls idea of equality is no different from the equality of opportunity that the constitutional framers believed in. Hence, what the concept of reservation does is it recognises the initial social and educational handicaps that affect a certain category of persons and which causes them to occupy a disadvantageous position in society and moves away from the standard procedure of meritocratic selection as demanded by formal equality in order to ensure substantive equality.

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[4] Supra note 53 at 46

3.3 Affirmative Action : Constitutional Foundations

Article 14 to 18 of the Constitution guarantees the right to equality to every citizen. In India‘s Socio-Political system, Equality has been given an important position. The perceived inequalities which India has inherited from its past, especially the caste system, prompted the draftsmen to accord principles of Equality a vital position in the Constitution. Inequality refers to the conditions created by a few privileged people who influenced the government and used their position of dominance for their purpose.[5] Equality advocates the abolition of all kinds of special privileges.

Article 14 encompasses ―Equality before the law and equal protection of laws‖. While the former ensures equal status to everybody and ensures equality in law the latter concept aims to achieve substantive Equality or Equality in Fact by classifying the advantaged and disadvantaged and providing the disadvantaged ones with Affirmative Action Programmes. ―It was the realisation that mere provision of formal Equality would not be sufficient to bring about desired Equality of status and opportunity that led to adopting these provisions‖. Thus, a Full Bench Of Kerala High Court observed : "It has however been realised that in a country like India where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees will be meaningless unless provision is also made for the upliftment of such backward classes who are in no position to compete with the more advanced classes. Thus to give meaning and content to the Equality guaranteed by Articles 14, 13, 16 and 29, provision has been made in Articles 15(4) and 16(4) enabling preferential treatment in favour of the weaker sections‖[6]. The Indian Constitution, by providing reverse or positive discrimination in favour of members of the SC and ST, whereby they could be provided with special treatment in various sectors of the socio-economic and political life of the country, has also ensured substantive along with Formal Equality.The State's general duty to promote "Equality in fact" is articulated in Article 46, a Directive Principle of State Policy. Article 46 provides that ―The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation‖.

[5] Supra note 47 at 152
[6] Hariharan Pillai V. State Of Kerala, AIR 1968 Ker 47

Article 15 (1) confers a fundamental right on every citizen by commanding the state ―not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them‖. If actions of the state are violative of Art. 15 (1), the same will be void under Article 13. The Constitution under Articles 32 and 226 provides a remedy for the citizens if their fundamental rights are violated. Article 15 (2) is directed not only against the state but also to any person, and it provides that "no citizen only on the grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability , restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public‖. Clause (3) enables the state to confer special rights upon women and Children. The constitution 73rd Amendment Act 1992 and the constitution 74th Amendment Act 1992, added articles 243-d and 243-t to the constitution, making provisions ―for reservation of not less than one third of the total seats for women in the constitution of the Panchayats and the Municipalities respectively‖.

The Scope of the government to make special provision for the backward class was soon put to the test in State Of Madras V. Champakam Dorairajan[7]. The Communal G.O, which reserved seats in professional colleges, was struck down by the Supreme Court as violative of Article 29(2) and Art. 15(1). The Court did not accept the argument that ―the directive principle of Art.46 by its own force established a principle of preference that might lawfully be embodied in legislation‖. The Court also observed that an exception to Art. 16 (1) in the form of Art.16(4) was missing in the case of Art. 29(2).The Court observed, ― Seeing, however, that clause (4) was inserted in article 16 the omission of such an express provision from article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds.‖ The Government reaction to the Supreme Court's Judgement that the government had no power to reserve seats for backward communities in educational institutions was the First Amendment to the Constitution. The First Amendment Act of 1951 inserted Art. 15 (4) into the Constitution, which provided that :(4) "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes

[7] AIR 1951 SC 226

of citizens or for the Scheduled Castes and the Scheduled Tribes". Thus, the first amendment was brought in to bring Articles 15 and 29 in line with Art. 16 (4). The Constituent Assembly had rejected the inclusion of an article similar to that of Art. 15 (4) in the Constitution. Thus the same assembly, but in a different role as the Provisional Parliament, passed the amendment because it was needed to empower the state to carry out the Directive Principles of State Policy and also as a facet of Substantive Equality.

The Parliament introduced Article 15(5) by The Constitution **(Ninety-Third Amendment) Act, 2005.** iIt states that ―Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially & educationally backward classes of citizens or for the scheduled castes or the scheduled tribes in so far as such special provision relates to their admission to educational institutions including private educational institutions other than the minority educational institutions referred to in Art. 30 (1)". The amendment was in response to the Supreme Court's explanation in P.A. Inamdar V. State of Maharashtra,[8] of the ratio in T.M.A Pai Foundation V. State of Karnataka[9] that ―imposition of reservations on the non-minority aided educational institutions, covered by sub-clause (g) of clause (1) of Art. 19, to be unreasonable restrictions and not covered by Art. 19(6)‖.

Article 16 (1) and 16 (2) confers a fundamental right on citizens, namely ―equality of opportunity in matters of public employment and the further right not to be discriminated against on the ground, among other things of caste and religion".However, along with this facet of equality that prohibits discrimination, the Constitution also directs the government ―to undertake special measures to advance the Backward Groups‖. Article 16 (4) confers no fundamental right but confers a discretionary power on the State to make the reservation of posts or appointments in the service of the State for backward classes.Also, Article 29(2) prohibits discrimination in state-run and State-aided educational institutions, Article 23(2) prohibits discrimination with regard to compulsory public service and Article 325 regarding electoral rolls. Untouchability is prohibited under Art 17.

Article 15 and 16 are facets of Article 14 which provides that ―the state shall not deny to any person

[8] (2005) 6 SCC 537

[9] AIR 2003 SC 355

equality before the law or the equal protection of the laws‖. However the statement that article 15 and 16 are facets of art 14 cannot be taken to mean that in every country where the state is constitutionally supposed to provide equal protection of laws, must carry with it the equality of opportunity of public employment also. For eg as in the case of U.S Constitution, the 14th amendment provides for equal protection of laws but there exists no equality of opportunity in matters of public employment. **3.3.1 Reservations : Scope**

Article 15(3) enacts that ―nothing in Art.15 shall prevent the state from making any special provision for women and children‖.Originally the Constitution specifically provided for preferential treatment only in the fields of Government employment and legislative representation. Article 16 prohibits discrimination in government employment, but Art 16 (4) permits ―the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State‖. In addition, Article 335 provides that: "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or a State‖. Article 16 (4) is explicitly confined to government employment while Article 15 (4) applies in all the dealings of the State. In General manager V. Rangachari[10], the Supreme Court held that Article 16(4) covers promotion within service also. The word "posts" in Art. 16(4) was construed to mean both initial appointments as well as promotions. However, at the same time indicated that preferential treatment under Art. 16 (4) does not extend to salary, increment, pension, retirement age and the same is protected by the Doctrine of Equality. In Rangachari, the dissenting judges opined that ―reservation was limited to securing adequacy of quantitative representation of the favoured group. At the same time, the majority held that reservation could legitimately be used to secure representation in posts of higher grades. Thus, in establishing preferences in government service, the state can aim at placing the members of the privileged groups in positions of authority‖.[11]

In Balaji V. State Of Mysore[12], the Court emphasised that ―the public interest in the efficiency of

[10] AIR 1962 SC 36 at 42

[11] Supra note 3 at 370

[12] AIR 1963 SC 649

government services set limits to reservation in promotions‖. Thus any ―unreasonable, excessive or extravagant reservation‖ would be out of the purview of Art. 16 (4). Thus the Supreme Court emphatically stated in Balaji that the Courts would carefully scrutinise the reasonableness of reservations. Following the Judgement in Balaji, in Devadasan V. Union Of India[13], the Court invalidated the reservation because of its unreasonable extent. In Rangachari, the Supreme Court had held that ―Art.16 (4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts‖. In Indra Sawhney V. Union Of India[14], Rangachari was overruled and held that ―Art. 16(4) was confined to initial appointments only and it did not warrant reservations in the matter of promotion as such‖. However, Clause (4A) has been added to Art. 16 by the 77th Constitutional Amendment thus "permitting reservation in promotion to Scheduled Castes and Scheduled Tribes‖. Article 16 (4B) inserted by the 81st Constitution Amendment envisages that ―the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year‖.

In Govt. of A.P V. P.B. Vijayakumar68, the court gave a nuance to article 15(3) by holding that ―reservation for women in state employment was also permissible under that provision notwithstanding separate provision in this regard under Article 16‖. The Court held that widest possible interpretation should be given to Article 15 (3) so as to even cover reservation in jobs subject to the fifty percent rule. The Court opined that both article 15(3) and 16(4) are aimed at achieving equality in society and both should interpreted harmoniously.

Article 15(4) has a wider scope and ―extends to all areas of government activity that are not covered by a more specific provision‖. The expression "making any special provision" is evidently open-ended in nature. The government under this provision can provide a wide range of facilities for promoting the interests of socially and educationally backward classes. Unlike 16 (4), 15 (4) does not limit the state action of preference to reservations alone. Along with reservations, the government can employ ―fee concessions, scholarships, special facilities (housing, medical), waiver of age requirements, special coaching, scholarships, grants, and loans‖. In Chaitram V.
Sikander[69], the Court held that ―the scope of protection authorised is not restricted by the qualifiers

[13] AIR 1964 SC 179

[14] AIR 1993 SC 477

socially and educationally which describe the classes who may be benefited but may extend to protection from economic exploitation‖.

The Constitution specifically provides for reserved seats in lower houses of parliament70 and state legislature71 for Scheduled Castes and Tribes. Seats are reserved for Scheduled Castes and Tribes in proportion to their population, and the electorate would be a joint one. The Constituent Assembly members were conscious of the harm separate electorates could cause, thus making it extralegal72. All the other provisions for preferences in the Constitution are merely authorisations that empower the State to make special provisions for the backward classes. Thus legislative reservations are only reservations that are enacted explicitly by the Constitution and the only type of reservation for which a Constitutional time limit was prescribed. Although initially, these reservations were provided for only ten years from the commencement of the Constitution under Article 334, the reservation has been further extended for 10 years periodically. Although no reservations were

68 (1995) 4 SCC 520 69 AIR 1968 Pat. 337 70 The Constitution Of India, art. 330 71 The Constitution Of India, art. 332

72 The Constitution Of India, art. 325

provided for OBC's in the legislative bodies, article 15 (4) could be construed to bring within its scope reserved seats for OBC's in political bodies at the local level.

3.3.2 Reservations and Merit

In Formal Equality, Equality is ―visualized as identical opportunities to compete for the existing values among those differently endowed, regardless of structural determinants of the chances of success or of the consequences for the distribution of values.‖[15] In formal equality, the differences in intelligence and background training are considered irrelevant for distributional decisions. It insists on uniform standard of competition for selection. On the other hand substantive equality takes into consideration the differences in intelligence, etc for the purposes of resource distribution.

[15] Supra note 3 at 379

Any civilised country should have an ideal balance between substantive and Formal Equality.

In Balaji V. State Of Mysore[16] the supreme court gave preference to merit principle. The Court held that ―the need for technical, scientific, and academic personnel was so great that it would cause grave prejudice to national interest if considerations of merit are completely excluded by wholesale reservation seats in all technical, medical or engineering colleges.‖[17] Justice V.R. Krishna Iyer succinctly stated the concept of formal equality as : ― If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference in admission. Merit must be the test when choosing the best according to the rule of equal chance for equal marks. To devalue merit at the summit is to temporise with country‘s development in the vital areas of profession expertise‖.[18] In State of Kerala V. N.M Thomas, Justice Krishna Iyer recognised that ―efficiency and national interest will suffer if Scheduled Castes and Scheduled Tribes are selected through reserved quota for higher posts‖.[19] But while defending the employment preferences for Scheduled Castes and tribes, he observed that ―by selecting pen-pushing clerks efficiency in administration would not be so much undermined as by selecting them as a space scientist or top administrator, thereby maintaining the need for the merit principle in selecting candidates for highly specified careers‖. In K.C Vasanth Kumar V. State Of Karnataka,[20] Justice A.P Sen also noted the difficulty in ―deviating from merit principle‖ while making selection for higher level profession and services : ―Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.‖[21]

[16] AIR 1963 SC 649

[17] Id. at 662

[18] Jagdish Saran V. Union Of India, (1980) 2 SCC 768

[19] (1976) 2 SCC 310, 527

[20] (1985) Supp.SCC.714,722

[21] Parmanand Singh, Tension Between Equality and Affirmative Action: An Overview, 1 J. Jindal Global Law Review 100

In Indira Sawhney V. Union Of India , the Supreme Court held that ―reservations should be excluded in higher echelon posts. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they are obtained, merit ……., alone counts. In such situations. It may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable. Reservations in theses kinds of jobs are seen as inconsistent with values of efficiency that are needed for professions and services‖[22].In Preeti Sreevastava V. State Of Madhya Pradesh[2324] the supreme court ruled that ―there could not be any reservations at the level of super specialities in medicine because any dilution of merit would adversely affect national interest. The element of public interest in having the most meritorious students is also present at the post graduate level in medical specialties and super-specialities‖.

The Supreme Court in the case of Ashok Kumar Thakur v. Union of India,82 had once again stated that "once a candidate graduates from a university, he is said to be educationally forward and is ineligible for special benefits under article15(5) of the Constitution for post-graduate and any further studies thereafter. This is for the purpose of balancing requirements of Articles 15, 16 on the one hand and Article 335 on other‖.

In the a friend of the court brief submitted by Harvard college in the Bakke case, it defended affirmative action on educational grounds. It stated that ―grades and test scores had never been the only standard of admission‖. ―If scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual existence… The quality of the

[22] Id. at 101

[23] (1999) 7 SCC 120

[24] (6) SCC 1

educational experience offered to all students would suffer.In the past, diversity had meant students from California, New york, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stock brokers, academics and politicians. Now, the college also cared about racial and ethnic diversity‖.[25]

According to Galanter, ―compensatory schemes involve enlargement of the basis of selection to include other criteria along with productivity…such as representation, integration….. This enlargement is justified on the ground that without it the society would be deprived of the various benefits thought to flow from the enhanced participation of specified groups in key sectors of social life.‖[84] The concept of merit can be enlarged and can be viewed as ―a system of perceived social need. Where there is a social need for rapid and substantial integration and representation of certain specific identified disadvantaged groups in the mainstream of national life, membership of such groups can itself be a part of one's own merit. Merit here is understood as a criterion to achieve some pre-determined social objective or value or to satisfy certain perceived social need.‖[26]

On analysing the decisions from Balaji to Indra Sawhney, we can conclude that Indian Courts have succeeded in balancing formal and substantive equality. Through out the decisions the courts have stressed the importance of merit, especially in technical posts and higher education. The Courts have accepted the fact that there can be no compromise of merit in certain jobs or occupations , because of the peculiar character of activity. At the same time, we have to reconcile the differences people possess in terms of education or other capabilities for reasons beyond their control or for reasons which was forced upon them. Thus excluding certain posts listed by the supreme court, it is important to offer a helping hand to the deserving people. In the field of education also, ensuring representation of people from all walks of life would increase the diversity and promote holistic learning.

3.3.3. Quantum of Reservation

The extent of reservations has always been a controversial issue. The Constitution is silent on the extent of reservations. However taking aid from the speech of BR Ambedkar in Constituent assembly and interpretation of provisions providing for preferential treatment as guaranteeing substantive

[25] Michael J Sandel , Justice , What's the Right Thing To Do ? 172 (Penguin Books , Great Britain,1st Edition, 2009)
84 Supra note 3
[26] Supra note 35 at 102.

equality the courts have concluded that it should remain to a minority of seats. In M.R Balaji, the court held that a ―A special provision contemplated by Art.15(4) like reservation of posts and appointments contemplated by Art.16(4) must be within reasonable limits. The interests of weaker sections of society which are, a first charge on the states and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art.15(4) .In this matter again we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case‖.Thus the court by capping the reservations at fifty percent laid the rule that reservation should always be available only to a minority of seats. If we examine the above extract of judgment we could see that the court by laying down the fifty percent rule has balanced Formal and substantive Equality.

In Devadasan, the court examined the validity of a rule of central government which actually reserved only 17.5 percent posts in the central services for the SC and STs but provided for carrying forward of their unfilled quota to the next two succeeding years, if suitable candidates were not available. The court following the decision of Balaji invalidated the rule because 17.5 percent in three years would come close to 54 percent. Both Balaji and Devadasan was decided by the courts construing Article 15(4) and Article 16(4) as exceptions to Article 15(1) and Article 16(1). As we will see later in this chapter this interpretation was discarded in the NM thomas case.

In Indra sawhney, the court held that ―barring extra ordinary situations, reservation should not exceed 50 percent. The Court observed that Article 16(4) speaks of adequate representation and not proportional representation. The fifty percent limit applies to all reservations including those which can be made under article 16(1)‖. While in Devadasan and Balaji the court arrived at the 50 percent limit by interpreting article 15(4) and Art. 16(4) as exceptions, in mandal case the court relied on ―balancing of interests under these two provisions and on the reasonable exercise of power under Art.16(4)‖.

In Jaishri Laxmanrao Patil V. The Chief Minister[27] the court held that ―the 50 percent rule spoken in Balaji and affirmed in Indra Sawhney is to fulfil the objective of equality as engrafted in Article 14 of which Articles 15 and 16 are facets. 50 percent is reasonable and it is to attain the object of equality. To change the 50 percent limit is to have a society which is not founded on equality but based on caste rule‖.

3.3.4 Reservations: Exceptional Nature

Till the decision of Supreme Court in State Of Kerala V. NM Thomas[28], Art. 15 (4) was construed as an exception to Art. 15 (1) with the consequence that the permissible limit of reservations could not exceed 50 per cent. In Balaji, the Supreme Court held that the exceptional character of compensatory discrimination "has to be read as a proviso or an exception to article 15(1) and 29(2) … as was evident from its history‖.[29] In Devadasan V. Union Of India, the Supreme court held that ―article 16 (4) is by way of a proviso or an exception to Art. 16 (1) and cannot be so interpreted to nullify or destroy the main provision‖. ―Thus its overriding effect is only to permit a reasonable number of reservations… in certain circumstances‖.[30] However, in his dissenting opinion, Justice Subba Rao opined that ―Art. 16 (4) has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article‖[31]. In C.A Rajendran V. Union Of India, the Supreme Court held that ―Art. 16(4) imposed no duty on the government to make reservations for these classes, but that Article 16(4) is an enabling provision and confers a discretionary power on the state to make a reservation.‖[32]. Galanter observes that ―although the particular means are discretionary, the object is not, the Constitution explicitly declares it is the duty of the state to promote the interests of the weaker sections and to protect them‖. He notes that ―if these provisions are exceptions, they are exceptions of a peculiar sort. They do not merely carve out an area in which the general principle of Equality is inapplicable. Instead, they are specifically designed to implement and fulfil the general principle.What these clauses do is to insure state power to pursue substantive

[27] 2021(3) KLT 465 (SC)

[28] (1976) 2 SCC 310

[29] AIR. 1963 SC 649

[30] AIR. 1964 SC 179

[31] Id. at 190

[32] AIR. 1968 SC 513

Equality vis a vis certain historical formations in Indian society‖. [33]

Article 15(4) was considered to be exception to Article 15(1) because as H.M Seervai argues ―if Art. 15(1) stood alone, no discrimination could be made in favour of Scheduled Castes because discrimination on the ground of caste is prohibited by Art. 15 (1). Therefore Art. 15 (4) takes out the discrimination favouring Scheduled castes from the prohibition against discrimination on the ground of caste or religion‖.[34][35] Subordination of ―Art.15(4) to Art.15(1) is further strengthened by the fact that Art. 15(1) confers a legally enforceable fundamental right while Art.15(4) confers no right at all‖.According to Seervai, a sub-article conferring a fundamental right is definitely on a higher plane than a ―sub-article which confers no right but merely confers a discretionary power‖ on the state.

The existing approaches of the Supreme Court as to how the ―competing commitments of formal equality and compensatory discrimination are to be combined‖ was reconsidered by Supreme Court in State Of Kerala V. NM Thomas.94 In NM Thomas, the LD clerks of the reg. dept were allowed to be promoted to UD clerks on a seniority cum merit basis. Tests were also mandated for the same and the candidate had to pass the test within 2 years. Relaxation of a further period of two years was given to Scheduled caste clerks. However, many Scheduled Caste Clerks had not satisfied the test qualification within the extended period. Thus the government promulgated in 1972 a new rule 13AA, ―giving the Scheduled Caste and Scheduled Tribes clerks a temporary exemption from passing tests for a specified period‖. Thus in 1972, ―of 51 vacancies in the category of UD clerks, 34 were filled by SCs who had not passed the tests, and only 17 were filled by persons who had passed tests‖. In the WP filed by N.M Thomas, a LD Clerk who passed the test but was not promoted due to the extensions provided by Rule 13AA, the division bench of Kerala High Court concluded that ―What has been done is not to reserve and what has been exempted by Rule 13AA is beyond the scope of Art. 16(4).‖ On Appeal, the Supreme Court, by a 5:2 Majority, reversed the Judgment.

The outline of Classification argument can be deciphered from the opinion of Chief Justice Ray.

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[33] Supra Note 3 at 377

[34] HM Seervai, Constitutional Law Of India 557 (Law and Justice Publishing Co., New Delhi, Fourth Edition, Reprint 2021)

[35] (2) SCC 310

According to CJ. Ray ―providing equal opportunity in government employment is a legitimate objective‖. Also article 46 and 335 creates a positive obligation on the state.[36] Thus ―classification of employees belonging to these groups to afford them an extended period to pass tests for promotion is a just and reasonable classification having rational rational nexus to the object of promoting equal opportunity relating to public employment. The difference in condition of these groups justifies differential treatment , just as rational classification is permissible under the general equal protection provision of Art. 14 . So it is permissible to treat unequals unequally under Art.16‖.

Justice Beg although among the majority did not participate in the reconceptualisation. According to Justice Beg, ―the guarantee contained in Art. 16(1) is not by itself aimed at removal of social backwardness due to socio-economic and educational disparities produced by past history of social oppression, exploitation, or degradation of a class of persons. Instead it was in fact intended to protect the claims of merit and efficiency… against incursions of extraneous considerations.‖ ―And efficiency tests, in turn, bring out and measure… existing inequalities in competency and capacity or potentialities so as to provide a fair and rational basis for justifiable discrimination between candidates‖. ―Thus provisions for equality of opportunity are meant to ensure fair competition in securing government jobs; they are not directed to removal of causes for unequal performances‖. ―But such provisions do not stand alone: they are juxtaposed with Articles 46 and 335, which imply preferential treatment for the backward classes to mitigate the rigour of equality in the same sense of strict application of uniform tests of competence‖. ―Article 16(4) was designed to reconcile the conflicting pulls of Article 16(1), representing justice conceived of as equality and of Articles 46 and 335, embodying the duties of the state to promote the interest of the economically, educationally and socially backward, so as to release them from the clutches of social injustice.‖

Thus ―Article 16(4) maybe thought to exhaust all exceptions made in favour of backward classes‖. These rules may be viewed as ―implementation of a policy of qualified or partial or conditional reservations which could be justified under 16(4).‖[37]

Dismissing the interpretation of ―Art.16(4) as an exception to Article 16(1), Justice Mathew

[36] Supra note 3 at 383.

[37] Supra note 3 at 384.

articulates the view of equality that implies the doctrinal shift‖. According to Justice Mathew ―The equality of opportunity guaranteed by the Constitution is not only formal equality with fair competition, but equality of result. In order to assure the disadvantaged their due share of representation in public services the constitutional equality of opportunity was fashioned wide enough to include… compensatory measures.‖ ―Thus the guarantee of equality implies differential treatment of persons who are unequal. Article 16(1) is only a part of a comprehensive scheme to ensure equality in all spheres.‖[38] ―If Equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz , even upto the point of making reservation .‖ Thus ―the state can adopt any measure for ensuring adequate representation of Scheduled Caste and Tribes members in public service and justify it as a compensatory measure to ensure equality of opportunity provided it does not dispense with minimum basic qualification which is necessary for efficiency of administration‖.

Justice Krishna Iyer, opined that ―Constitution should be interpreted by a spacious, social science approach, not by pedantic, traditional legalism,‖ Justice Krishna Iyer advocated the need to have a ―general doctrine of backward classification to pursue real and not formal equality. According to the Doctrine of backward classification, the state may, for the purposes of securing genuine equality of opportunity , treat unequals equally . Thus Article 16(4) serves not as an exception but as an emphatic statement. So in addition to reservation under 16(4) the state may confer lesser order advantage on the principle of classification under Article 16(1)‖ .[39]

Although according to Justice Mathew , the compensatory measures might be extended to ―all members of the backward classes‖. However, According to Justice Krishna Iyer ―the lesser degree advantages conferred under 16(1) under the doctrine of classification should be confined to Scheduled Castes and Scheduled tribes alone‖ . ―Article 16(4) covers all backward classes, but to earn the benefit of grouping under 16(1) based on Article 46 and 335 the twin considerations of terrible backwardness of the type harijans have to endure and maintenance of administrative efficiency must be satisfied. Not all caste backwardness is recognised as a basis for differential treatment under

[38] Ibid at 385

[39] ibid

Article 16(1). The differentia ..is the dismal social milieu of harijans… The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search.. .. we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes….No Class other than harijans can jump the gauntlet of equal oppurtunity guarantee. Their only hope is in Article 16(4).‖

We can decipher from four of the majority judgements that Article 16(1) provides for a general authorisation to ―adopt reasonable classifications for purposes of securing equality of opportunity . But it is conceded that this does not include a power to employ those classifications specifically prohibited under 16(2) . Thus the implication of the 4 opinions is that Scheduled Castes and Tribes do not constitute a classification on the basis of caste‖. [40]

This view of Thomas case was treated by the majority as the ―correct one by Chief Justice Kania and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ in Indra Sawhney V. Union of India‖. The Court observed ―That article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons equally. Not doing so, would perpetuate and accentuate inequality. Article 16 (4) is an instance of such classification, put in to place the matter beyond controversy. The backward Class of Citizens is classified as a separate category deserving a special treatment in the nature of reservation of appointments / posts in the services of state. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1)‖ .

The reconceptualisation of the constitutional foundation of preferential treatment, as contained in Article 16(1) seems to have complicated the subject. The position before NM Thomas that Article 16(1) provides for formal equality and 16(4) is an exception and provides for substantial equality was theoretically simple. Following this theory we could also legitimise the capping of reservations at 50 percent.But Justice Mathew‘s opinion that formal equality and substantial equality both are contained in article 16(1) itself and the resultant equality provides for preferential treatment might have far reaching consequences. But on the other hand, The concept that preferential treatment is based on

[40] Supra note 3 at 387

reasonable classification under 16(1) could be interpreted to make the reservation process more stringent because the legislature while identifying the beneficiaries of reservation would be forced to identify a class and a reasonable object and nexus to that classification which the reservation tries to remedy but practically.But at the end of the day Dr Ambedkar‘s take on Art. 16(4) is relevant : ―call it what one will - an exception or proviso or what - and semantics apart, reservation by reason of its exclusion of the generality of candidates competing solely on merits must be narrowly tailored and strictly construed so as to be consistent with the fundamental constitutional objectives. Clause (4), seen in whatever colour, is a very powerful and potent weapon which causes lasting ill effects and damage unless justly and appropriately used." [41]

3.4. Conclusion

In this Chapter, the nature and basis of reservations were discussed. Reservations are justified on the premise that all persons in society are distinct, and some are situated in the least disadvantageous position that some positive measures are required to guarantee a level playing field in matters among others of education and employment. The said idea is contained in the principles of distributive Justice and the Constitution's equality principles. However, these principles fail to mention the criteria used to identify the least advantageous category. The Rawls theories of Justice justify the reservations as a measure that is beneficial to the most disadvantageous category of people.Till the N. M Thomas decision, ―Art. 16 (4) was considered as an exception to Article 16(1)‖. The same implied that reservations are an extraordinary measure, and they can be used only to correct the injustice caused due to historical discrimination. In N.M Thomas, it was declared that ―Art. 16 (4) was not an exception to Art. 16 (1)‖ and privileges can be granted even under Art. 16 (1) under the doctrine of classification, the writer is apprehensive whether economic criteria would form a rational basis for classification.

[41] VII, Constituent Assembly Debates, 712.