
Aditya Singh & Vipashyana Hilsayan, *Sealing the 50% Ceiling: Assessing the Foundations of the Numerical Upper Limit in Reservations*, 9(1) NLUJ L. REV. 69 (2022).

**SEALING THE 50% CEILING: ASSESSING THE
FOUNDATIONS OF THE NUMERICAL UPPER LIMIT IN
RESERVATIONS**

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ABSTRACT

There exists reservations regarding reservation policies. They have historically been regarded as a charity that stands in conflict with the ideals of equality and merit. The discourse surrounding the two ideals was rekindled in the recent judicial pronouncements on the reservations for the Maratha Community in 2021, underlining the equality debate and further in light of the merit issue in National Eligibility cum Entrance Test's ["NEET"] examinations case in 2022. These two judgments have crafted a meaningful locus for reservations in contemporary India. In this jurisprudential context, the 50% reservation ceiling is observed as a right move towards curbing the extent of reservation. However, in actuality, it is more detrimental. The first part of the article sets the background of how the concept of affirmative action came into existence and its implications while briefly delving into the contemporary legal issues presented by the two judgments. The second part describes the origin of the ceiling and argues

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that it is judicial creation and constituent assembly did not set any numerical cap. The authors argue that an objective cap on reservation is an inadequate answer to a subjective problem. The last part of the article debunks the myth that reservation affects merit and efficiency - illustrating that there is no concrete evidence that efficiency dwindles because of reservation. The authors argue that the ceilings are protecting the traditional definition of merit. However, merit must be interpreted as overcoming the obstacles rather than mere numerical merit, as also observed by Justice D. Y. Chandrachud in the case challenging reservations in NEET examinations.

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I. INTRODUCTION

India has a scarring history of caste-based atrocities being inflicted on individuals. Such atrocities often involved attacks on opportunities of educational progress and on meaningfully engaging in the employment landscape thus, directly inhibiting the social mobility of the individual. Certain caste groups have been systematically discriminated against for centuries because of their alleged “polluted” status, and they are by any measure among the most deprived people in India. In view of this, our founding fathers envisaged a provision for compensatory discrimination in the form of reservations. It is an attempt to correct the past injustices suffered by those at the lowest pedestal of India's four-tier caste hierarchy.¹ There has been much debate on how to address the question of the extent of affirmative action is required to bring equality. The system acts in response to the twin demands of the backward classes pursuing equity and the general class seeking equality and the state is required to locate and fix itself at a point of equilibrium between these two opposing claims.

The equality issue resurfaced in 2021 in the Maratha reservation case, where a five-judge Constitution Bench of the Supreme Court, while adjudicating upon the case observed the 50%, ruled to deny reservation to the Maratha community.² This led to emergence of the question as to whether the said rule needs reconsideration. The issues raised in the judgment revolved around the provision of 16% reservation to the Maratha community. As per the court, the requirement of an ‘extraordinary

¹ E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L 63, 65-66 (1996).

² *Jaishri Laxmanrao Patil v. The Chief Minister And Ors*, (2021) 4MLJ 305 (India).

situation’ to carve out an exception to the 50% limit was not satisfied by the contentions of the Gaikwad Commission constituted by the Maharashtra government, the Bombay High Court judgment in *Shri Sanjeet Shukla v. The State of Maharashtra or the Socially and Educationally Backward Classes (“SEBC”) Act, 2018*. More recently, the Court while upholding the constitutional validity of reservations provided to Other Backward Classes (“OBCs”) in the National Eligibility cum Entrance Test, conferred depth to the notion of merit. The judgment called for a “deeper scrutiny” of the idea of merit while sustaining the reservations in the All-India Quota (“AIQ”) scheme of 1986.³ This scheme empowers the central government to provide domicile free admission to candidates pan India.⁴ Democratising the concept of merit to incorporate inherent inequalities, the Court asserted that “reservation is not at odds with merit” as substantiated by the implications of caste privileges on a candidate’s basic opportunities and odds of success in such an open examination. The two judgments thus invigorated the questions of the validity of the numerical ceiling in the context of the common understanding of merit and equality in this discourse.

We shall seek to examine how the equilibrium between merit, equality and rights of backward classes is reached and whether such equilibrium is effective.

II. ORIGIN OF RESERVATIONS

A. LADDER CALLED CASTE

³ Neil Aurelio Nunes and Ors v. Union of India, (2022) 4SCC 95 (India).

⁴ *Id.*

The Indian society, when viewed in a crude sense, has been classified into four ranks on the basis of members' occupation, which played a decisive role in getting access to wealth, power and other pleasures of life.⁵ This scheme of classification is termed the 'caste system,' which Ambedkar rightly described as the system of "ascending scale of reverence and a descending scale of contempt".⁶ Due to the rigid compartmentalisation, the lower castes were subject to animalistic existence and were derisively discriminated against in matters of opportunity. As a result of centuries of systematic oppression, the lower strata of society were left backwards educationally, socially and economically. As society progressed, technological development also advanced. The caste which was higher on the ladder of social structure benefited from technological advancement, but not all strata of the society could integrate with the technological development with the same intensity as the upper caste.⁷

It is essential to construct affirmative action as a set of policies intended to surpass the preliminary objective of non-discrimination with an overarching goal of enhancing the quality of life of depressed classes by improving education, employment, economic condition, and overall growth.⁸ The justifications for affirmative action are two-fold. Firstly, it serves as compensatory justice which is a belief that society must

⁵ Anand Teltumbde, *Debating Dalit Emancipation*, 42(42) ECON & POL WKLY 4229, 4230 (2007).

⁶ BAWS (2019c): B.R. Ambedkar, *Philosophy of Hinduism*, Babasaheb Ambedkar: Writings and Speech, Ministry of Social Justice and Empowerment, Vol 3, pp. 48.

⁷ K.S. CHALAM, *CASTE BASED RESERVATIONS AND HUMAN DEVELOPMENT IN INDIA* 37 (Sage Publications 2007).

⁸ Holzer, Harry J. & David Neumark, *Affirmative Action: What Do We Know?*, 25 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 463, 466-467 (2006).

compensate for oppression and ostracism that continues to burden that community.⁹ Secondly, it promotes distributive justice which hints towards the idea that a just and fair society should provide opportunities to all its citizens.¹⁰

The principal purpose of affirmative action, which can be gathered from caste studies and jurisprudence, is to break free from the vicious cycle of discrimination and provide opportunities to the past sufferers who were denied opportunities unjustly.¹¹

The earliest attempt to integrate backward classes into mainstream society was made during British rule. The said attempt largely involved reserving seats in public service and universities for Muslims and other minority communal groups.¹² However, in the authors' opinion, virtually no attempts were made to ameliorate the conditions of the caste groups constituting the lowest strata of society. Many viewed it as an extension of the divide-and-rule policy to help remain a dominant force in the country. In 1943, the Government ordered to reserve 8.5% of vacancies for SC communities. In 1946, it was increased to 12.5% so that it could be consistent with the total population of the country.¹³

In order to advance the ideals of justice and equality and reduce social inequalities, reservation as a method of compensatory discrimination

⁹ Penelope E. Andrews, *Affirmative Action in South Africa: Transformation or Tokenism*, 15 LAW CONTEXT: A SOCIO-LEGAL J. 80, 85 (1999).

¹⁰ *Id.*

¹¹ *Canadian National Railway Co v. Canada (Canada Human Rights Commission)*, [1987] 1 SCR 1114 AT 1143 (Can.).

¹² PARMANAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 82 (1982).

¹³ Rao, J. Laxmi Narasimha, *Affirmative Action In India: Emerging Contours*, 69(3) THE INDIAN J. OF POL. SCI. 483, 484-486 (2008).

was best suited to the nation's contemporary socio-political requirements.¹⁴ Reservations were engineered to further social justice practically and procedurally undo the centuries of neglect suffered by the victims of such a system.¹⁵ Pursuant to this, the Constitution of India guarantees equality and social justice to its citizen. Articles 14, 15, 16 and 17 expressly provided to ensure equality and advancement of the underprivileged.¹⁶ Article 15(1) prohibits discrimination on grounds "*only of religion, race, caste, sex or place of birth*".¹⁷ Article 16(1) guarantees to all citizens "*the equality of opportunity in matters relating to employment or appointment to any office under the state*".¹⁸ A prima facie reading of Article 15(1) and Article 16(1) suggests that the classification on certain lines is also not allowed. However, a close reading of Article 16(4) suggests that it does not hinder the state from "*making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.*"¹⁹

Before the first amendment, the issue of reservations was examined through the lens of Article 15 and Article 16 in the case of *State of Madras v. Champakam Dorairajan*,²⁰ where a government order allocated seats amongst various castes according to their numerical strength for entrance into

¹⁴ Marc Galanter, *The "Compensatory Discrimination" Theme In The Indian Commitment To Human Rights*, 13 INDIA Q. 77, 78 (1986).

¹⁵ Om Prakash Sharma, *Right to Reservation as an Emerging Fundamental Right: A Study under the Indian Constitution*, 4 INDIAN J.L. & Just. 124, 124-125 (2013).

¹⁶ V.D. MAHAJAN, CONSTITUTIONAL LAW OF INDIA 104 (7th ed. 1991).

¹⁷ INDIA CONST. art. 15, cl.1.

¹⁸ INDIA CONST. art. 16, cl.1.

¹⁹ INDIA CONST. art. 16, cl. 4.

²⁰ *The State of Madras v. Champakam Dorairajan*, 1951 AIR 226 (India).

Government medical and engineering in a given proportion.²¹ The court held that such allocation by the government order, which relied solely on caste barring some other factors for considering the backwardness, is a violation of Article 15.

Pursuing mechanisms that could potentially stand parallel to the idea of reservations, in 1953, the President appointed the first Backward Classes Commission (also referred to as 'Kaka Kalelkar Commission') under Article 340(1)²² to examine new approaches to ameliorate the condition of socially and educationally backward classes.²³ The commission submitted its report in 1955, in which it came up with different factors in identifying a class as backwards. This included traditional occupation or profession, social standing that the community holds in the caste system and percentage of literacy or general educational advancement.²⁴ This was a response to the claim of violation of Article 15 of the Constitution, by envisaging a system that was not exclusively circling caste. Further, it is also essential to understand what kind of equality Article 16 seeks to introduce in society.

B. FORMAL EQUALITY V. SUBSTANTIVE EQUALITY

The idea of formal equality was put forth by Aristotle, wherein he believed in a binary model that envisaged that equals must be treated equally

²¹ *Id.*

²² INDIA CONST. art. 340, cl.1.

²³ Wood, John R, *Reservations in Doubt: The Backlash Against Affirmative Action in Gujarat*, 60(3) *India Pacific Affairs* 408, 412-413 (1987) (*hereinafter* “**Wood**”).

²⁴ Kaka Kalekar, REPORT OF THE BACKWARD CLASSES COMMISSION, Vol. 1 (1953).

and unequals unequally.²⁵ Aristotle argued that “*when two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect.*”²⁶ However, this sort of equality promotes means equality in a moral and strictly physical sense as it does not tackle the fact that some men are born and treated differently than the rest. For this, there has been a departure from interpreting equality formally to account for the differences in human beings. Substantive equality requires the state to undertake positive action to improve the situation of disadvantaged groups.²⁷ If Article 16(1) reflected the view of formal equality, then Article 16(4) becomes an exemption to this doctrinaire rule. However, if Article 16(1) in the first place guarantees substantive equality, then Article 16(4) becomes an extension of this rule.

III. INTRODUCTION OF CEILINGS

Justice Gajendragadkar was the first to point out the problem of maximum reservation. While giving the majority opinion, he opined that reservation under Article 16(4) aspires to provide adequate representation.²⁸ It cannot be used to disturb the genuine interest of other people. Equilibrium must be struck between the needs of backward classes and the claims of other employees to maintain the level of efficiency in the

²⁵ Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1, 3 (2007).

²⁶ ARISTOTLE, NICOMACHEAN ETHICS, V.3. 1131 a10-b15.

²⁷ Ontario (Human Rights Commission) v. Ontario (Ministry of Health), [1987] 1 SCR 1114 AT 1143.

²⁸ The General Manager, Southern Railway and Anr. v. Rangachari, 1962 SCR (2) 586 (India).

administration.²⁹ However, the conundrum of the extent of the reservation was not directly answered in this case.

A. EXCEPTION OR FACET?

The issue was directly addressed in the case of *M.R. Balaji v. State of Mysore* (“**Balaji**”).³⁰ The state provided reservations up to 68% in engineering, medical and other specialised institutions. The petitioner argued that the state is not barred by any limitation in providing the quantum of reservation and could provide for 100% reservations if the issue of backwardness in the state requires so. Furthermore, Article 15(4) should be read with Article 46, and steps must be taken to address the inequality of backward classes, Schedule Castes and Schedule Tribes.³¹ While agreeing that Article 46 and Article 15(4) must be construed harmoniously, the Court rejected the argument that the reservations can be provided up to 100%. The advancement of one class cannot be at the expense of the rest of society.³² In the case of *Balaji*,³³ it was held that providing 68% reservation would be incoherent with the provision of Article 15(4) and Article 16(4) and a “*fraud on the constitution.*”³⁴ The court held that Article 15(4) is an exception to Article 15(1) and this provision must be construed rationally and within a reasonable limit. While it imposed a 50% reservation ceiling so that excessive reservations do not engulf the ideals of non-discrimination and equality, it did not explain why this

²⁹ *Id.*

³⁰ *M.R. Balaji v. State of Madras*, 1963 Supp (1) SCR 439 (India).

³¹ INDIA CONST. art. 46.

³² M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1381 (5th ed. 1998).

³³ *M.R. Balaji v. State of Madras*, 1963 Supp (1) SCR 439 (India).

³⁴ *Id.*

number is fixed at 50%. The reasoning was followed in a number of cases that followed after the Balaji judgment. For example, in the case of *R. Chitralkha v. State of Mysore*,³⁵ the court held that the reservation ceiling must be capped at 50%; however, a little relaxation is permissible. It should not be “*excessive and societally injurious*”.³⁶

The major takeaways from the reasoning of the court pertinent to our discussion are that:

- 1) There should be compelling circumstances where the state can depart from the principles of equality of opportunity to achieve justice;
- 2) Since the provisions of Article 15(4) and Article 16(4) are an exception to the general rule of equality that is why it is imperative to interpret them in the strictest sense. The court was wary that unchecked and unlimited reservations would impair the idea of equality.

The Constitution framers had an identical view that formal equality would be inadequate in bringing the much-necessary transformation in the country. In the view of Dr. BR Ambedkar, the addition of sub-clause (4) was a step towards acknowledging that formal equality enunciated in sub-clause (1) would be insufficient for the needs of the disadvantaged people and proper coordination between the two clauses is needed.³⁷ This

³⁵ *R. Chitralkha v. State of Mysore*, AIR 1964 SC 1823(India).

³⁶ *Chebrolu Leela Prasad Rao and Ors v. State of A.P. and Ors*, (2021) 11 SCC 401.

³⁷ Parliament of India, Constituent Assembly Debates, Vol. VII, 30th November 1948 (Speech of Dr. BR Ambedkar), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30.

demonstrates that sub-clause (4) was seen as an exception by the framers of the Constitution as well.³⁸

Moreover, in the case of *N.M. Thomas*,³⁹ the court shifted gears and questioned the reasoning employed in the *Balaji* judgment. In the majority opinion, Chief Justice Ray observed that Article 14 and Article 16(1) would not be violated if a rule ensures equality of representation for the unrepresented class after catering to the rudimentary needs of efficiency in the administration.⁴⁰ It was held that Article 16(4) is not an exception to Article 16(1) but “*one of the methods of achieving equality embodied in Article 16 (1)*.”⁴¹ If one considers that Article 16(1) is an exception to Article 16(4), then it is implied that no classification can be made under this article. Further, an exception is required to make a reasonable classification. Article 16 (1) helps us achieve one of the many goals envisaged by Article 14.

The court considers Article 16(1) a part of a larger design to guarantee equality which has been embodied in Article 14 and Article 15.⁴² Justice Fazal Ali observed that the state is empowered to make reservations as per the express provision of Article 16(4), provided three conditions are satisfied.⁴³

- 1) The class for which reservation is made must be socially and educationally backward;
- 2) The class for which the reservation is made is not adequately represented in the services; and

³⁸ *Id.*

³⁹ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 330 (India).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 21.

⁴³ *Id.*

- 3) The reservation should not be too excessive to destroy the tenet of equality.⁴⁴

What constitutes excessive should be decided on a case-to-case basis, and no arithmetic limit of reservation ceiling can be placed. The percentage limit of 50% placed in Balaji is a rule of caution.⁴⁵ The only rider is that the objective of this provision is to provide adequate reservations. However, it cannot come at the cost of sacrificing efficiency in the administration.⁴⁶ Mathew J. did not explicitly deal with the question of the 50% reservation ceiling rule but from his discussion on proportional equality, it was clear that he did not accept the rule. He adopted the concept of proportional equality from the Supreme Court of the United States of America in the case of *Harper v. Virginia Board of Election*,⁴⁷ where the constitutionality of a law which barred citizens from voting if the payment of poll tax exceeds USD 1.50 was challenged. The court held that the state is required to take different circumstances of a class of citizens into consideration so that they can enjoy essential rights. It is important to note that substantive equality discussed above is not different from proportional equality but is a component of it.⁴⁸ Where proportional equality is a concept that focuses more on merit and virtue, on the other hand, substantive

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Harper v. Virginia Board of Election*, (1966) 383 US 663.

⁴⁸ Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 4–6 (2011) (*hereinafter* “**Catharine**”).

equality aims at race, gender or social standing in identifying the person's disadvantageous position in society.⁴⁹

B. RULE OF CAUTION?

The matter was put to an end in the case of *Indra Sawhney (Mandal Commission case)*,⁵⁰ where the court held that the 50% ceiling enunciated in the Balaji case is not a mere rule of caution. The power conferred on the state by Article 16(4) must be administered judicially and within reasonable limits.⁵¹ In this case,⁵² the Supreme Court scrutinized the validity of 27% reservation in government services for socially and educationally backward classes granted through a government order.⁵³ The government order was based on the recommendation of the Mandal Commission (Second Backward Classes Commission) which was set up in 1979 to decide the basis for identifying SEBC.⁵⁴ Finally, the committee concluded that 52% of the population was under the SEBC category.⁵⁵ The government order passed by the V. P. Singh Government to reserve seats on the basis of the report submitted by the committee led to cases of violence.⁵⁶ In the majority

⁴⁹ MARI J. MATSUDA, PUBLIC RESPONSE TO RACIST SPEECH: CONSIDERING THE VICTIM'S STORY, IN *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT*, (Routledge 1993).

⁵⁰ *Indra Sawhney Ors. v. Union of India and Ors.*, AIR 1993 SC 477 (India).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Durgaprasad Bhattacharya, *The Mandal Commission in a Historical and Statistical Perspective*, 51 *Proceedings of Indian History Congress* 641, 641-642 (1990).

⁵⁵ *Id.*

⁵⁶ SMITA NARULA, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES"* 38 (Human Rights Watch 1999).

opinion of the court, the reservation cannot exceed more than 50% barring “exceptional circumstances.”⁵⁷

IV. JUSTIFICATION OF CEILING BASED ON EQUALITY?

The concept of equality of opportunity in public employment, which was originally contained in Article 10 of the draft constitution, which later became known as Article 16 contemplated reservation to be restricted to a 'minority seats'. Even Dr Ambedkar stated:

*“...therefore the seats reserved, if the reservation to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the constitution and effective in operation... we have to safeguard two things, namely, the principle of equality and at the same time satisfies the demand of communities which have not had so far representation in the state...”*⁵⁸

A. PREVAILING LEGAL REGIME ON CROSS-BORDER INSOLVENCY

Article 16(4) of the Constitution reflects upon reservations for classes that have not been adequately represented.⁵⁹ The appointment of SCs/STs or any other backward classes must be made so as to preserve efficiency in administration. The phrase “adequate representation” cannot be interpreted as “proportional representation.” As mentioned above, Dr. Ambedkar did not consider the idea of proportional representation but only representations confined to minority seats.⁶⁰ Perusing the Constituent

⁵⁷ Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).

⁵⁸ Parliament of India, Constituent Assembly Debates, Vol. VII, 30th November 1948 (speech of B.R. Ambedkar), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30.

⁵⁹ INDIA CONST. art. 16, cl.4.

⁶⁰ Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).

Assembly debates, it can be seen that nobody pitched in the idea that Article 16 (4) should not be confined to minority seats. The constituent assembly members were aware that this provision had the potential to be used for political reasons. Thus they left the soundness of these actions in the constitutional structure to the courts. The usage of speech by Dr. Ambedkar has been used by multiple judgments to highlight the need for a 50% reservation cap to protect equality. However, the speech has not been construed in the context that it was made. Dr Ambedkar was referring to the need to add the word 'backward' so that both clauses can be harmoniously interpreted.⁶¹ If there were a need felt by the assembly members, then a numerical cap would have been fixed. This shows that the 50% reservation ceiling is a judicial tool to inhibit the extent of reservation. Further, for the reasons of lack of statistical backers and geographical inconsistencies, one can examine the shortfalls of an arithmetic ceiling.

In arguendo, even if one is to accept the argument that Dr. Ambedkar was referring to curb the extent of reservation, it must be kept in mind that ideas that drive social change cannot be kept static and must be modified to our needs. For instance, the Constitution drafters debated and consciously kept out the 'due process' model and adopted a 'procedure established by law' while drafting Article 21.⁶² However, the courts, while

⁶¹ Gautam Bhatia, *Equality of Opportunity, Group Subordination, and the Directive Principle: State of Kerala vs. N.M. Thomas*, SSRN, (2017), <https://ssrn.com/abstract=3071903>, (last visited 13 July 2021).

⁶² INDIA CONST. art. 21.

interpreting it in the case of *Maneka Gandhi*,⁶³ glossed over this, indicating that the Constitution is an organic document which must keep evolving.⁶⁴

The numerical value of 50% cannot be understood as it does not have scientific backing. The court simply mentioned 50% is the reasonable limit to which reservation can be extended. The court stated:

*“Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should be exercised in a fair manner and within reasonable limits- and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter.”*⁶⁵

The court has tried to bring competing claims of equality between backward classes and forward classes to equilibrium by setting a limit at 50%. However, it fails to explain the origins and dynamics of the magical number. If clause (4) is truly a facet of clause (1) that guarantees substantial equality, then fixing a limit is unnecessary. In that case, the extent of reservation must be decided on a case-to-case basis rather than cementing the extent of reservation.⁶⁶

B. GEOGRAPHICAL DETERMINATION: DECONSTRUCTING THE PAST STATISTICS

In India, as geography dictates, the population of the backward classes does not reside in a few states but is distributed throughout the

⁶³ *Maneka Gandhi v. Union Of India*, AIR 1978 SC 597 (India).

⁶⁴ Gautam Bhatia, *Critique of the Supreme Court's Maratha Reservation Judgment-I: Equality*, INDIAN CONST. L. & PHIL. (July 4, 2021, 3:18 PM), <https://indconlawphil.wordpress.com/2021/05/06/a-critique-of-the-supreme-courts-maratha-reservation-judgment-i-equality/>.

⁶⁵ *Indra Sawhney Ors. v. Union of India and Ors.*, AIR 1993 SC 477 (India).

⁶⁶ *Id.*

country. The spatial distribution becomes a quintessential factor of analysis. There can be a possibility wherein one state the population of classes that require the benefit of reservation is more than the others. For example, in State 'A', where only 30% reservation would have been sufficient, is given 50% reservation, and in State 'B', where 70% reservation is needed, is capped at 50%. Nevertheless, the court has decided that the ceiling of 50% can only be penetrated in extraordinary circumstances which arise due to the vivid diversity in the country.⁶⁷ There might be a possibility that a certain percentage of the population is outside the mainstream national life, living in a remote area which would require relaxation in the 50% rule.

In the recent judgment by the Supreme Court on the Maratha reservation, the relaxation provided to the 50% rule was dissected. Justice Bhushan held that “extraordinary circumstances” such as “remote or far-flung areas” is “illustrative but indicative.” The court has negated the idea that this is a geographical test but has considered it a social test.⁶⁸ The court refused to recognise that the Maratha caste was a backward class and in need of reservation.⁶⁹ According to the 2011 census, half of India's scheduled caste population lives in 4 states.⁷⁰ The first state is Uttar Pradesh (20.5%), followed by West Bengal (10.7%), Bihar (8.2%), and lastly, Tamil Nadu, with 7.2% of the total scheduled caste population.⁷¹ This shows that the population of the depressed class is not uniform around the country

⁶⁷ *Id* at 810.

⁶⁸ Jaishri Laxmanrao Patil v. The Chief Minister And Ors, (2021) 4MLJ 305 (India).

⁶⁹ *Id*.

⁷⁰ B. Sivakumar, *Half of India's dalit population lives in 4 states*, THE TIMES OF INDIA (July 11, 2021), <https://timesofindia.indiatimes.com/india/Half-of-Indias-dalit-population-lives-in-4-states/articleshow/19827757.cms> (last visited 11 July 2021).

⁷¹ *Id*.

and is disproportionately spread across the states.⁷² If the beneficiaries of reservation are not spread uniformly across the states, then the need for a uniform 50% reservation ceiling is not required and must be based on individual cases. Hence, it is paramount that the court must earnestly reconsider the 50% reservation ceiling.

In order to determine a model for arriving at a workable ceiling figure or to eliminate it, viewing the caste demographics of different states becomes critical. The pertinent demographics are substantiated in an extensive report published by the Planning Commission (now Niti Aayog) in 2005.⁷³ It presents figures from the 2001 Census covering Scheduled Castes and Scheduled Tribes data, primarily. Herein, it is important to state two lacunae at the very outset. Firstly, the Census of 2001 lacked data on Other Backward Classes (OBCs). Secondly, the caste data of 2011 (which is the latest Census) remains contentious and full of discrepancies making it unreliable as mentioned by the Union Government in a statement.⁷⁴ Thus, the Planning Commission Report of 2005, produced based on the 2001 Census, is sufficient and significant in carving out trends.

1) *Scheduled castes*

As per the 2001 Census data, the population of Scheduled Castes in India (exclusive of the population of certain areas of Manipur) is 166,635,700 persons. In totality, this amounts to 16.2 per cent of the

⁷² *Id.*

⁷³ NITI AAYOG, REPORT OF THE TASK GROUP ON DEVELOPMENT OF SCHEDULED CASTES AND SCHEDULED TRIBES, (March 2005).

⁷⁴ Anand U, 2011 *Caste Census Data Unusable: Centre to Supreme Court*, HINDUSTAN TIMES (September 24, 2021), <https://www.hindustantimes.com/india-news/2011-caste-census-data-unusable-centre-to-supreme-court-101632429422444.html> (last visited September 29, 2021).

country's population. These population figures (2001) have unquestionably remained absent in the determination of the 50% ceiling figure, which puts into question its validity.

It is proposed that the reservation ceiling should be in tandem with the proportion of reserved categories in each state. This distribution of the SC population, when viewed with respect to the rest of the categories itself, is highly mottled. The data shows that the largest concentration (proportion of Scheduled Castes population to total State population) is found in Punjab (28.9 per cent), followed by Himachal Pradesh (24.7 per cent) and West Bengal (23 per cent). The proportion of the Scheduled Castes population in most states is inconsistent with the national average of 16.2% which constitutes the theoretical basis of the 50% ceiling. In merely three states, i.e. Karnataka, Andhra Pradesh, and Pondicherry the population proportion of Scheduled castes matches the national average (as per 2001 caste data). On the other end of the spectrum lie the states where the Scheduled Castes population stands way below the national average of 16.2%. These are the North-Eastern tribal States, namely, Mizoram wherein interestingly the Scheduled Castes population is as low as 272 persons. Followed by, Meghalaya with only 0.5 per cent and Arunachal Pradesh with 0.6 per cent.⁷⁵

From an alternate perspective; more than 57 per cent of the total population of Scheduled Castes up till 2001, resided in just five States-Uttar Pradesh (with 21.1 per cent) which has the largest percentage of Scheduled Castes population with respect to the total SCs population of the country,

⁷⁵ Neil Aurelio Nunes and Ors v. Union of India, (2022) 4 SCC 95 (India).

followed by West Bengal (11.1 per cent) and Bihar (7.8 per cent), Andhra Pradesh (7.4 per cent) and Tamil Nadu (7.1 per cent).⁷⁶

Marking 1961 Census as the reference point,⁷⁷ the following table lays down the proportion of the Scheduled Castes population in India.

Census year	Total population (in million)	Scheduled Castes population (in million)	Proportion of SCs population
1961	439.2	64.4	14.7
1971	547.9	80.0	14.6
1981#	665.3	104.8	15.7
1991 @	838.6	138.2	16.5
2001 \$	1028.6	166.6	16.2

Table 1.1: Trends in Proportion of Scheduled Caste Population
 (# Excludes Assam in 1981 @ Excludes Jammu & Kashmir in 1991 \$ The figures excludes Mao-Maram, Paomata and Purul sub-divisions of Senapati district of Manipur).

There is an increase in the proportion of the Scheduled Castes population from 1961 to 2001. The proportional shift solely in this one reserved category elucidates how even holding inadequate caste data as a base for the ceiling of 50% is arbitrary and, resultantly an inefficient mode of administering reservations. Fixating on the reservation ceiling results in defeating the core purpose of reservation.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* at 4.

2) ***Scheduled Tribes***

As per the same census data, the overall Scheduled Tribes population was 84,326,240 persons. Scheduled tribes constituted 8.2 per cent of the total population.⁷⁸

Typically, North-Eastern states and islands have high-density clusters of Scheduled Tribes population in India. Such states with the highest proportion of the Scheduled Tribes to the total population of the States/Union territories are Mizoram (94.5 %) with the same percentage as Lakshadweep (94.5 %), followed by Nagaland (89.1 %), and Meghalaya (85.9 %).⁷⁹ Statistics of the mainland highlight that the highest proportion claiming reservation of Scheduled Tribes population are in Chhattisgarh (31.8%), followed by Jharkhand (26.3%) and Orissa (22.1%). The prevalence of Scheduled Tribes appears to be shrinking from the statistics of states like Uttar Pradesh (0.1 %), Bihar (0.9 %), Tamil Nadu (1.0 %) and Kerala (1.1%).⁸⁰

In an overall sense, the highest percentage of Scheduled Tribes population to total Scheduled Tribes population of the country is found in Madhya Pradesh, which accounts for 14.5 per cent itself. This goes way beyond the percentage limit fixed for Scheduled Tribes in India. Illustratively, a Scheduled Tribes member from Madhya Pradesh claiming reservation would be automatically put at a disadvantageous position in cases of employment and education as compared to someone from states like Bihar, U.P. or Tamil Nadu. Sixty-eight per cent of the country's

⁷⁸ *Id.* at 6.

⁷⁹ *Id.*

⁸⁰ *Id.*

Scheduled Tribes population was concentrated in just seven states (including Madhya Pradesh). Six other states with a sizeable concentration of Scheduled Tribes to total Scheduled Tribes population are Maharashtra (10.2 per cent), Orissa (9.7 per cent), Gujarat (8.9 per cent), Rajasthan (8.4 per cent), Jharkhand (8.4 per cent) and Chhattisgarh (7.8 per cent).⁸¹

The proportion of total Scheduled Tribes population with respect to the total population is given in the following table,⁸² fixing the Census of 1961 as the reference point:

Census year	Total population (million)	Scheduled Tribes population (million)	Proportion of SCs population
1961	439.2	30.1	6.9
1971	547.9	38.0	6.9
1981#	665.3	51.6	7.8
1991 @	838.6	67.8	8.1
2001 \$	1028.6	84.3	8.2

Table 1.2 : Trends in Proportion of Scheduled Tribe Population Census Year.

Excludes Assam in 1981 @ Excludes Jammu & Kashmir in 1991 \$ The figures exclude Mao-Maram, Paomata and Purul sub-divisions of Senapati district of Manipur.

The Census data elucidate the apparent fault lines in following the Doctrine of Adequacy as propounded in *Indra Sawhney's* judgment and calls

⁸¹ *Id.*

⁸² *Id.*

for a shift towards the Doctrine of Proportionality.⁸³ Each state with varying caste composition and representation dynamics should be provided with a newly designed reservation model with customised ceilings suiting the demographics of the respective areas. Although this requires a total revamp of the caste-based data collection framework, it is bound to eliminate the over-representation and under-representation of reserved caste groups at a central level.

C. HEADING TOWARDS A SOLID STATISTICAL GROUNDWORK: CASTE CENSUS

Census and statistical inadequacies form another stream of apparent issues. A strong reason for reconsidering the aforementioned ceiling is that the Mandal Commission which identified 52% of the population as backward, was based on statistics from the 1931 Census. There is a dire need for a revision in that list because the population of Schedule Castes, Schedule Tribes and Other Backward Classes must have risen over 90 years.⁸⁴

The 1931 Census, a colonial legacy, was inherently flawed because of a superficial British understanding of ‘jaatis’, their reliance on oriental literature and the Brahmanical perspective of Varna classification,⁸⁵ which masked the subaltern discourse. The existence of ‘fuzzy communities’,⁸⁶

⁸³ Catharine, *supra* note 48.

⁸⁴ Shoiab Daniyal, What justifies /an arbitrary 50% cap on reservations – when upper caste numbers are so much smaller?, SCROLL.IN (5 November 2017) <https://scroll.in/article/856462/what-justifies-an-arbitrary-50-cap-on-reservations-when-upper-caste-numbers-are-much-smaller> (last visited 11 July 2021).

⁸⁵ Ram B. Bhagat, *Census and Caste Enumeration: British Legacy*, 62 GENUS 119, 121 (2006) (*hereinafter* “**Bhagat**”).

⁸⁶ Moses MS, *Moral and Instrumental Rationales for Affirmative Action in Five National Contexts*, 39 EDUC. RESEARCHER 211, 211 (2010).

fluid social identities and overlapping social groupings based on religion, dialects, and occupations further disoriented the census. Although caste, tribe and race were not definitively defined, attempts were made to classify Indians into mutually exclusive groups which disregarded the fact that caste had remained a highly dynamic and mobile category of the social fabric.⁸⁷

The ambiguity surrounding the actual count of the OBC population, the unanswered question of “how many” after answering “who all”⁸⁸ (through the National Commission for Backward Classes under the National Commission for Backward Classes Act, 1993) further weakens the validity of the 50% figure which boils down to 27% for OBCs. In the absence of a recent base population figure (the presence of an obsolete 52% figure), the applicability of the 27% figure amounts to tokenism in the garb of a false ‘adequacy’.

The reality is that the courts have overemphasised the need for a numerical limit of the reservation to such an extent that this judicial invention has been assumed as a part of the basic structure.⁸⁹ Justice Bhushan observed:

“To change the 50% limit is to have a society which is not founded on equality but based on caste rule. Democracy is an essential feature of our constitution and part of our basic structure. If the reservation goes above the 50% limit which is reasonable, it will be a slippery slope, the political pressure make it hardly to

⁸⁷ Bhagat, *supra* note 85

⁸⁸ Amar Pattnaik, *Breaching Quota Ceiling and Need for Caste Census*, THE NEW INDIAN EXPRESS (September 20, 2021) <https://www.newindianexpress.com/opinions/columns/2021/sep/20/breaching-quota-ceiling-andneed-for-caste-census-2361021.html> (last visited September 29, 2021).

⁸⁹ Alok Prasanna Kumar, *On Maratha Reservations Judgment: Part- I*, 56 ECON.& POL. WKLY 10, 12 (2021).

*reduce the same. Thus, the answer to the question posed is that the percentage of 50% has been arrived at on the principle of reasonability and achieves equality as enshrined by Article 14 of which Article 15 and Article 16 are facets.*⁹⁰

The above observation gives the impression that the 50% reservation ceiling is a part of the basic Constitution since equality is considered a part of the basic Constitution.⁹¹ After analysing the constitutional pronouncements, and geographical distribution of caste groups and examining the arguments of equality and representation that the applicable ceiling professedly maintains, it is clear that the 50% ceiling does not do justice to such ideals.

Moving on, the other pool of arguments emanates from the fact that reservation is an antithesis to the idea of merit. However, the conception of merit itself is flawed. By defeating the common stand on reservation's impact on merit one can establish that the endorsement and application of this reservation cap is unjustified.

V. RESERVATION AS BUTCHER OF MERIT?

While constructing merit in its rudimentary sense, it can be construed as a form of validation rendered by examination outcomes which are devised to determine the knowledge or aptitude of a candidate. The assumption is that more the marks a candidate scores, the higher their merit. There are two major reasons for glorifying merit as a concept; the first is efficiency and the second is fairness.⁹² It can be considered a logical system

⁹⁰ Jaishri Laxmanrao Patil v. The Chief Minister And Ors, (2021) 4 MLJ 305 (India).

⁹¹ *Id.*

⁹² MICHAEL J. SANDEL, THE TYRANNY OF MERIT *WHAT'S BECOME OF COMMON GOOD?*, 35 (2020).

to allocate jobs and opportunities and can be seen as the capacity of a person to perform.⁹³

A. CONSTITUTIONAL DISCOURSE ON MERIT

The most fundamental argument that comes forth for opposing reservations is that of merit and efficiency. This stems from Article 335⁹⁴ which focuses on finding a balance between the claims of SCs and STs and efficiency in administration. The Constitution does not specify what efficiency in administration means. Because of this ambiguity, there is a need to interpret these provisions liberally and make them inclusive so that efficiency and claims of representation can be balanced.

The case of *General Manager, Southern Railway v. Rangachari*,⁹⁵ first brought forth the need to maintain efficiency in administration while providing reservations under Article 16(4). It contended that the factor of competence could not be neglected while providing reservations.⁹⁶ The need to preserve efficiency in administration is of cardinal importance, and it is derived from the benefit of the common good rather than a small section of society.⁹⁷

In the case of *Janki Prasad Parimoo v. State of Jammu Kashmir*⁹⁸ the court was of the view that reservation is in itself antithesis to merit, as it

⁹³ Sturm, Susan & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal*, 84(4) CAL.L. REV. 953, 953-958 (1996).

⁹⁴ INDIA CONST. art. 335.

⁹⁵ *The General Manager, Southern Railway and Anr. v. Rangachari*, 1962 SCR (2) 586 (India).

⁹⁶ *Jagadish Saran v. Union Of India*, AIR 1962 S.C. 36 (India).

⁹⁷ *A.B.S.K. Sangh (Rly) v. Union Of India*, AIR 1981 SC 332 (India).

⁹⁸ *Janki Prasad Parimoo v. State of Jammu and Kashmir*, 1973 AIR 930 (India).

prefers a less meritorious candidate to a more meritorious candidate. This view was reflected in the *Balaji* case, where it was supposed to be *anti-merit*.⁹⁹

The advocates of meritocracy also believe that merit is a personal accomplishment and does not depend on factors of caste or gender.¹⁰⁰ However, this depends on how merit is defined. The definition of merit is volatile and has a different connotation. According to Rhodes, “Merit is a social construct that reflects a range of factors over which individual has no control, including natural talent, family background, educational environment, economic role and gender-role socialisation.”¹⁰¹ Thus, merit is determined by the objectives set by society. Since it is contingent on societal values, the fulfilment of the objective is the end, and merit is the means.¹⁰² Amartya Sen observes that the concept of merit derives from our understanding of a good society.¹⁰³ Notably, if merit is confined to only statistical meritocracy, then the reservation will always be considered at odds with merit. Merit will be more meaningful if constructed as the determination to overcome impediments. Discrimination based on caste is an inherent obstacle for an individual who is at the receiving end and defeating such an obstacle in itself is a certificate of potential and hence evidence of individual merit.¹⁰⁴

⁹⁹ Wood, *supra* note 23.

¹⁰⁰ John E. Morrison, *Colorblindness, Individuality, And Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 330 (1994).

¹⁰¹ DEBORAH L. RHODES, JUSTICE AND GENDER 186 (1989).

¹⁰² M.P. Singh, *Jurisprudential Foundation of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 DELHI L. REV. 41, 43-44 (1983-84).

¹⁰³ AMARTYA SEN, MERIT AND JUSTICE, IN MERITOCRACY AND ECONOMIC INEQUALITY (2000).

¹⁰⁴ Margaret Y. K. Woo, *Reaffirming Merit in Affirmative Action*, 47 J. LEGAL EDUC. 514 (1997).

The court has also rejected the argument of reservation being anti-merit. This is evident from the divergent view of Subba Rao J. where he observed that it would be wrong to say that lowering the standard to some extent makes reservations anti-merit.¹⁰⁵ Conclusively, it can be said that the reservation of seats is not a compromise of merit by admitting less meritorious candidates. It is, in fact, the inclusion of those candidates who have been chained in the swamp of destitution and neglect.

B. EFFICIENCY IN ADMINISTRATION VIS A VIS MERIT

The myth that Schedule Caste and Schedule Tribe candidates are less efficient is a reflection of social prejudice which is ingrained in society.¹⁰⁶ This view was also shared by Dr. B.R. Ambedkar, who believed that the upper castes enjoy privileges of social advancement not because of merit but solely based on their birth.¹⁰⁷ According to him, the argument put forth by the upper caste of “efficiency of administration” is to preserve their interests and maintain their monopoly.¹⁰⁸ He differentiated “efficiency of administration” from “good governance” and observed that a mark of an exemplary government not only lies with efficiency but also with representation. An administration that does not encourage representation cannot be considered a good administration.¹⁰⁹ He further asserted that

¹⁰⁵ T. Devadasan v. The Union of India And Another, 1964 AIR 179 (India).

¹⁰⁶ B.K Pavitra & Ors v. Union of India, AIR 2019 SC 2723 (India).

¹⁰⁷ Babasaheb Ambedkar: Writings and Speeches, (2019b): B.R. Ambedkar, What Congress and Gandhi Have Done To The Untouchables, Ministry of Social Justice and Empowerment, Vol.9. (*hereinafter* “BAWS”).

¹⁰⁸ *Id.*

¹⁰⁹ BAWS (2019c): B.R. Ambedkar, Manu and the Shudras, Babasaheb Ambedkar: Writings and Speeches, Ministry of Social Justice and Empowerment, Vol 12, pp. 723-724.

“efficiency in administration” was a colonial creation and must not be used to oppose reservation.¹¹⁰

The meritocracy arguments that glorify merit inducing stakeholders to prioritise merit are disastrous as, resultantly, the knowledge and power will be concentrated in the hands of the few. At the same time, a large section of society suffers. There are three main ingredients that help a candidate produce good results in a competitive exam which also satisfies the scale of merit.

- a) Economic resources;
- b) Social and cultural resources; and
- c) The ability of the candidate to work hard,¹¹¹

The critics of reservation take for granted the first two ingredients in achieving good results in an examination. Reservation seeks to mitigate the effect of the first two ingredients on the third so that a level playing field can be ensured. It is, therefore, not a murderer of merit but only an attempt to alleviate the extraneous factors affecting it. Holding it as an opposite force has its own problems.

It is also essential to understand how efficiency in administration and merit are connected. A conjecture by the critics has been that high merit leads to high efficiency in administration. Administrative efficiency comes from the person occupying the post after the selection rather than the selection process itself. There is no quantifiable data available to show that

¹¹⁰ Anurag Bhaskar, *Reservation, Efficiency, and the Making of Indian Constitution*, 56 *ECON.& POL. WKLY* 42, 44(2021).

¹¹¹ MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA*, 212 (1984).

administrative efficiency is tied to the selection process. In the case of *KC Vasanth Kumar v. State of Karnataka*,¹¹² it was observed that scoring extraordinarily well in an examination is not a yardstick for a good administrator.¹¹² If the state had not mandated some minimum qualifications for the candidates applying, then the argument for efficiency of administration could have been compromised. For example, when the Madhya Pradesh government completely obliterated the minimum qualification for admission of SC and STs in admission to the medical courses, the court held the Government's order as inconsistent with efficiency of administration.¹¹³ This is true for other fields as well. Best doctors and engineers are not produced by measuring their aptitude in a test.

Another argument that connects merit and efficiency is that the candidate clearing the cut-off marks in a standardised test in a standard format supposedly segregates “meritorious” from “non-meritorious”. This reflects an over-emphasis on the role of merit in administrative efficiency. It also shows that merit is equated with numbers, and is purely a “numerical meritocracy”. This numerical meritocracy has its flaws. The first flaw is that candidates are from different backgrounds and do not necessarily have equal access to education. Secondly, high scores in an examination may reflect a good academic performance and show a particular level of preparation for the exam but do not measure the potential of the candidate to overcome obstacles which should be an accurate benchmark of merit.

¹¹² *K.C. Vasanth Kumar & Another v. State of Karnataka*, 1985 AIR 1495 (India).

¹¹³ *State of M.P. v Nivedita Jain*, 1982 SCR (1) 759 (India).

Hartigan and *Wigdor* in their study of the General Aptitude Test Battery (“**GATB**”)¹¹⁴ in 1989, examined affirmative action’s role in aiding the equalisation of circumstances for the development and perpetuation of talent. GATB tests and individual’s cognitive, motor and perceptual skills and has been deployed by the U. S. Government since 1947 to screen employment applications. The study focused on examining whether the extensive use of GATB is a detriment for low scorers, especially minority job seekers. They established that equating merit merely with conventional measures is unfair. As resultantly, various individuals would be denied opportunity, massively hampering their prospects unjustly.¹¹⁵

The social system of Hindu society is fragmented into castes, and merit cannot be cultivated individually without considering the social reality. In the Indian scenario, the reservation is seen by the upper caste as a hindrance to leading a comfortable life. However, the lower strata consider it as a tool to bring social progress.¹¹⁶ Social justice must be the bigger meritorious gesture.¹¹⁷ The Courts have considered the conventional definition of merit and efficiency to justify the ceiling of 50% and linked Article 16(4) with Article 335 to support their contention.¹¹⁸ Constituent Assembly Debates show that constitution-makers did not link Article 16(4)

¹¹⁴ FAIRNESS IN EMPLOYMENT TESTING: VALIDITY GENERALIZATION, MINORITY ISSUES, AND THE GENERAL APITUDE TEST BATTERY (John A. Hartigan., & Alexander K. Wigdor eds., 1989).

¹¹⁵ Michele M. Moses, *Moral and Instrumental Rationales for Affirmative Action in Five National Contexts*, 39 *EDU. RESEARCHER* 211 (2010).

¹¹⁶ Satish Despande, *Exclusive Inequalities: Merit, Caste and Discrimination in Indian Higher Education Today*, 41 *ECON.& POL. WKLY* 2438, 2440-2444(2006).

¹¹⁷ Rajat Roy, *Does ‘Merit’ Have a Caste*, *THE WIRE* (June 28, 2021, 6:40 AM), <https://thewire.in/education/merit-caste-maroon-murmu>.

¹¹⁸ Alok P. Kumar, *Revisiting the Rationale for Reservation*, 51 *ECON.& POL. WKLY* 10, 11 (2016).

to Article 335.¹¹⁹ This is evident from the clarification of Pandit Hidray Nath Kunzru, who was a member of the Constituent Assembly, where he made a distinction between Article 335 and Article 16(4). He contended that, under Article 16(4), it is not essential to discuss the reservation of posts by the Union or State Government with the Public Service Commission.¹²⁰ The power to reserve posts under Article 335 is discretionary, and can be exercised by the state; however, under Article 16(4), the state has been conferred with this power explicitly. Kunzru's explanation of both the provision shows that reservation under Article 16(4) is not dependent on efficiency mentioned under Article 335. The former has a macroscopic view and is unrestricted by any other provision in the Constitution. In contrast, Article 335 is a directive to the government.¹²¹ Thus, setting a cap on the reservation does not make sense because the provision of Article 16(4) is broader in nature, and the argument of “efficiency of administration” cannot be brought to put a numerical cap on reservation.

Even if we concede to the argument that Article 16(4) is connected to Article 335, there is nothing to show that reservation exacerbates administration efficiency. In fact, a study showed that reservation in the Indian railways did not harm efficiency but only showed positive results in efficiency in some areas.¹²² Most importantly, there is no data to support

¹¹⁹ Anurag Bhaskar, *Reservation, Efficiency, and the Making of Indian Constitution*, 56 *ECON.& POL. WKLY* 42, 44(2021).

¹²⁰ Parliament of India, Constituent Assembly Debates, Vol. XI, 14th November, 1949 (speech of H.N. Kunzru), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-14 (last visited 30 June 2021).

¹²¹ BAWs, *supra* note 109.

¹²² Ashwini Despande & T.E. Weisskopf, *Does Affirmative action reduce productivity? A case study of the Indian Railway*, 64 *WORLD DEV.* J. 169, 174-175 (2014).

that the 50% reservation ceiling is preserving merit and efficiency in administration. Considering the example of Tamil Nadu, where 69% of seats are reserved as per the Tamil Nadu Reservation Act, 1993,¹²³ is still amongst the most advanced state in relation to innovation and human development. In Sustainable Development Goals India Index and Dashboard, Tamil Nadu was ranked among the top 5 states.¹²⁴ Tamil Nadu ranks at third position in India Innovation Index, 2020.¹²⁵ Thus, if the court wishes to restrict reservation to any numerical limit, then it must be based on quantitative data. Even if there is inefficiency in administration, there is a lack of data to blame reservation for it. Thus, limiting the reservation to preserve merit and efficiency would be barking at the wrong tree.

This discourse on efficiency and meritocracy results in grave social stigma around reservation. The competence of a person benefitting from an affirmative action policy is deemed to be considered inherently low.¹²⁶ Students from the depressed caste have been victims of a new sort of discrimination because they are utilising the reservation policies to seek admission to colleges and employment and they are branded as incompetent.¹²⁷ One study proves that because of fear of social stigma, there is a lack of utilisation of affirmative action. This is defeating the

¹²³ Tamil Nadu Backward, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, No. 45, Acts of Tamil Nadu State Legislative Assembly, 2004.

¹²⁴ NITI AYO, SDG INDIA INDEX & DASHBOARD, (2020-2021), https://niti.gov.in/writereaddata/files/SDG_3.0_Final_04.03.2021_Web_Spreads.pdf.

¹²⁵ NITI AYO, INDIA INNOVATION INDEX, (2020), <https://niti.gov.in/sites/default/files/2021-01/IndiaInnovationReport2020Book.pdf>.

¹²⁶ Madeline E. Heilman, Caryn J. Block & Jonathan A. Lucas, *Presumed Incompetence? Stigmatization and Affirmative Action Efforts*, 77(4) J. OF APPLIED PSY. 536, 538-540 (1992).

¹²⁷ Ashwini Despande, *Double Jeopardy? Stigma of Identity and Affirmative Action*, 46(1) THE REVIEW OF BLACK POLITICAL ECONOMY 38, 50-55 (2019).

purpose of the policies since they aim to bring forward those castes which have been historically marginalised.¹²⁸ There is a need for change in the outlook that students utilising reservation as less hardworking and incompetent because the data shows that there is negligible difference in the hours of hard work put in by students claiming reservation and general castes in studies.¹²⁹ There is a disproportionate gap in the educational status of the castes which shows that social factors are at play rather than their inability to put in hard work.¹³⁰

VI. CONCLUSION

The issue of reservation has always been a bone of contention among beneficiaries of reservation policies and upper-middle classes. A reservation ceiling is seen as a solution to that, but the solution is doing more harm than good. There is no need to curb the extent of reservation. However, the extent of reservation must not be curbed through a numerical limit but with the help of quantifiable data, which will help the state recognise the backwardness of a community. The Maratha reservation verdict was an alarm in this regard. As previously mentioned, reservations exceeding 50% should not make it excessive but should be evaluated on a case-to-case basis. Importantly, the policy of reservation neither hinders equality nor merit but on the contrary, seeks to promote it.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ MINISTRY OF STATISTICS AND PROGRAM IMPLEMENTATION, KEY INDICATORS OF HOUSEHOLD SOCIAL CONSUMPTION ON EDUCATION IN INDIA, (November 2019), http://mospi.nic.in/sites/default/files/publication_reports/KI_Education_75th_Final.pdf.