THE 50% CEILING: BULWARK OF SUBSTANTIVE EQUALITY OF OPPORTUNITY

INTRODUCTION

The Constitution of India aspires to secure equal opportunity for all its citizens. Articles 15(1), 15(2), 16(1), and 16(2) embody and concretise this vision of equality by prohibiting discrimination and guaranteeing equality of opportunity to all citizens. On the other hand, the Constitution also recognises that colour-blind equality will only perpetuate the discrimination and disadvantage faced by the historically depressed and socially backward classes of individuals, making equal opportunity all but a hollow promise. Accordingly, the equality code has been augmented with explicit provisions for affirmative action, such as Articles 15(4) and 16(4), to abide by the principle of individual equality in its deepest sense and secure substantive equality of opportunity for all. Reservations in public education and employment are instances of such affirmative action.

The Indian State has actively shaped the reservation policy through its wide legislative, executive, and constitutional amendment powers. Although the Judiciary has largely deferred to the State in such matters, it has taken a few steps to check the violation of constitutional values and prevent the attempts of various governments to weaponize reservation policy by using it to gain political patronage. The 50% ceiling is one such step. Recently, this ceiling has come under renewed scrutiny since the Supreme Court has used it to quash the reservations granted to the Maratha community in Maharashtra.

In this context, the wide powers of the State and the limited scope of judicial review vis-à-vis the reservation policy, along with the shifting jurisprudence on the 50% ceiling, give rise to a complex web of questions. For instance, what are the principles guiding the reservation policy under the equality code? How has the Judiciary used its powers to uphold these

principles? What is the 50% ceiling and how has it evolved over the years? How has the 50% ceiling been applied? And most importantly, does the 50% ceiling protect or hinder the equality guaranteed by the Constitution? These are some of the questions that I will answer through this essay.

In Part 1 of this essay, I analyse the values guiding the equality code contained within Part III of the Constitution. I argue that the code requires harmonisation of the dual objectives of substantive equality of opportunity – creating a level playing field and breaking cycles of disadvantage linked with group association. In Part 2, I trace the origin of the 50% ceiling, which was introduced as a judicial attempt to harmonise the aforementioned objectives, and its evolution from an impenetrable ceiling to a flexible policy directive. I argue that in so evolving, the ceiling has shifted away from its earlier formalistic conceptualisation of equality towards a more substantive understanding of equality of opportunity. In Part 3, I argue that the ceiling is no longer a straight-jacket formula for determining the permissible quantum of reservations by analysing some of the judgments where it has been applied. Accordingly, I submit that the current version of the 50% ceiling is flexible and provides for reservations higher than 50% if so required. In Part 4, I argue that the ceiling achieves the harmonization required by the equality code by mandating the State to develop reservation policies per constitutional values and ensuring such compliance through judicial review. In Part 5, I address the various criticisms of the 50% ceiling with a specific focus on the argument that it is an instance of judicial overreach. I argue that the Judiciary has guarded the usurpation of reservation policies by majoritarian urges and that the 50% ceiling has played a major role in doing so. Then, I demonstrate the instrumental role of the ceiling in safeguarding the interests of several communities against the backdrop of majoritarian reservation policies, in Part 6. Finally, I conclude by submitting that the 50% ceiling has

protected the equality guaranteed by the Constitution and is hence, an indispensable part of the equality code.

1. EQUALITY AND THE INDIAN CONSTITUTION

While the principle of equality is a fundamental tenet of most democratic societies today, it remains an elusive concept when it comes to widespread agreement on its meanings and aims.[1] For some, equality means treating everyone alike; for others, equality inheres in the equality of outcomes; and, for some others, equality may revolve around the equality of opportunity.[2] These three categories are not exhaustive of all the different ways equality has been conceived, but they do reflect the underlying frameworks of the equality codes of most jurisdictions today.[3]

Increasingly, jurisdictions have combined elements from various conceptions of equality to form their equality codes and reinforce their constitutional values, since no one conception can claim to be the ultimate basis for grounding all anti-discrimination measures.[4] It is apposite to say, then, that "the choice between (such) formulations and conceptions is not one of logic but of values and policy."[5] Accordingly, we must look at the values and policy directives contained within the Constitution to determine the values and policy which should guide the equality code and its concomitant anti-discrimination measures.

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[1] Sandra Fredman, *Discrimination Law* (2nd ed., OUP 2011) 1 (hereinafter, 'Fredman'); IM Young, *Justice and the Politics of Difference* (Princeton University Press 1990).

[2] *ibid*; See B Hepple, 'The Aims of Equality Law' [2008] 61 Current Legal Problems 1 – 22.

[3] Fredman 1 -25.

[4] Fredman 2.

[5] *ibid*.

The Preamble to the Constitution secures to all its citizens equality of status and opportunity.[6] Article 16 builds upon this promise by granting to all citizens the fundamental right to equality of opportunity in matters of public employment.[7] Thus, it is quite evident that the drafters of the Constitution selected 'equality of opportunity' as the cornerstone for incorporating and promoting equality within the Indian society.[8] This foundation has been supplemented by certain elements of the 'equality of outcomes' doctrine to ensure that substantive equality of opportunity is achieved.[9] I will now analyse the significance of these principles and their application within the Constitution.

Equality of Opportunity is an idea that people ought to be able to compete on equal terms, i.e., it is about genuinely open competition, devoid of any barriers, prejudices, or preferences.[10] In this regard, it also recognises that equal competition against the background of past and structural discrimination can perpetuate disadvantage, i.e., true equality cannot be achieved if individuals begin the race from different starting points.[11] Accordingly, this conception of equality aims to equalize the starting points for all – instead of treating everyone alike or seeking to equalize the end results.[12] This is usually done by taking remedial measures to ensure that individuals from "all sections of the society have a genuinely equal chance of satisfying the criteria for access to a particular social good",[13] such

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[6] The Constitution of India 1950, Preamble.

[7] The Constitution of India 1950, Art. 16.

[8] See Chandrachud J. in *Indira Nehru Gandhi v. Raj Narain* 1976 (2) SCR 347.

[9] Williams, 'The Idea of Equality' in P Laslett and WG Runciman (eds.), *Philosophy Politics and Society Second Series* (Blackwell 1965) (hereinafter, 'Williams'); The Constitution of India 1950, Arts. 15(4), 16(4).

[10] Richard Arneson, 'Equality of Opportunity' in Edward Zalta (eds.), *Stanford Encyclopaedia of Philosophy* (Summer 2015); Andy Mason, 'Equal Opportunity' (Encyclopaedia Britannica, 2019).

[11] Sandra Fredman, 'Substantive Equality Revisited' [2016] 14(3) International J. of Constitutional Law 712.

[12] Williams, pp 125 – 126; Fredman 18.

[13] *ibid*.

as ensuring universal education, equal access to public facilities, etc., and providing certain exemptions/relaxations for individuals belonging to the deprived sections of the society to bring them on an equal footing with the others.[14]

However, there are a few problems with the formal conception of equality of opportunity. First, it traditionally rejects policies that aim to correct imbalances in the society through reservations/quotas for benefitting individuals belonging to deprived sections.[15] Second, while this model may remove obstacles in the path of advancement of such deprived sections, it does not guarantee that this will lead to greater substantive fairness in the resulting access to a particular social good.[16] Third, it may perpetuate the existing criteria of merit, which often reflect and reinforce the extant patterns of disadvantage.[17] Hence, formal equality of opportunity can only be a partial basis for grounding an equality code that aims to achieve substantive equality.[18]

Being cognizant of these limitations, the drafters supplemented the equal opportunity model with some features of equality of outcomes. Article 16(4) is a prime example of such supplementation; the drafters provided for reservations to ensure greater substantive fairness in the resulting access. In doing so, they had to choose the objective of such reservations, i.e., whether reservations should lead to proportionate representation of backward classes or something else. Proportionate representation is about equal outcomes and requires that the

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[14] *ibid*.

[15] Williams 110; Fredman 18.

[16] *ibid*. For example, mandatory qualification requirements for a particular job will continue to exclude those who lack these requirements as a result of past discrimination.

[17] B Hepple, 'Discrimination and Equality of Opportunity – Northern Irish Lessons' (1990) 10 OJLS 408, 411; Fredman 236. For example, merit criteria which stresses on continuous work history will be detrimental to women since they may have to temporarily leave the workforce to bring up children.

[18] Fredman 19.

spread of backward classes in educational institutions/workforce should reflect their proportions in the population as a whole.[19]

The drafters rejected proportionate representation as the objective for reservation policies, as is made explicit by comparing the phraseology of Article 16 with Articles 330(2) and 332(3), which provide for proportionate representation of SCs and STs in legislative bodies.[20] I believe that the reasons for such rejection were that a) proportionate representation completely subordinates the right to individual equality through its utilitarian emphasis on outcomes,[21] b) it does not necessitate any fundamental re-examination of the structures perpetuating discrimination,[22] and c) it is a mathematical impossibility since the Indian society is finely sliced into thousands of castes, sub-castes, and related identifiers.

Instead, the drafters chose 'adequate representation' of backward classes as the objective of reservations under the equality code.[23] I submit that this was the correct decision since adequate representation does not affix any inflexible norms for determining the quantum of reservations.[24] Under it, quotas can be expanded or contracted as per the specific needs of the backward classes, without having to adhere to the strict limits of population proportions.[25] Accordingly, the percentage of seats reserved for a particular backward class can be more than its share in the population if the State is of the opinion that it has not been adequately

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[19] Fredman 15 – 16.

[20] See The Constitution of India 1950, Arts. 16(4), 330(2), and 332(3).

[21] Fredman 18: Utilitarianism correlates to a socio-legal conception where the overemphasis on results, and the principle of distributing equal proportions of a resource, can mask the unfairness inherent in the process of achieving these results.

[22] Fredman 16, For example, women who achieve positions in the workplace may do so "by conforming to "male" working patterns, contracting out their childcare obligations to other women, who remain as underpaid and undervalued as ever."

[23] See The Constitution of India 1950, Art. 16(4).

[24] See Kailash Jeenger, 'Reservation is About Adequate Representation, Not Poverty Eradication' (The Wire, 18 May 2020) <https://thewire.in/law/supreme-court-bench-reservation> accessed 29 June 2021.

[25] *ibid*; Reddy J. in *Indra Sawhney v Union of India* AIR 1993 SC 477.

represented in the services and vice-versa.[26] The reservation for Scheduled Tribes in the north-eastern states provides a good example of the State's discretion in this regard - while 69% and 94% of the population belongs to STs in Arunachal Pradesh and Mizoram respectively, 80% of the seats have been reserved in both these states to achieve adequate representation of the ST candidates.[27] Such adequate representation ensures that backward classes can access State power and share it with the upper classes,[28] redressing past disadvantage, opening up new perspectives on decision making, casting light on several structural assumptions, and enhancing the store of social knowledge.[29]

Equality, then, is about creating a level-playing field whilst breaking the cycle of disadvantage linked to status or group association, as per the Constitution. Harmonization of these dual objectives has made the co-existence of equality of opportunity and strong affirmative action possible in India, creating a framework conducive to achieving substantive equal opportunity.

2. THE ORIGIN AND EVOLUTION OF THE 50% CEILING

In an attempt to harmonise the aforementioned objectives of substantive equal opportunity, the Judiciary introduced the 50% ceiling on reservations. The ceiling first appeared in M.R. Balaji v. State of Mysore[30] and has been a permanent fixture of reservation jurisprudence ever since. Its meaning, however, has not remained static; changes in the Judiciary's understanding of substantive equal opportunity have led to several modifications to the ceiling over the

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[26] See Iyer J. in *State of Kerala v. N.M. Thomas* 1976 (2) SCC 310; *ibid*.

[27] See *State of Arunachal Pradesh v. Solien Phukan* 2007 (4) GLT 321.

[28] Supra 26.

[29] Fredman 259, 266 -268; *Action Travail des Femmes v. Canadian National Railway Co.* [1987] 1 SCR 1114.

[30] *M.R. Balaji v. State of Mysore* AIR 1963 SC 649.

years. These constant changes necessitate that the evolution of the 50% ceiling be traced to identify its contemporary meaning and scope. Accordingly, I will now scrutinize the key judgments that have shaped the 50% ceiling.

As noted above, the Supreme Court first introduced the 50% ceiling in **M.R. Balaji v. State of Mysore** (*'Balaji'*).[31] In *Balaji*, a 5-judge bench dealt with the challenges against State of Mysore's order reserving 68% seats in educational institutions for backward classes. The Court held that the reservation of 68% seats is inconsistent with the special provisions authorised by Article 15(4) since it completely ignores the interests of the other citizens in the society. The Court, upon equating 15(4) and 16(4),[32] held that reservations under these Articles must be within reasonable limits, i.e., the interests of the weaker sections of the society have to be adjusted with the interests of the community as a whole. It held that, "(s)peaking 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."[33]

The Court reasoned that the State should not provide for unreasonable, excessive, or extravagant reservations under Article 16 because that would have the effect of destroying the equality of opportunity contained in 16(1), and would also eliminate general competition in a large field.

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[31] *ibid*.

[32] *ibid* p.37.

[33] *ibid* p.34.

A year later, another 5-judge bench, by a 4:1 majority, held that the 'carry-forward rule'[34] is unconstitutional since it allows the State to reserve more than 50% of the vacancies in a particular year, in **T. Devadasan v Union of India ('*Devadasan*').**[35]

Interpreting *Balaji*, the court held that, "(a) proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under cl. (4) would in effect efface the guarantee contained in cl. (1) or at best make it illusory."[36] It reasoned that the method evolved by the State to reserve seats under 16(4) must strike a balance between the claims of the backward classes and claims of other classes to effectuate the guarantee under 16(1).

In summary, the 50% limit in *Balaji* and *Devadasan* was based on the premise that Articles 15(4) and 16(4) are exceptions to Articles 15(1) and 16(1), and that there must be a limit on these exceptions.

However, Justice Subba Rao dissented in *Devadasan* and held that the carry-forward rule would not amount to a violation of 16(1) unless it is "established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes."[37] He held that the expression 'nothing in this article' employed in 16(4) "is a legislative device to express (drafters') intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the

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[34] See The Constitution of India 1950, Art. 16(4B); The State can 'carry-forward' reserved seats for backward classes that remain unfilled to the subsequent years.

[35] *T. Devadasav v. Union of India* AIR 1964 SC 179.

[36] *ibid* p.18.

[37] *ibid* p.31.

Article."[38] Accordingly, he interpreted the 50% ceiling adopted in *Balaji* to be a workable guide and not an inflexible rule of law.[39]

This was the first instance where a Supreme Court judge was treating the reservation provisions as an expression of the larger equality principle, and not as an exception to it. Accordingly, it marked a shift in the constitutional understanding of equal opportunity and the 50% ceiling.

The shift continued in 1975 when a 7-judge bench, in **State of Kerala v. N.M. Thomas (*'N.M. Thomas'*),**[40] heard challenges against a rule which temporarily exempted SC & ST employees from passing the qualifying tests mandated for being promoted from the Lower to the Upper Division Clerk level. The Court held that such an exemption was constitutionally valid.

While 5 of the 7 judges did not explicitly comment on the 50% ceiling since the impugned rule did not provide for any reservations, the majority held that 16(4) was an "emphatic restatement" of 16(1). The other 2 judges, Justices Fazal Ali and Krishna Iyer approved Justice Subba Rao's previous dissent and expressed doubt on the rigidity of the 50% limit on reservations.

Justice Ali held that 16(1) permits classifications and is akin to Article 14 which "implicitly permits classification in any form provided certain conditions are fulfilled."[41] Hence, 16(4), which is a specific form of classification, is not an exception to 16(1) and is rather a part and

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[38] *ibid* p.26.

[39] Relying upon the dissent of Justice Wanchoo in *General Manager, Southern Railway v. Rangachari* AIR 1962 SC 36.

[40] *State of Kerala v. N.M. Thomas* 1976 (2) SCC 310.

[41] *ibid* p.185.

parcel of 16(1). Accordingly, he held that the State is empowered to make reservations under 16(4) provided that the following conditions are strictly met;

- That the class for which reservation is made must be socially and educationally backward.
- That the class for which reservation is made is not adequately represented in the services under the State.
- That the reservation should not be made at the cost of efficiency.
- That the reservation must not be too excessive so as to destroy the very concept of equality.

While explaining the last condition, he observed that the 50% ceiling was largely a rule of caution and did not exhaust all categories.

Justice Iyer concurred with Justice Ali and held that 16(4) is an "illustration of constitutionally sanctified classification"[42] under Article 16 and "reconciles the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to."[43]

However, since the legality of the 50% ceiling was not in question in *N.M. Thomas*, the opinions of Justices Ali and Reddy against the impenetrable ceiling were obiter. Consequently, the 50% ceiling as envisaged in *Balaji* and *Devadasan* continued to operate even after these judgments, despite a marked shift in the constitutional understanding of the nature of Articles 15(4) and 16(4).

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[42] *ibid*, p.136.

[43] *ibid*; However, Iyer J. later upheld the constitutionality of the 50% ceiling later in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* (1981) 1 SCC 246.

This changed in 1992, when a 9-judge bench was called upon to decide the validity of the executive orders reserving 27% seats for Other Backward Classes (OBCs),[44] in **Indra Sawhney v Union of India** ('*Indra Sawhney*').[45] In this context, the Court also reconsidered the meaning and the constitutional validity of the 50% ceiling in light of the opinions expressed in *Balaji*, *Devadasan*, and *N.M. Thomas*.

Seven out of nine judges clearly held that 16(4) is a facet of 16(1), and it was declared that "the view taken by the majority in Thomas is the correct one".[46]

Justice Jeevan Reddy, writing for himself and Justices Kania, Venkatachaliah and Ahmadi, held that the power conferred by 16(4) should be exercised in a "fair manner and within reasonable limits".[47] He held that the protection under 16(4) has to be harmonised with the guarantee of equality enshrined in 16(1). He also observed that 16(4) envisages adequate, and not proportionate, representation and that the drafters of the Constitution never intended to reserve a majority of the seats. Accordingly, he held that reservations contemplated under 16(4) should not generally exceed 50%, unless an extraordinary situation exists.[48] The opinion called for "extreme caution" to be exercised and a "special case made out" when providing high reservations.[49]

In a similar vein, Justice Sawant held that "the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre or service

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[44] See Aneesha Mathur, 'Mandal Commission Report, 25 years later' (The Indian Express, 01 September 2015) <https://indianexpress.com/article/india/india-others/sunday-story-mandal-commission-report-25-years-later/> accessed on 29 June 2021.

[45] *Indra Sawhney v Union of India* AIR 1993 SC 477.

[46] M.H. Kania, C.J., M.N. Venkatachaliah, S.R. Pandian, A.M. Ahmadi, Kuldip Singh, P.B. Sawant, and B.P. Jeevan Reddy, JJ.

[47] Supra 46, 299.

[48] *ibid*.

[49] *ibid.*

in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per cent will have to be justified on valid grounds which grounds will have to be specifically made out."[50] Accordingly, the 50% ceiling could be breached if the State could make out a special case of the existence of extraordinary circumstances to justify such breach.

Therefore, the Court first materially changed the meaning of the 50% ceiling, from impenetrable to flexible, and then upheld its constitutional validity. *NM Thomas* and *Indra Sawhney* explicitly rejected the exception paradigm of *Balaji* and *Devadasan*, and redesigned the 50% ceiling as a flexible one to reflect this rejection.

In the wake of *Indra Sawhney*, several constitutional amendments were made to override the Court's holdings concerning reservations in promotions.[51] Through one such amendment, the legislature introduced Article 16(4B) which allowed the application of the 'carry-forward' rule to reservations in promotions.[52] Accordingly, the State could now carry forward unfilled vacancies from previous years and provide for reservations in promotions exceeding 50% of the total seats opened.

Such amendments were challenged before a 5-judge bench in **M. Nagaraj v Union of India** ('*Nagaraj*'),[53] including the amendment which introduced Article 16(4B).[54] The Court upheld the validity of this amendment by holding that it does "not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and

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[50] *ibid* 305.

[51] 77th [Article 16(4A)], 81st [Article 16(4B)}, 82nd [Proviso to Article 335], and 85th [Consequential Seniority] Constitutional Amendments.

[52] Supra 34.

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

[54] Supra 34.

STs on the other hand"[55] since unfilled vacancies are a separate class of vacancies and are not to be considered the same as vacancies of the particular year in which they are being filled up to determine and apply the 50% ceiling.

However, in so doing the Court opined that the State must see that its reservation provision does not lead to excessiveness and should collect 'sufficient'[56] "quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment." This echoes the concern of misuse of the powers under 16(4) to provide reservations which functioned less as instruments to redress inequality and more as a ploy for vote-bank politics,[57] and seems to be in line with Justice Reddy's appeal for the exercise of "extreme caution" and the requirement of "special case made out" before providing high reservations, in *Indra Sawhney*.[58]

Perusing these judgments makes it clear that the 50% ceiling has come a long way – from its origins in *Balaji* and *Devadasan*, rooted in a formalistic conceptualisation of equality, to *Indra Sawhney* and *Nagaraj*, which together expanded the scope of substantive equal opportunity within the equality code.

Before *Indra Sawhney*, the rule was simple – reservations will always be less than 50% per Articles 15(4) and 16(4), how much less would depend on the given circumstances. The Court in *Indra Sawhney* turned this interpretation on its head by holding that there can be certain extraordinary situations where more than 50% of the seats can be reserved – the 50% ceiling was no longer impenetrable. *Nagaraj* took this a step further by upholding the

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[55] *ibid* 278.

[56] Instances of determining if the data is sufficient can be found in *BK Pavitra v. Union of India* AIR 2019 SC 2723 and *Jaishri Laxmanrao Patil v. Chief Minister, Maharashtra* C.A. No. 3123 of 2020 (Supreme Court).

[57] Supra 49; See *Ashoka Kumar Thakur v. Union of India* (2008) 6 SCC 1.

[58] Supra 49.

constitutional validity of the carry-forward rule, which was previously viewed as antithetical to the 50% ceiling (even in *Indra Sawhney*).

Having understood the evolution of the 50% ceiling, I will now look at some of the cases where it has been applied to understand its true import.

3. 50% CEILING AND THE EXTRAORDINARY CIRCUMSTANCES

Justice Reddy had noted in *Indra Sawhney* that, "it might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule ('50% ceiling') may become imperative."[59] Accordingly, several relaxations to the 50% ceiling have been made for classes of people living in remote areas of country. The following sub-sections provide examples of such relaxations.

North-Eastern States and Andaman & Nicobar Islands

In Arunachal Pradesh, Meghalaya, Mizoram, and Nagaland, 80% of State Government jobs have been reserved for individuals belonging to STs.[60] Such high reservation has been provided keeping in mind that STs comprise a majority of the population in all these states.[61] Similarly, the Supreme Court in Parents Association v. Union of India has upheld the reservation of 70% of the seats in educational institutions for several classes of residents in

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[59] Supra 45, p.810.

[60] Supra 27; See Notifications of the respective State Legislatures/Governors: Arunachal Pradesh - https://www.arunachalpradesh.gov.in/wp-content/uploads/extraordinary_gazette/1548230977_494%20EOG%20No.%20494%202018%20Adve%20Refomrs.pdf; Meghalaya - http://megpns.gov.in/gazette/2013/06/13-06-13-IIA.pdf; Nagaland - https://dpar.nagaland.gov.in/reservation-of-80-of-all-appointments-or-posts-under-the-govt-of-nagaland-clarification-thereof/.

[61] *ibid*.

Andaman & Nicobar Islands.[62] The Court observed that the high reservation was justified due to the absence of educational opportunities for the concerned classes over several decades, given the remoteness and underdevelopment of the area.[63]

Hence, high reservations provided to residents of the above-mentioned states and islands fit Justice Reddy's conceptualisation of 'extraordinary circumstances' satisfactorily since these groups inhabit far-flung and remote areas and are virtually out of the mainstream of national life. This might also explain why the reservations in the North-eastern states have not faced any major judicial challenges despite years of operation.

Fifth Schedule Areas

Although the 50% ceiling relates to Articles 15 and 16, its principles have been applied to decide several cases relating to local self-government under the Fifth Schedule of the Constitution.[64] These cases dealt with state legislations reserving more than 50% of the seats for ST candidates in the Panchayats of Scheduled Areas,[65] enacted to give effect to the Panchayats (Extension to Scheduled Areas) Act, 1996 and Articles 243D and 243T of the Constitution.[66]

While 243D and 243T only provide for proportionate representation, the state legislations provided reservations which were often more than the proportion of STs in the total

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[62] *Parents Association v. Union of India* AIR 2000 SC 845.

[63] *ibid*.

[64] See *Ashok Kumar Tripathi v. Union of India* 2000 (2) MPHT 193; *Union of India v. Rakesh Kumar* (2010) 4 SCC 50.

[65] See The Constitution of India, Art. 244.

[66] The Panchayats (Extension to Scheduled Areas) Act, 1996; The Constitution of India 1950, Arts. 243D and 243T.

population.[67] Therefore, on a plain application of the text of 243D and 243T, these reservations should have been invalidated. However, the Court took into consideration the criteria for declaring any area as a "Scheduled Area" under the Fifth Schedule, including preponderance of tribal population and marked economic backwardness of the area as compared to neighbouring areas,[68] and invoked the 'extraordinary circumstances' proviso to the 50% ceiling in its application of 243D and 243T. Accordingly, it validated the high percentage of reservation in Scheduled Areas.[69]

While doing so, the Court added a caveat that when providing such high reservations, the State is also responsible to account for the interests of the other deprived classes, in Union of India v. Rakesh Kumar ('*Rakesh Kumar*').[70]

Apart from cases dealing with reservation in local self-government in Scheduled Areas, the Court has also dealt with a case concerning employment under Article 16 in such areas.[71] In Chebrolu Leela Prasad Rao v. State of Andhra Pradesh ('*Chebrolu Leela*'),[72] the Supreme Court overruled the Andhra Pradesh Governor's order reserving 100% of the posts of teachers for ST candidates in Scheduled Areas of the state.[73]

Invalidating such complete reservation, the Court held that "by providing hundred percent reservation to the scheduled tribes has deprived the scheduled castes and other backward

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[67] *ibid.*

[68] Ministry of Tribal Affairs, Government of India, 'Declaration of the Fifth Schedule' <https://tribal.nic.in/Clm.aspx> accessed on 29 June 2021.

[69] Supra 64.

[70] Supra 64: Rakesh Kumar.

[71] *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh* (2020) SCC Online SC 383.

[72] *ibid*.

[73] *ibid*.

classes … of their due representation."[74] It held that "a reservation that was permissible by protective mode, by making it hundred percent would become discriminatory and impermissible. The opportunity of public employment could not be denied unjustly to the incumbents, and it was not the prerogative of few. The citizens had equal rights, and the total exclusion of others by creating an opportunity for one class was not contemplated by the founding fathers of the Constitution of India."[75]

Accordingly, it is logical to say that the Court was not opposed to the high reservations provided to STs in Scheduled Areas in *Chebrolu Leela*, but was against the complete exclusion of all the other classes, including SCs & OBCs, residing in these areas. This is in line with the Court's caveat in *Rakesh Kumar* where it had held that the State must account for the interests of the other deprived classes while making reservations for STs in these areas.

The position that emerges out of these decisions is that Scheduled Areas come under the 'extraordinary circumstances' proviso to the 50% ceiling and therefore, more than 50% of the seats can be reserved for the disadvantaged communities, especially the STs, in such areas. In formulating any reservation policy, the interests of the other backward classes have to be taken into consideration. These instances also indicate that the 50% ceiling is very flexible and provides for higher reservations than 50% if the circumstances necessitate so – the 50% ceiling is no longer a "*Lakshmana Rekha*".[76]

Equipped with this understanding of the flexible nature of the 50% ceiling, I will now begin analysing whether this ceiling protects or hinders equality.

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[74] *ibid* p.127.

[75] *ibid* p.134.

[76] In modern Indian parlance, Lakshmana Rekha refers to a strict convention or a rule - never to be broken.

4. 50% CEILING AS THE GOLDILOCKS SOLUTION

Given reservations' ameliorative function, the following questions often crop up in determining how a reservation policy should be formulated: 'Why should we not reserve all the seats?' and 'Why cap reservations at all?'.[77]

As noted before, substantive equal opportunity is premised on genuinely open competition.[78] While reserving some seats helps address the various societal barriers inhibiting equal opportunity, reserving all the seats is antithetical to open competition and is hence, against the constitutional conception of equality.[79] The underlying objective of constitutional reservations is not to achieve group equality qua groups, but to achieve substantive equality of opportunity among individuals.[80] In this light, reservations are only a means to the end of achieving equal opportunity, and not an end in themselves.[81] Accordingly, reservations must be capped at the point beyond which they shed their complementary character and begin abating equal opportunity.

Nevertheless, determining the capping point of reservations is a tall order, one which requires a deeper appreciation of the nature and objectives of reservations and a careful consideration of the effects of a reservation policy on both the beneficiaries and the non-beneficiaries.[82] Care must be taken that the reservation policy provides candidates belonging to backward classes a genuine chance of competing on an equal footing with other better-placed

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[77] See AP Sen, *Inequality Re-examined* (OUP 1992).

[78] Supra 10.

[79] *ibid*; Supra 6; Supra 7.

[80] See Marc Galanter, *Competing Inequalities: Law and the Backward Classes in India* (OUP 1984); Gautam Bhatia, 'State of Kerala v. NM Thomas and the Transformation of Equality' (Indian Constitutional Law & Philosophy, 01 February 2014) <https://indconlawphil.wordpress.com/tag/affirmative-action/> accessed on 29 June 2021 – "the use of groups is a convenient mechanism to achieve the end goal of individual equality".

[81] See Fredman 278.

[82] Fredman 279 – 334.

candidates.[83] Care must also be taken that categories of candidates are not effectively excluded from the public education and employment by virtue of their group association.[84] Accordingly, it can be said that the act of determining the capping point is a balancing act – one which balances the various elements of substantive equality of opportunity.[85]

The various elements of equal opportunity, such as open competition, remedial measures, and affirmative action, must be balanced with each other to achieve substantive equality of opportunity.[86] Since balance is highly context-specific, the right balance of these elements would differ from region to region depending upon their unique circumstances.[87] Accordingly, the legitimacy of any capping point should be determined by testing whether it is able to achieve such varying balance(s).

Then, the question is ‘Whether the 50% ceiling achieves this balance?’

The erstwhile version of the 50% ceiling interpreted reservations as an exception to equality of opportunity and capped them at 50% because exceptions cannot override the rule. Accordingly, the Court in *Balaji* and *Devadasan* held that reservations must remain below 50% at all times. While Constituent Assembly Debates suggest that 16(4) was indeed envisaged as an exception to the general principle laid down by 16(1) read with 16(2),[88] such an interpretation is rooted in an extremely formalistic conceptualisation of equality and

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[83] See Rudolf Heredia, *Taking Sides: Reservation Quotas and Minority Rights in India* (Penguin Books, 2012) (hereinafter, ‘Heredia’).

[84] *ibid*.

[85] Supra 10; Fredman 16.

[86] *Ibid*; Reddy J. in Indra Sawhney, Supra 45 180.

[87] *ibid*.

[88] Parliament of India, Constituent Assembly Debates, Vol. VII, 30th November 1948 (Speech of Dr. BR Ambedkar); P. Rao and Ananth Padmanabhan, ‘Legislative Circumvention of Judicial Restrictions on Reservations: Political Implications’ [2013] NSLIR Special Issue 53, 68.

thereby fails to recognise that 16(1) itself permits reservations and preferential treatment.[89] Hence, the previous version of the 50% ceiling did not achieve the right balance.

After Justice Subba Rao's dissent,[90] the Court started tweaking the 50% ceiling to reflect the true nature of reservations within the equality code. As noted before, the Court in *Indra Sawhney* held that the ceiling was flexible and exceptions can be made to breach the 50% limit. This was further substantiated by the Court in *Nagaraj*, where it upheld the constitutionality of the carry-forward rule.

Post these judgments, the rule no longer operates as an automatic bar on any legislation which reserves more than 50% of the seats. Rather, it signifies the point beyond which the Judiciary may ask the State to demonstrate why such high reservation is required and accordingly, determine whether such reservation is excessive by exercising intermediate scrutiny through judicial review.[91] Hence, legislations reserving more than 50% of the seats are no longer invalidated for simply providing high reservations under the current rule; they are invalidated if there exist no 'extraordinary circumstances' to justify reservations higher than 50%.

As a result of this shift, the 50% ceiling now serves as a directive for the State to develop and implement its reservation policies. Through the ceiling, the State has been alerted that it cannot wantonly reserve seats since it can be asked to provide its reasons for providing such high reservations. By doing so, the Judiciary has sought to remind the State that it must also take into account the interests of those who have been excluded while providing reservations to a particular class.[92]

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[89] Supra 39: 16(4) is an emphatic restatement of 16(1) and seeks to make explicit what is already implicit in it.

[90] Supra 37.

[91] See Supra 56; Gautam Bhatia, 'Ashoka Kumar Thakur and Tiers of Scrutiny' (Indian Constitutional Law & Philosophy, 15 June 2021) <https://indconlawphil.wordpress.com> accessed on 29 June 2021.

[92] See Bhat J. Supra 46, pp. 18 – 22; Supra 66.

In that sense, such policy directives are largely similar to the approach of South African Constitutional Court, which requires the State to demonstrate 'genuine ameliorative purpose'[93] behind its reservation measures and that these measures are reasonably likely to achieve the end of advancing the interests of those who have been disadvantaged by unfair discrimination, i.e., arbitrary, capricious, blatantly preferential methods are invalidated through judicial review.[94]

Accordingly, the rule does not present any straightjacket formula for determining the permissible quantum of reservations applicable across the entire country. Instead, it mandates the State to develop a reservation policy for any given group or region which balances the need for reservations with the guarantee of open competition. Additionally, it empowers the Court to look at the unique circumstances of the given groups or regions and determine whether high reservations are required to ensure their adequate representation. Together these factors help the current version of the 50% ceiling achieve the balance required to ensure substantive equality of opportunity. Consequently, Justice Bhat was right in terming the current version of the 50% ceiling as the "Goldilocks solution" – not too large, not too small, but just right.[95]

5. CRITICISMS OF THE 50% CEILING

Several commentators have criticised the 50% ceiling on a variety of fronts, by deeming it as an arbitrary judicial innovation, an instance of judicial overreach, and an interpretative

[93] Fredman 270; See *R v Kapp* 2008 SCC 41 (Canadian Supreme Court).

[94] *Minister of Justice v. Van Heerden 2004* (6) SA 121 (CC) pp. 38 - 41; *ibid*.

[95] Supra 92, p.21.

checkerboard solution, among other things.[96] I will summarise such substantive criticisms against the 50% ceiling in this section and will then analyse their soundness.

The primary criticism against the 50% ceiling is that it affixes a straight-jacket formula to determine the quantum of reservations across the country, without taking into account the specific extent of group disadvantage in a particular region.[97] Ergo, the flat figure of 50% is against the notion of substantive equality.[98] This, however, is a mis-conceptualisation since the present version of the rule does not affix an impenetrable ceiling on the quantum of reservations and rather provides a flexible policy directive for the State's reservation policies, as has been noted in the previous sections.

Additionally, it is also argued that the 50% ceiling is "just a subtler way of rephrasing the exception paradigm" as propounded in *Balaji* and *Devadasan*.[99] Gautam Bhatia summarises this argument well by stating that, "the 50% rule and Article 16(4) being an exception to Article 16(1), are joined at the hip. If one goes, the other must necessarily go."[100] However, the current version of the rule explicitly rejects the defining feature of the exception paradigm by not treating the 50% ceiling as a "*Lakshmana Rekha*" and making available reservations above 50%. Furthermore, this argument is premised on the assumption that only those constitutional values, or the constituents of such values, that are exceptions to each other have to be balanced against each other. This is an erroneous assumption since constitutional values

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[96] See Justice Nagmohan Das, 'The clamor for reservations signals a deeper crisis elsewhere' *The Hindu Magazine* (Mohali, 01 July 2010) 4; Alok Prasanna Kumar, 'Revisiting the Rationale for Reservations' [2016] 51(47) EPW 10; Gautam Bhatia, 'A Critique of the Supreme Court's Maratha Reservation Judgment – I: Equality' (Indian Constitutional Law & Philosophy, 06 May 2021) <https://indconlawphil.wordpress.com/2021/05/06/a-critique-of-the-supreme-courts-maratha-reservation-judgment-i-equality/> accessed on 29 June 2021.

[97] *ibid*: Das J. and Kumar.

[98] *ibid*.

[99] Supra 96: Bhatia

[100] *ibid*.

and constituents of rights are balanced against each other all the time without them being deemed as exceptions in constitutional law scholarship and jurisprudence.[101] Hence, it would be appropriate to say that while the erstwhile 50% ceiling was joined at the hip with the exception paradigm, the current version is not.

Another criticism of the 50% ceiling is that it is purely a judicial invention, without any textual backing.[102] Under Articles 15 and 16, the State has been empowered to determine those backward classes of citizens who are inadequately represented in public education and employment and accordingly, reserve seats for them to remedy such inadequate representation, i.e., "the marker of inadequacy of representation is a matter within the subjective satisfaction of the State".[103] Moreover, the Constitution does not define these backward classes and rather, delegates the task to the State.[104] These Constitutional provisions are relied upon to argue that only the State has been entrusted with the task of determining adequate representation under Articles 15 and 16 and hence, any attempt by the Judiciary to interfere with the State's decision-making is an instance of judicial overreach. Accordingly, it is argued that the State should be given a free hand to pick the percentage as per the need and requirement of a particular community or region and the Judiciary should not have any power to pick a percentage.

This limb of criticism against the 50% ceiling is very potent since it attacks the very source of the 50% ceiling and thereby threatens to de-legitimise it entirely. Hence, this criticism needs to be addressed holistically if the constitutional validity of the 50% ceiling has to be upheld.

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[101] See Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' [1987] 96(5) Yale LJ 943; Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (OUP 2009).

[102] Supra 96.

[103] See *Suresh Kumar Gautam v State of UP* (2016) 11 SCC 113; *State of Punjab and Hira Lal* 1970 (3) SCC 567.

[104] Supra 23.

Is 50% ceiling a judicial overreach?

I submit that the primary reason for reckoning the 50% ceiling as an instance of judicial overreach is the underlying sentiment that the Legislature, an institution that represents the will of the majority of the people, should make all decisions related to reservations, and the Judiciary, an institution which does not have any elected representatives, should not have any say in this highly subjective political decision.[105] This sentiment stems from an understanding of democracy as a principle that "emphasises preference aggregation and supports majority will".[106] However, this is a flawed conceptualisation of the Indian democracy since it reduces the Judiciary to a mere spectator of the State's unfettered exercise of discretionary powers. Accordingly, I submit that there are three primary reasons why the State's reservation policies should be subject to judicial oversight.

Powers of Judicial Review

While drafting the Constitution, members of the Constituent Assembly ensured that the Indian Judiciary is given sufficient power to strike down legislative attempts to abridge fundamental rights guaranteed by the Constitution.[107] Consequently, the Supreme Court and the High Courts have been given wide powers of judicial review to test whether a legislative/executive action is contrary to provisions of the Constitution,[108] with a special

[105] Heredia 186.

[106] Vinay Sitapati, 'Reservation' in Sujit Chaudhary et al. (eds.), *The Oxford Handbook of Constitutional Law* (OUP 2006).

[107] See Jonathan Rajan, 'The Strong and The Weak: Locating India's Reservation Dialogic in Mark Tushnet's Dichotomy' [2020] 14(2) NUALS LJ 85.

[108] The Constitution of India 1950, Arts. 32 and 226.

emphasis on the fundamental rights contained in Part III.[109] The question, then, is not if powers of judicial review exist, but if they exist in the context of Articles 15 and 16.

The text of Articles 15 and 16 suggests that the dual questions of 'determining who the backward classes are' and 'what would comprise adequate representation of such classes' are within the subjective satisfaction of the State.[110] Accordingly, it is up to the State to determine the backward classes for whom special provisions, including reservations, have to be made and how these provisions have to be implemented.[111] Hence, the powers of the State under these articles are of very wide amplitude.

This, however, is not to say that the State's powers under Articles 15 and 16 are absolute and unfettered. Constituent Assembly Debates make clear that while the powers under these articles are very wide, they are still subject to judicial review. In this regard, Dr. Ambedkar stated that "What is a backward community"? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government … If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner."[112] Reading this in conjunction with Article 32(1) demonstrates that the Supreme Court and the High Courts have the power to review any act of the State making special provisions under Articles 15 and

[109] The Constitution of India 1950, Art. 13(2); Justice (Retd.) Ruma Pal, 'Seperation of Powers' in Sujit Chaudhary et al. (eds.), *The Oxford Handbook of Constitutional Law* (OUP 2006).

[110] See Arpita Sarkar, 'Judicial Review of Reservation in Promotion: A Fading Promise of Equality in Services guaranteed by the Indian Constitution' [2018] 11 NUJS LR 213.

[111] *ibid*.

[112] Supra 88: Speech of Dr. BR Ambedkar.

16 against the touchstone of fundamental rights and constitutional values.[113] Hence, the arguments against the Judiciary's constitutional competence to review the validity of reservations made under Articles 15 and 16 are not well-founded.

Judiciary as the guardian against majoritarian propensities

As noted above, the legislature and the executive branches have the power and the responsibility to reserve seats for people belonging to backward classes in India. Accordingly, these branches have to utilise their significant fact-finding abilities and develop flexible assessment procedures to develop the most appropriate reservation policy and identify its beneficiaries.[114] While this has happened to some extent over the decades, the vote bloc potential of reservation policies has opened them to widespread abuse to benefit certain political blocks.[115] Vinay Sitapati notes that "As numerically significant but socially and educationally disadvantaged groups have begun to exercise political power in India, they have used reservations through elected representatives to gain educational and professional power. These are groups …. working in concert to form a majority, and then pushing their collective will through elected institutions."[116]

OBCs comprise a major chunk of the population, with estimates placing them between 33% to 52% of the total population,[117] making them an effective interest group in the Indian polity. Accordingly, majoritarian urges, spearheaded by these groups and their various sub-groups,

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[113] See Clark Cunningham & M. Menon, 'Race, Class, Caste...? Rethinking Affirmative Action', [1997] 97 Michigan LR 1296 (hereinafter, 'Cunningham and Menon'); The Constitution of India 1950, Art. 32(1).

[114] *ibid*, 1306.

[115] *ibid*; See Sunita Parikh, The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India, (University of Michigan Press, 1997).

[116] Supra 106, 771.

[117] SS Negi, 'Reply to SC daunting task for Government' *The Tribune* (New Delhi, 10 June 2006); Surjit Bhalla, '36% population is OBC, not 52%' *Business Standard* (New Delhi, 14 June 2013).

have driven the reservation policy in India.[118] That the Parliament and most state legislatures have extended OBC beneficiaries and quotas, with increasing majorities and diminishing rounds of debate, over the years is indicative of such majoritarian urges driving the reservation policy.[119] Such majority rule is not an aberration but a feature of the Indian electoral system.[120]

Against this backdrop, the role of the Judiciary as the guardian of the fundamental rights of the minorities becomes even more pronounced.[121] Such protection against majoritarian urges requires the Court to ask the State to demonstrate inadequate reservation and/or backwardness, instead of deferring to the State any and all matters related to reservation policies and their beneficiaries.[122]

Consequently, the Judiciary has evolved concrete jurisprudence to check the political abuse of reservation policies for political patronage, side-stepping the constitutionally embedded weaknesses in the electoral reform mechanisms, without violating the separation of functions envisaged by the Constitution.[123] It has done so by establishing policy directives, such as the 50% ceiling, which strive to incorporate objectivity and transparency in the reservation policies. These directives serve as guidelines for the State to develop constitutionally valid reservation policies, while the State retains full control over determining the policy and its beneficiaries through its legislative fiat.[124]

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[118] Sujit Choudhary, 'How to Do Constitutional Law and Politics in South Asia' in Mark Tushnet and Madhav Khosla (eds.), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015); Rajeev Dhavan*, Reserved! How Parliament Debated Reservations, 1995–2007* (New Delhi: Rupa&Co., 2008).

[119] *ibid*.

[120] Supra 53, p.245; Christopher Jaffrelot, India's Silent Revolution: The Rise of the Lower Castes in North India (New York: Columbia University Press, 2003).

[121] Cunningham and Menon, 1306 - 1307.

[122] Supra 118.

[123] Supra 121.

[124] Supra 106.

Judiciary as the Legitimiser of Reservations

The misuse of reservation policies to benefit certain political blocks has fomented public distrust against these policies.[125] This has stemmed from the fact that neither the legislature nor the executive have functioned as neutral decision-making mechanisms for deciding which groups "deserve" reservations and in what percentages.[126] In the absence of any neutral decision-maker, the reservation programme has been characterised as a "crude political struggle between groups seeking favoured status."[127] As a result, all the actions of the State relating to reservations, irrespective of their underlying intentions, have become suspect in the eyes of the public, diminishing the overall legitimacy of the reservation programme.[128]

The Judiciary is the closest thing to a neutral arbiter for shaping the reservation programme in the Indian context and has hence, played a major role in bolstering the legitimacy of the State's political decisions.[129] Profs. Cunningham and Menon aptly note that "In 1990, proposed executive action to expand reservations led to widespread protest and urban unrest; yet when the Supreme Court two years later approved most of the proposed changes, [through its decision in Indra Sawhney] public acceptance was equally widespread."[130] Hence, the Judiciary plays an important of legitimising the reservation policies of the State due to its perception as the only neutral arbiter involved in shaping the reservation programme.

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[125] Cunningham and Menon, 1306.

[126] *ibid*, 1300.

[127] *ibid*.

[128] *ibid*.

[129] *ibid*, 1307.

[130] *ibid*, 1307.

From the discussion above, it becomes clear that the Judiciary has the power to review the State's reservation policies under Articles 15 and 16, and that the exercise of such power through issuing policy directives is valid and indispensable. Ultimately, the role of the Judiciary is to further substantive equality by supporting the State's measures that use status to achieve substantive equality and shun those measures which are purely politically motivated and/or encroach upon the rights of others. This can be ensured by requiring the State to demonstrate that its measures are based on objective data of backwardness and inadequate representation, rather than political obligations, assumptions, or generalisations. The Indian Courts, through their policy directives and related judicial scrutiny, have done just that.

6. 50% CEILING IN THE AGE OF MAJORITARIAN RESERVATION POLICIES

When a seat is reserved for a particular class of individuals, all other classes are excluded from vying for that seat. Hence, as more and more seats are reserved for a particular class, the corpus of seats available for all the other classes diminishes. It is apposite to say then that as the reservation pie grows larger, in effect, it becomes a method of exclusion rather than inclusion.[131]

On the other hand, all candidates can vie for unreserved seats and even when a reserved candidate obtains an unreserved seat, it is not counted against the total reserved seats for that

[131] Narayan Ramachandran, 'Time to Review India's Reservation Policies' (mint, 01 October 2018) <https://www.livemint.com/Opinion/OMjluNQsw48JDqZqtzKnXL/Opinion--Time-to-review-Indias-reservation-policies.html> accessed on 29 June 2021.

particular community.[132] Today, numerous reserved category candidates are competing for and increasingly securing unreserved seats, given the operation of policies aimed at ameliorating their socio-economic backwardness.[133] Accordingly, the following seats are available to the candidates in the present system;[134]

Category	**Reserved Seats**	**Total Seats Available**
Scheduled Castes	15%	65.5%
Scheduled Tribes	7.5%	58%
Other Backward Classes	27%	77.5%
Unreserved	N/A	50.5%

While the reserved seats for SC and ST candidates are in proportion to their total population, the seats for OBC candidates are not. The primary reason for this is that the levels of backwardness vary for SCs, STs, and OBCs and therefore, they require varying degrees of reservation to ensure their adequate representation.[135] To this effect, evolving different standards of reservation policies for the OBCs on one hand and SCs & STs on the other has been held to be a constitutional requirement.[136]

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[132] See *RK Sabharwal v. State of Punjab* (1995) 2 SCC 745.

[133] See Ishwar Bhat, *Law and Social Transformation* (Eastern Book Company, 2020).

[134] Figures are for Central Public Education and Employment Opportunities. All states have their own reservation quotas.

[135] See *State of Punjab v Davinder Singh* (2020) 8 SCC 1.

[136] Supra 53.

However, some argue that OBCs should be provided proportional reservations, in line with SCs and STs.[137] Beneath the surface of these demands and arguments for more quotas is the sentiment that each group deserves its share of resources, and that share ought to be proportionate to its numbers.[138] Accompanying such demands are the demands of various 'forward' castes to be recognised as OBCs too, in order to obtain the benefits of reservations through political mobilization.[139] Consequently, there has been a sharp increase in the number of centrally notified OBCs, increasing from 1257 in 1993 to 2297 in 2006.[140] As the number of OBC beneficiaries is rising, the demands for increasing the quotas for these communities are rising too.[141] Hence, this process of increasing demands for reservation has become cyclical.

L.R. Naik, the only Dalit member in the Mandal Commission, had noted that OBCs are of two categories – the landowning OBCs ("Intermediate Backward Classes") and the artisan OBCs ("Most Backward Classes").[142] He noted that these two categories are "not at the same degree or level of social and educational backwardness" since the landowning classes are significantly better-off, both economically and socially, than their artisan counterparts.[143] In several states, these landowning classes yield significant socio-political power too, such as

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[137] See Mridul Kumar, 'Reservations for Marathas in Maharashtra, [2009] 44(14) EPW 4; Ashwini Deshpande and Rajesh Ramachandran, 'Dominant or Backward? Political Economy of Demand for Quotas by Jats, Patels, and Marathas', [2017] 52(19) EPW.

[138] Shyam Babu, 'Times Face-off: Is it time to lift the 50% ceiling on total reservation?' *The Times of India* (New Delhi, 26 March 2021).

[139] Mayank Tewari, 'Tribes of OBCs growing in leaps' *Hindustan Times* (New Delhi, 28 May 2006); Supra 137.

[140] *ibid.*

[141] *ibid*; Supra 137.

[142] Chandra Bhan Prasad, 'Mandal's True Inheritors' (Times of India, 12 April 2006) <https://timesofindia.indiatimes.com/edit-page/mandals-true-inheritors/articleshow/1486250.cms> accessed on 29 June 2021.

[143] *ibid*.

the Yadavs in Uttar Pradesh and the Jats in several North-western states.[144] Recently, the Marathas in Maharashtra and Patidars in Gujarat, both landowning classes with significant political power in their respective states, have claimed to be backwards too and hence, eligible for reservations under Articles 15 and 16.[145]

Given their political influence, these classes have successfully persuaded successive governments to grant them special, and often exclusive, reservations.[146] When added to existing reservations, such special reservations take the total quantum of reservations beyond 50%. Upon such increase, the seat distribution often looks as follows;

Category	**Reserved Seats**	**Total Seats Available**
Scheduled Castes	15%	49.5%
Scheduled Tribes	7.5%	43%
Other Backward Classes	27%	62.5%
"Intermediate Backward Classes"	10 - 15%	77.5%
Unreserved	N/A	35.5%

Hence, granting proportional reservation to politically mobilised OBCs/'IBCs' is detrimental to the interests of all other classes. Here, SC and ST candidates will be additionally disadvantaged by such an increase in OBC reservations since the State will have no room to

[144] Supra 137.

[145] Supra 137.

[146] Supra 106; Supra 120: Jaffrelot.

provide additional reservations to SC and ST candidates even if the circumstances necessitate so.

Furthermore, among the OBCs too, only a select few will be able to take advantage of the increased number of seats.[147] Naik "fear(ed) that the safeguards recommended for (OBCs') advancement will not percolate to the less unfortunate sections among them" given the wide gap between the conditions of the landowning and the artisan classes.[148] These fears have actualised since IBCs have been able to corner most of the benefits for themselves, leaving little to nothing for the Most Backward Classes.[149]

Therefore, increasing reservations for IBCs, who have effectively used their numerical power to develop into powerful political blocks, will only benefit a select few among the OBCs and will have a detrimental impact on the most backward groups of the society along with the unreserved groups. In this context, protection of the interests of these non-IBC classes necessarily requires the Judiciary to take concrete steps to prevent the usurpation of reservation policies by majoritarian urges. These concrete steps must be pragmatic if they are to prevent inroads into the constitutional desideratum of equality of opportunity. The 50% ceiling is one such concrete step.

The ceiling requires the State to take into account the interests of non-beneficiaries of a reservation policy and thwarts governments' efforts to weaponize reservation policies for their political interests. Such safeguards are imperative in light of political mobilizations, and not redressal of backwardness, driving reservation policies today.

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[147] Supra 133, 496.

[148] Supra 142.

[149] Sujit Choudhry, (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP, 2008).

Hence, by pre-empting unidimensional reservation policies and thwarting attempts at weaponizing reservations, the ceiling effectively safeguards the interests of the minorities who are likely to be side-lined or marginalised by the normal functioning of the political process.

CONCLUSION

I have demonstrated that the 50% ceiling is not an impenetrable ceiling ('*Lakshmana Rekha*'), invalidating all legislations which reserve more than 50% of the seats. Rather, it operates primarily as a policy directive to help the State develop reservation policies that are in accordance with the Constitutional objective of achieving substantive equality of opportunity. Through the ceiling, the Judiciary has created a space for itself to review any reservation policy of the State which provides for high reservations to certain classes of people. This helps ensure that the tool of reservations does not become an exercise in distributing political patronage among certain castes. Given that majoritarian urges and electoral compulsions have increasingly emerged as the driving force behind several reservation policies today, such power of review ensures that the Judiciary is able to safeguard minorities' fundamental right to equality of opportunity effectively.

In doing so, the ceiling does not usurp the State's powers to develop and implement reservation policies under Articles 15 and 16 but limits the amount of power to ensure that these reservation policies do not violate constitutional values and policy directives. The ceiling reminds the State that it must develop policies that appropriately balance open competition and reservations. Therefore, the 50% ceiling promotes equality by ensuring that reservation policies are implemented in a way that bolsters substantive equality of opportunity.