COMPARATIVE CONSTITUTIONAL AND ADMINISTRATIVE LAW QUARTERLY

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FOREWORD

It brings us immense pleasure to introduce the final instalment of the second volume of the Comparative Constitutional Law and Administrative Law Quarterly. The Journal has constantly endeavoured to highlight contemporary issues in the field of Comparative Constitutional Law and Administrative Law. The present issue strives to bring forth three issues which constitute the cornerstones of the Indian Constitution – Directive Principles of State Policy, Elections and Reservation.

The opening article titled *Globalisation and Judicialisation of Socio-Economic Rights in India and South Africa: Catalysts for New Directions in Nigeria* discusses the process of judicialisation of certain rights which are non-justiciable in the countries of India and South Africa. In the Indian context, these rights are the Directive Principles of State Policy, which have been imbibed into the framework of legally tenable rights by the efforts of the judiciary. The authors discuss the need for the import of such a practice in the Nigerian scenario in order to assure a holistic guarantee of rights to its people.

The second piece is a critique by Ninni Susan Thomas, an Advocate practising at the Supreme Court, who worked on the decision of Rajbala v. State of Haryana. This decision upheld the constitutionality of educational qualification as a pre-requisite for contesting elections, which in the opinion of the author, is a flagrant violation of the principle of universal adult suffrage. The piece is a practitioner's perspective which earmarks the fallacies in the judgment which make the decision fall foul of the Constitutional mandate.

The issue of how the right to equality ought to be observed and administered has been subject to several debates across various jurisdictions. In India, a country which is riddled with inequalities, both social and economic, the debate has been particularly fiery when it comes to the issue of reservations and affirmative action under Articles 15 and 16 of the

Constitution of India. Further, to complicate matters the Supreme Court has over a period of seventy odd years changed its position as to how these Articles ought to be interpreted. The waters have been further muddied with the fact that the Supreme Court, since 1991, has invoked the concept of excluding the creamy layer when it comes to a separate class altogether called the Other Backward Classes (OBC), whereby the persons who have already achieved economic and social upliftment ought to be kept aside when it comes to the benefits of reservation. However, the Court has controversially failed to apply this concept when it comes to Scheduled Castes.

Therefore, the third piece titled *Equality Before Law and Affirmative Action under the Constitution of India: whether the Creamy Layer concept is still relevant?* attempts to answer questions regarding the kind of equality which is sought to be achieved by the Indian Constitution and how the Supreme Court has interpreted Articles 15 and 16 over the years and how should the creamy layer concept be invoked and why should it only be applicable to the OBCs.

The effort of the Editorial Board in striving for excellence deserves a mention. We also express our gratitude to the support and guidance extended by our Chief Patron Prof. Poonam Saxena and our Director, Prof. I. P. Massey. We hope to continue providing a platform which synthesises varying opinions and perspectives regarding Constitutional Law and Administrative Law in the global realm.

Pooja Menon

Shrijita Bhattacharya

[Editors-in-Chief]

GLOBALISATION AND JUDICIALISATION OF SOCIO-ECONOMIC RIGHTS IN INDIA AND SOUTH AFRICA: CATALYSTS FOR NEW DIRECTIONS IN NIGERIA.

Aloy Ojilere* & Gan Ching Chuan**

ABSTRACT

The Constitution of South Africa makes no distinction between civil and political rights and socio-economic rights. Both are positive justiciable rights in the Bill of Rights to the Constitution. However, in India and Nigeria, the Constitutions distinguish between the justiciable fundamental rights on one hand, and the non-justiciable socio-economic rights, otherwise known as Directive Principles of State Policy, on the other hand. However, in India, these so-called "non-justiciable" rights have been globalized and judicialised by the creativity and activism of the Indian judiciary, especially the Supreme Court of India, such that they now apply as *implied* fundamental rights despite an express constitutional provision to the contrary. But in Nigeria, the Supreme Court insists that socio-economic rights,

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described in Chapter II of the 1999 Nigerian Constitution as *Fundamental Objectives and Directive Principles of State Policy* and declared unenforceable by adjudication vide Section 6(6)(c) of the same Constitution, shall remain so until the legislature changes it. More often than not, Nigerian courts also refuse to invoke international law on the enforcement of socio-economic rights because they are not *domesticated* into the Laws of the Federation of Nigeria under Section 12 of the Constitution. Ironically, even the African Charter on Human and Peoples' Rights which has been so domesticated is still held *inferior* to the constitutional provisions on non-justiciability of socio-economic rights. This paper is doctrinal and adopts the methodology of comparative analysis to explore globalisation and judicialisation of socio-economic rights in India and South Africa as catalysts for new directions in Nigeria. The object of this paper is to show that India and South Africa offer sustainable judicial and constitutional templates for the advancement of fundamental rights in Nigeria.

I. INTRODUCTION

> *"Small minority of countries have created institutions that are formally entrusted with protecting the interests of future generations. I hope more and more countries will adopt this approach until it becomes standard around the world."*
>
> - UN Secretary-General Ban Ki-Moon, 2014

Since the late twentieth century, most democratic constitutions have provided for second generation (socio-economic) rights such as rights to education, shelter, food and health care, in addition to the first generation (civil and political) rights like the right to life and personal liberty, free speech, private and family life, dignity, free movement, amongst others.

Generally, international law recognizes three generations of human rights.[1] The first generation of rights are the civil and political rights which emphasise human freedom and

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[1] The third generation rights also known as solidarity or group rights are outside the purview of this paper and have thus not been included.

seek to protect the individual against the excesses of the State. The rights protected herein include the right to life and dignity, equality and equal protection of the law, liberty and religion, free speech and association, as well as right of political participation and voting. These rights became the source and inspiration for the fundamental rights provisions in the national constitutions of most countries including Nigeria, South Africa and India.

The second generation of rights are socio-economic rights. These comprise rights relating to the economic, social and cultural life of the people, which guarantee equal treatment of persons with respect to social benefits and service delivery. These rights include food, shelter, health care, education, employment and social security benefits. Most of these rights are today contained in the Directive Principles of State Policy in most national constitutions (including those of Nigeria and India) and declared non-justiciable. The Bill of Rights in the South African constitution makes no similar distinction. The constitutional non-justiciability and non-judicialisation of socio-economic rights in Nigeria is the basis of this paper. In the Indian Constitution, adopted in 1950, and the Nigerian Constitution of 1999[2] these socio-economic rights are non-justiciable negative rights described as "Fundamental Objectives and Directive Principles of State Policy." However, Chapter 2 of the Constitution of South Africa, 1996, includes this class of rights as a part of the Bill of Rights as positive justiciable rights.

Interestingly, in spite of the constitutional provision of non-justiciability of socio-economic rights in India,[3] these rights have been *judicialised* and continue to be enforced as *implied* fundamental rights,[4] unlike in Nigeria where they remain *mere aspirations*.[5] *Judicialisation*

[2] CONSTITUTION OF NIGERIA (1999), ch. II.

[3] India CONST. art. 37.

[4] Francis Mullin v. The Administrator, Union Territory of India, (1981) 2 S.C.R. 516; Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161.

refers to the process of bringing socio-economic rights under the scrutiny or adjudicatory power of the courts. It may be said that the judicialisation and justiciability of both socio-economic rights and civil and political rights are guaranteed in India and South Africa, while in Nigeria, only the civil and political rights are justiciable.

This paper therefore seeks answers to these questions: Do socio-economic rights constitute an imperative subject of globalisation? What is the jurisprudence of socio-economic rights in Nigeria, India and South Africa? What lessons from the judicialisation and globalisation of socio-economic rights in India and South Africa may be applied to Nigeria?

These questions will be answered by examining the constitutional provisions and decisions of the Supreme Court of Nigeria on the non-justiciability of socio-economic rights in Nigeria, the judicialisation of similar rights in India through the interpretative judicial activism of its Supreme Court and the guarantee of the same rights in the Bill of Rights in South Africa through transformative constitutionalism and the pragmatism of the Constitutional Court of South Africa.

This paper will also conclude that the constitutionalisation and judicialisation of socio-economic rights in India and South Africa are inevitable catalysts for the globalisation of human rights as well as for ushering in democratic accountability in Nigeria.

II. CONSTITUTIONAL NON- JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN NIGERIA

> *In Africa nearly 50% of the people have no access to a hospital or doctor. Children and adults suffer and die every day from curable or treatable causes. Every year 6.6 million vulnerable children die before the age of 5 from preventable diseases.*

–World Health Organization Report, 2012.

[5] General Sanni Abacha v. General Fawehinmi [2000] 6 NWLR 228.; Archbishop Olubunmi Okogie v. Attorney General of Lagos State (1981) 2 NCLR 218.

Generally, socio-economic rights comprise the likes of right to health, right to work and favourable conditions of work, right to education, right to social security, food, shelter and clothing. In Nigeria, these rights are contained in Chapter II (sections 13-18) of the 1999 Constitution which is a replication of similar provisions that can be found in the International Covenant on Civil and Political Rights[6] and International Covenant on Economic, Social and Cultural Rights[7] and the African Charter on Human and Peoples' Rights.[8] However, only the African Charter has been incorporated into Nigerian Law as the African Charter (Ratification and Enforcement) Act, 1990.[9]

Specifically, Section 16 of the Nigerian Constitution spells out the economic objectives of government, namely, to *harness the resources of the nation and promote national prosperity* for the efficiency and growth of the national economy,[10] and more explicitly, to *control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.*[11] The section further provides that the State shall direct its policy to ensure for every citizen *suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and pensions, and unemployment, sick benefits and welfare of the*

[6] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

[7] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

[8] African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

[9] African Charter on Humans and Peoples' Rights (Ratification and Enforcement) Act (1990) Cap. 10 (Nigeria).

[10] CONSTITUTION OF NIGERIA (1999), § 16(1) (a).

[11] CONSTITUTION OF NIGERIA (1999), § 16(1) (b).

disabled.[12] Section 17(3) enjoins the State to pursue policies that will guarantee equality and equal protection of the law, non-discrimination, adequate means of livelihood, employment and opportunity, safe health and medical facilities, leisure and special assistance for the needy. Section 18 promotes the right to free education at all levels including an adult literacy programme.

However, Chapter II of the Nigerian Constitution describes these "rights" as Fundamental Objectives and Directive Principles of State Policy and specifically declares them to be non-justiciable in Section 6(6)(c) which provides thus:

> *"The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution."*

Again, Section 1 of the Nigerian Constitution affirms its supremacy and *binding force on all authorities and persons* throughout Nigeria and that *if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."*[13]

It is therefore not strange that Nigerian courts simply consider socio-economic rights as *mere aspirations* of the government; ordinary *Objectives* and guiding *Principles* which are non-binding and do not qualify as *rights per se*. In other words, due to their legal character, the Courts have not obligated the government to enforce these rights.

[12] CONSTITUTION OF NIGERIA (1999), § 16(2) (d).

[13] CONSTITUTION OF NIGERIA (1999), § 1(1), § 1(3).

The authors therefore wonder if per chance, successive Nigerian governments fear that the constitutionalisation and/or judicialisation of socio-economic rights will place heavy financial burden on government resources[14] or entail the policing of government's activities and institutionalise democratic accountability,[15] without bearing in mind that it is equally costly to run a docile or corrupt government[16] or guarantee the justiciable/fundamental rights (including life and liberty)[17] entrenched in Chapter IV of the Nigerian constitution.

It is further submitted, albeit with regret, that the Supreme Court which ought to be the last hope of the common man now seems to align with government against the interests of the ordinary man without realizing, according to Stephen Holmes and Cass R. Sunstein[18] that "*all rights have costs"* and that the so called "resources of government" actually come from *public wealth* (human and material) and *tax payers' funds.*

Regrettably, despite the statutory ratification of the African Charter in the African Charter (Ratification and Enforcement) Act, 1990, the Supreme Court held in the celebrated case of

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[14] COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 183-223, (Varun Gauri and Daniel M. Brinks eds., 2008), http://dx.doi.org/10.1017/CBO9780511511240.007 (last visited Dec. 21, 2015).

[15] *See,* Adedokun Ogunfolu, Can Socioeconomic Rights Make the Nigerian State More Accountable? 1-46, (KNIGHT L. CTR., UNIV. OR., Working Paper No. 1, 2011), http://waynemorsecenter.uoregon.edu/wpcontent/uploads/sites/6/2012/11/twail_working_paper_1.pdf (last visited Dec. 21, 2015).

[16] Fatile Jacob Olefumi & *Adejuwon Kehinde David, Democracy and Development under the Shadow of Corruption in Africa: The Nigeria's Fourth Republic in Perspective,* INT'L J. PHYS. & SOC. SCI., Apr. 2012, 152, 159, http://www.ijmra.us/project%20doc/IJPSS_APRIL2012/IJMRA-PSS940.pdf (last visited Mar. 3, 2015).

[17] Tom G. Palmer, *Book Review, Stephen Holmes and Cass R. Sunstein's The Cost of Rights: Why Liberty Depends on Taxes,* 19 CATO JOURNAL 331 (1999), http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1999/11/cj19n2-10.pdf (last visited Dec. 20, 2015).

[18] *Id.*

Gen. Sanni Abacha v. Gani Fawehinmi[19] that by the interpretation of Section 1(3) and Section 6(6)(c) of the Nigerian Constitution, no manner of *rights* or socio-economic rights can be adjudicated or enforced even under the African Charter, as doing so will impliedly place an international/regional treaty at par with, or superior to the Constitution which is clearly unintended by the legislature.[20]

However, in the landmark case of *Attorney Gen. of Ondo State v. Attorney Gen. of the Federation,*[21] the Supreme Court held, *inter alia*, that if a subsequent statute is enacted by the legislature to enshrine the socio-economic rights listed in Chapter II of the 1999 Nigerian Constitution, then those rights become invariably enforceable in a court of law pursuant to that statute, even though these secondary rights are not enforceable directly under the Constitution. This decision may therefore be considered as a progressive judicial improvement which dilutes or modifies the earlier decision in *Gen. Sanni Abacha v. Gani Fawehinmi.*

Again, in *Federal Republic of Nigeria v. Anache,*[22] the Nigerian jurisprudence on socio-economic rights took another progressive bold step when the Supreme Court observed that

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[19] General Sanni Abacha v. General Fawehinmi [2000] 6 NWLR 228.

[20] These authors therefore infer that since a claim for socio-economic rights cannot be judicialised under a regional/international instrument which has been domesticated by legislation under Section 12 of the Nigerian constitution, it will be absurd to imagine the judicialisation of claims under the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights which are yet to be domesticated in Nigerian law. Fear has also been expressed that a similar fate may befall such legislations as the Child Rights Act, 2004 and the Basic Education Act, 2004 which provide for the socio-economic rights to food, basic health, education, safety and welfare of children. *See,* Iyabode Ogunniran, *Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions,* 1 NNAMDI AZIKIWE UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE, Sept. 2010 73, 79.

[21] Attorney Gen. of Ondo State v. Attorney Gen. of the Federation, [2002] 9 NWLR 222 (Nigeria).

[22] Federal Republic of Nigeria v. Anache, [2004] 14 W.L.R. 1 (Nigeria).

the non-justiciability provision of Chapter II rights in the Nigerian Constitution are negotiable and not sacrosanct and that Section 6(6) of the Nigerian Constitution ought to be interpreted in a flexible manner so as to not prevent recognition of socio-economic rights.

These cases thus depart from the earlier dogmatic and zero-activist approach of the Supreme Court with respect to the judicialisation of socio-economic rights in Nigeria when it held in *Archbishop Olubunmi Okogie & Others v. Attorney General of Lagos State & Others*[23] that:

> *"Whilst section 13 of the Constitution makes it a duty and responsibility of the judiciary amongst other organs of the government to apply the provisions of Chapter two, Section 6(6)(c) of the same constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of the government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made chapter two of the constitution justiciable."*

For the sake of clarity, Section 13 of Chapter II of the 1999 Nigerian Constitution is highlighted hereunder:

> *"It shall be the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution."*

It is most humbly submitted that an *activist* Supreme Court could safely have provided the missing link in the justiciability question by *conforming to, observing and applying* the provision in such a manner as would have globalised Nigeria's constitutionalism and institutionalised the judicialisation and enforcement of socio-economic rights in Nigeria.

[23] Archbishop Olubunmi Okogie & Ors v. Attorney General of Lagos State & Ors (1981) 2 NCLR 218.

Interestingly, *Archbishop Olubunmi Okogie & Others v. Attorney General of Lagos State & Others* no longer represents the law on the judicialisation of socio-economic rights in Nigeria.[24] The Supreme Court had relied heavily on the Indian case of *State of Madras* v. *Champakan*[25] which held that the directive principles were inferior to the fundamental rights and that only parliament or the electorate could reverse the non-justiciability provision as the court was helpless constitutionally. Unfortunately, that was not the position of substantive law in India at this time. Today, both classes of rights are judicialised in India.

It is also interesting to note, albeit obiter, that even Nigeria's foreign policy objectives which include "promotion of African integration and support for African unity"[26] as well as "respect for international law and treaty obligations"[27] also fall under the non-justiciable Chapter II of the Nigerian Constitution and continue to suffer breach by Nigeria.

For instance, in *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)*,[28] the plaintiff, a Lagos-based NGO which *inter alia*, promotes Nigeria's full compliance with the human rights and anti-corruption treaties to which it is party, brought an action at the Economic Commission of West African States (ECOWAS) Community Court of Justice (ECOWAS

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[24] State of Madras v. Champakan (1951) S.C.R. 252; *See*, Keshavananda v. State of Kerela (1973) 4 S.C.C. 225; State of Kerela v. Thomas (1976) 2 S.C.C. 310).

[25] State of Madras v. Champakan (1951) S.C.R. 252.

[26] CONSTITUTION OF NIGERIA (1999), § 19(b).

[27] CONSTITUTION OF NIGERIA (1999), § 19(d).

[28] R*egistered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC),* ECOWAS Community Court of Justice, Judgment No: ECW/CCJ/JUD/07/10, (Nov. 30, 2010), http://www.worldcourts.com/ecowasccj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm (last visited Dec. 20, 2015).

CCJ) against the defendants alleging that they have contributed to the denial of education to Nigerians by the failure to seriously address chronic allegations of corruption at the highest levels of government as well as the catalysts which breed and support high-level corruption in Nigeria. This had led to a denial and violation of the people's right to quality education and dignity as well as their right to enjoy their wealth and natural resources, and their socio-economic rights guaranteed under the provisions of the African Charter on Human and Peoples' Rights.

Before this action, SERAP had petitioned the Independent Corrupt Practices and other Related Offences Commission (ICPC) alleging official misappropriation of several billions of Naira allocations meant for the Universal Basic Education Commission (UBEC), the agency responsible for providing improved access and quality education to every Nigerian child. The ICPC investigated the petition and recovered about ₦.3.4 billion stolen funds.

At the ECOWAS CCJ, the Nigerian government filed an objection against the jurisdiction and competence of the Court on three grounds namely, that the Basic Education Act and the Child's Rights Act were national laws and not ECOWAS conventions or protocols and therefore not subject to the jurisdiction of the Court; that under the 1999 Nigerian Constitution, educational objective is non-justiciable; and that SERAP had no legal competence to maintain the action against Nigeria and UBEC.

In its judgment of 30 November 2010, the ECOWAS CCJ dismissed the three objections raised by the Nigerian government and ruled that the Nigerian government was obliged to provide free and compulsory education to every Nigerian child, and that the right to education is enforceable and may be litigated before the ECOWAS CCJ. The Court found Nigeria in violation of Article 17 of the African Child's Right Act (a Protocol to the African Charter on Human and Peoples' Rights), Section 15 of the Nigerian 2003 Child's Right Act and Section 2 of the 2004 Compulsory Free and Universal Basic Education Act, while at the

same time dismissing Nigeria's objection that education is merely a prerogative of government policy under the non-justiciable Chapter II provisions of the Constitution.

The implications of this decision is that even on the international fora, Nigeria continues to make concerted efforts to ensure that the globalisation and judicialisation of socio-economic rights are not guaranteed to its citizens both under domestic and international law. Consequently, both regionally and internationally, Nigeria's stance on the judicialisation of socio-economic rights remains under unenviable scrutiny.

It is therefore on such note that this paper insists that the Nigerian judiciary should take centre stage by being populist and people-oriented rather than acting as an annexe of the reluctant executive arm.

III. SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN BILL OF RIGHTS

> *"…the South African constitution-makers had an extraordinary degree of sophistication about constitution making and constitutions, including encyclopaedic knowledge of other nations' constitutions…This degree of sophistication sharply distinguishes the constitution-making experience in South Africa…"*

- Cass Sunstein, *American Advice and New Constitutions* 1 CHI. J. INT'L. L. 173, 179 (2000).

Generally, a constitution may be exploitative, that is, explicitly draconian like the old Apartheid Constitution or it may be preservative and non-exploratory, that is, simply maintaining *status quo* for fear that emergent situations may be unpredictable and make things worse. Yet, others are transformative or exploratory, whereby they apply new grounds which challenge and reverse *status quo* and ensure that things get better and work differently.

Prelude to the drafting of the 1996 Constitution of post-apartheid South Africa, the debate over the inclusion of the socio-economic rights in the South African Bill of Rights was intense.

Understandably, much of the debate was influenced by memories of the horrendous indignity, pain and socio-economic deprivations of the apartheid era and the need to institutionalise a constitutional legacy that will to an extent, erase the trace of those deprivations. Imperatively, it became *irresistible* in the spirit of *Ubuntu*, that is, "social harmony and healing",[29] to enshrine socio-economic rights as positive rights in the Bill of Rights *because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid – the overriding goal of the new Constitution.*[30]

Section 39 of the Constitution mandates courts, when interpreting the Bill of Rights, to ensure the promotion of the common values of an open and democratic society based on human dignity, equality and freedom, as well as international law. Further, Section 184(3) also obligates the non-judicial bodies to monitor and superintend the participation of government and its agencies in the enforcement of socio-economic and environmental rights by providing thus:

> *"Each year, the South African Human Rights Commission must require relevant organs of state to provide the commission with information on the measures they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment."*

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[29] *See*, Mark Kende *President Nelson Mandela's Constitutional Law Legacy*, LAW.DRAKE.EDU (2006), http://www.law.drake.edu/clinicsCenters/conLaw/docs/recentMaterials-mandelaLegacy.pdf (last visited Jan. 10, 2015).

[30] Cass Sunstein, *Social and Economic Rights? Lessons from South Africa*, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS, Working Paper No. 124 (2001).

The South African Constitutional Court is another edge in South Africa's transformative constitutionalism. The court has shown "pragmatism"[31] in the protection of socio-economic rights, promotion of "constitutional patriotism" and enforcement of political accountability. It ranks alongside India and Colombia, a major player in the constitutionalism of the Global South.[32] At the formal inauguration of the Constitutional Court, then President Nelson Mandela described it as "a court South Africa has never had, on which hinges the future of our democracy."[33] In two landmark judgments namely, *Government of the Republic of South Africa v. Grootboom*[34] and *Minister of Health v. Treatment Action Campaign*,[35] the Court confirmed that the socio-economic rights to housing and health respectively were basic fundamental rights.

In the *Grootboom case,* the plaintiff, Irene Grootboom was one of four thousand desperately poor residents living in Wallacedene, an informal settlement outside Cape Town, in 1998. The living conditions in the settlement were terrible: there was no running water, sewer or refuse disposal facilities, and only about five percent of the inhabitants had electricity. A quarter of the inhabitants had no income, and more than two-thirds lived approximately on a meagre US $70 per month. Most of them, including more than five hundred children had no choice than to settle on nearby *bona vacantia* (vacant no man's land) which the government

[31] CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 93-113 (Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan eds., 2013).

[32] CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1-94 (Daniel Bonilla Maldonado ed., 2013).

[33] PRESIDENTIAL SPEECH AT THE FORMAL INAUGURATION OF THE SOUTH AFRICA CONSTITUTIONAL COURT, 15TH FEBRUARY, 1994, http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases (last visited June 7, 2013).

[34] Government of the Republic of South Africa v. Grootboom 2001 (1) *SA* 46 (CC) (S. Afr.).

[35] Minister of Health v. Treatment Action Campaign 2002 (5) SA 703 (CC) (S. Afr.).

had earmarked for future development of low-income housing. Three months after they settled, they received an eviction order from the government. The community refused to move, stating that they had no other place to go to. Nonetheless, the government forcibly evicted the community, razed their homes, and destroyed their personal belongings.

The community filed an action at the High Court of the Cape of Good Hope against the municipal, state, and national governments asking them to provide adequate temporary shelter or housing (pursuant to the right to access to adequate housing under Section 26 of the South African Constitution). They also sought for the constitutional rights to adequate healthcare, basic nutrition and social services.

The High Court ruled *inter alia*, that the government did not violate Section 26 of the Constitution since it was on a process of implementing a housing program in spite of its lean resources. It also held that there was no obligation to provide adequate housing for adults and that such an obligation for providing shelter was owed only to children under section 28(1)(c) of the Constitution if their parents could not afford to do so.

On appeal, the South Africa Constitutional Court overturned the High Court decision and found that the State’s obligation to fulfil the right of access to adequate housing does not have to be met through direct provision of shelter to those without it, but in accordance with section 26(2) of the constitution, through “reasonable legislative and other measures, within its available resources.” The Court observed that in spite of the national and provincial housing programs, it was unreasonable for the government to have ignored the immediate and short-term needs of the poor residents of Wallacedene in the interests of medium and long-term objectives.

The Court further held that the foundational values of society, namely, human dignity, freedom and equality, are denied to those who have no food, clothing or shelter because the guarantee of socio-economic rights enables the people to enjoy the other enshrined

constitutional rights. This judgment thereby effectively tied socio-economic rights—traditionally seen as judicially unenforceable—with civil and political rights which are enforceable.

Similarly, in the *Minister of Health v. Treatment Action Campaign* case, the Constitutional Court held that government was obliged… to provide health care and anti-retroviral drugs to HIV-positive women and their children because in South Africa, the justiciability of socio-economic rights was beyond question and non-negotiable.

IV. GLOBALISATION AND JUDICIALISATION OF SOCIO-ECONOMIC RIGHTS IN INDIA

> *"…no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life will be to deprive him of his means of livelihood…such deprivation would…make life impossible to live."*

- *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 S.C.C. 545, 572 (Supreme Court of India)

In India, socio-economic rights contained in Part IV of the Constitution, described as the *Directive Principles of State Policy,* are similar to Nigeria. Similar to the non-justiciability provision in the Nigerian Constitution, Article 37 of the Indian Constitution also seemingly ousts the judicialisation of socio-economic rights by providing that though the Directive Principles of State Policy "are nevertheless fundamental", they "shall not be enforceable by any court" but the State shall apply them in making laws.

Ordinarily, Article 37 places the Indian Supreme Court in a fix with respect to the enforcement of socio-economic rights. However, by its uncommon activism, the Supreme Court redefined socio-economic rights in relation to fundamental rights by linking them to the sacrosanct right to life and liberty in Article 21 of the Indian Constitution. Accordingly, in

a number of remarkable judgments including the celebrated "bonded labour case", namely *Bandhua Mukti Morcha v. Union of India*,[36] the Supreme Court emphasised that the justiciable fundamental rights, especially the right to life, will be meaningless without the guarantee of the so-called non justiciable rights whose judicialisation is barred by Article 37, because they constitute the "essentials" without which it is impossible for one to enjoy a secure life guaranteed with liberty, freedom and human dignity.

Similarly, in *Shantistar Builders v. Narayan K Totame*,[37] the Court emphasised that the fundamental rights and socio-economic rights complemented each other and that a person's right to life *will take within its sweep the right to food and a reasonable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.*[38]

Again, in the case of *Unnikrishnan v. State of Andhra Pradesh,*[39] the Indian Supreme Court interlinked the right to education in Article 45 with the right to life and personal liberty in Article 21 in order to guarantee justiciability of the said socio-economic right, invariably as a positive fundamental right. The same was reiterated in the case of *Melita v. State of Tamil Nadu*[40] which virtually elevated Article 45 to the same level as that of fundamental rights. The *Melita* case involved certain private tertiary engineering and medical schools who had brought an action objecting to a statute which regulated the "capitation" fees levied on students seeking admission to their institutions. The Court held that every citizen has a right to education under the Constitution and that the State is obliged to establish educational

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[36] Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161(India).

[37] Shantistar Builders v. Narayan K Totame, (1990) 1 S.C.C. 520 (India).

[38] *Id* at 527.

[39] Unnikrishnan v. State of Andhra Pradesh, (1993) 1 S.C.C. 645 (India).

[40] Melita v. State of Tamil Nadu, (1996) 6 S.C.C. 772 (India).

institutions to enable the citizens to enjoy the said right. The State may, however, discharge this obligation through the granting of licences or recognition to private educational institutions, thereby making them agents of the government for fulfilling its obligation under the Constitution. Thus, charging capitation fee in consideration of admission to educational institutions was a patent denial of a citizen's right to education under the Constitution and wholly arbitrary and violative of the right to equality in Article 14 of the Constitution. The Court further held that education is significant to the life, growth and development of both the individual and the nation and therefore implicitly flows from the right to life guaranteed in Article 21, even though there existed no express constitutional provision of fundamental right to education in Part III of the Constitution of India at the time this decision was rendered.

The innovativeness, uncommon activism, independence and courage of the Indian Supreme Court goes beyond clear cases of constitutional non-justiciability and manifests even in cases where no legislation exists on a particular subject of right violation. Thus, in *Vishaka & Others v. State of Rajasthan*,[41] the Court assumed its social function as a *law giver,* by formulating *guidelines* which applied as "the binding legislation" for the protection of women against sexual violation at their workplaces, at a time when there was no existing law on the subject in India.

In *Vishaka*, the court's innovativeness was highlighted by the observation of Justice J.S. Verma, the then Chief Justice of India in his judgement when he said:

> *"Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the*

[41] Vishaka & Others v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India).

guidelines to achieve this purpose. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the judiciary in the LAWASIA region. [T]hese principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary."

Australian jurist, Michael Kirby refers to such interpretative ingenuity as *judicial reasoning*.[42] This form of uncommon ingenuity and activism is strongly recommended for the Nigerian judiciary to ensure the globalisation and judicialisation of all rights and not just socio-economic rights.

Generally, unlike the Nigerian courts, the Indian courts have manifested enormous flexibility with regard to enforcement of socio-economic rights, making sound and logical interpretative reasoning depending on the facts of each case. For instance, in *S. Subramaniam Balaji v. Government of Tamil Nadu & Others*,[43] certain political parties, in fulfilment of their campaign promises and election manifestoes, commenced provision and distribution of food and household items (including fans, colour televisions, sheep, rice, cattle, gold/cash as marriage incentives) to the people in the State of Tamil Nadu, using state funds. This was challenged as being unconstitutional and corrupt since the scheme was not for a "public purpose" but for the selfish interests of the political party. He further contended that the scheme was in violation of equality rights under Article 14 of the Constitution. The Supreme

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[42] Michael Kirby, *Domestic Implementation of International Human Rights Norms,* (5(2) AUSTL. J. HUM. RTS. 109.

[43] S. Subramaniam Balaji v. Government of Tamil Nadu & Ors, (2013) 9 S.C.C. 659 (India).

Court of India took a very liberal view regarding the application of Directive Principles and held *inter alia*, that the schemes challenged in the instant writ petition falls within the realm of public purpose and also fulfils the Directive Principles of State Policy which are necessary for the enjoyment of fundamental rights.

The Court also emphasised the fact that judicial interference in executive action is permissible only when the action of the government is unconstitutional or contrary to a statutory provision and not when such action is not wise or that the extent of expenditure is not for the good of the State, so long as the schemes come within the realm of public purpose and monies withdrawn for the implementation of schemes are passed by a suitable Appropriation Bill.[44] The Court also examined the import of the word "socialism" in the Preamble of the Indian Constitution, envisaged to promote social order through rule of law as the basic structure of the Constitution. It also held that the Fundamental Rights and the Directive Principles are like the two wheels of the chariot necessary to achieve the constitutional object of democratic socialism, and that the word "socialist" used in the Preamble must be read from the constitutional goals seeking to reduce inequalities in income and status and provide equality of opportunity and facilities. Accordingly, it insisted that "social justice" enjoins the Court to uphold every Government effort to remove economic inequalities, provide a decent standard of living to the poor and protect the interests of the weaker sections of the society as well as the dignity and equality of status of all persons within the Union of India.

[44] *See,* State of Kerala v N.M Thomas, A.I.R. 1976 S.C. 490 (India) where the Indian courts equally applied the Directive Principles to further interpret the Part III Fundamental Rights, thereby maintaining that a clear nexus exists between Part III rights and Part IV principles.

V. RECOMMENDATIONS

Short of establishing Constitutional Courts, it is recommended that relevant sections of the Nigerian Constitution be amended to make it as *transformative* as the South African Bill of Rights, and for the judiciary to exhibit activism amidst a *preservative* constitution as in India. These steps will institutionalise globalised democratic constitutionalism as well as judicialise socio-economic rights in Nigeria as it is in other climes. It will also make the government and its agencies more responsive to providing people's *minimal* socio-economic needs, especially if civil society groups, the media, organised private sector, human rights activists, Non-Governmental Organisations and like bodies add pressure in this quest. Iyabode Ogunniran in her work[45] 'Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions' cites cases across different jurisdictions where courts have intervened to secure socio-economic rights of the people. For instance, the right to water was affirmed and the government was ordered to provide adequate water within forty-eight hours for families in a rural community whose only source of water was polluted.[46] Similarly, the right to health was linked to the right to life so as to compel the government to provide anti-retroviral medication for people living with HIV/AIDS.[47]

Notably, Catalina Smulovits has observed that judicialisation in Argentina did not arise from any change in the legal culture *per se* but from "the combined effects of changes in opportunity structure for claim making and the earlier emergence of a support structure for

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[45] Iyabode, *supra* note 20.

[46] Defensoria de Menores c. Poder Ejecutivo Municipal s/acción de amparo, Tribunal Superior de Justicia,(Mar. 2, 1999) (Argentina).

[47] Cruz Bermtudez, et al v. Ministerio de Sanidad y Asistencia Social, Sala Politico Administrativa, Corte Suprema de Justicia, Republica de Venezuela (July 15, 1999) (Supreme Court of Venezuela).

legal mobilisation consisting of labour lawyers and the new rights-advocacy network of Non-Governmental Organisations. [48]

Similarly, socio-economic rights in Nigeria may also be constitutionalised by adopting the Argentine model wherein Section 75(22) of its 1994 Constitution provides that certain international treaties including the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and its empowering protocols; Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Rights of the Child "*are part of this Constitution and are to be understood as complimenting the rights and guarantees recognized herein*".[49] The supposed fiscal implication of constitutionalising the enforcement of negative/socio-economic rights cannot be a valid consideration because it is equally costly to enforce the positive/fundamental rights and further, both the judiciary and government are run on tax payers' money. As ably expressed by Sunstein,

> *"The right to free speech or for that matter to freedom from police abuse will not be protected unless taxpayers are willing to fund a judicial system willing and able to protect that right and that freedom. In fact, a system committed to free speech is also likely to require taxpayer resources to be devoted to keeping open certain arenas where speech can occur, such as streets and parks."*[50]

Above all, the Supreme Court of Nigeria must manifest populist unalloyed independence and interpretative activism in the protection of socio-economic rights rather than working as

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[48] CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 234-253 (Javier Cuoso, Alexandra Huneeus & Rachel Sieder eds., 2010).

[49] *Id.*

[50] Sunstein, *supra* note 30.

though it is an annexe of the political *status quo*. Further, by not judicialising and constitutionalising these socio-economic rights, damage may be caused to the international image of Nigeria because strategically, Nigeria is acclaimed to be the "giant" of Africa, and politically, is the largest democracy in Africa, while being demographically the most populous country in Africa as well as the largest black nation in the world. Accordingly, it becomes arguably true to contend that any progressive or regressive socio-political, judicial or economic development in Nigeria will create multiple ripples which may threaten or weaken regional security and human rights and certainly be of serious consequences to other African countries, if not the rest of the developing world.

VI. CONCLUSION

Transformative constitutionalism and judicial activism, common in countries like India and South Africa, are effective and inevitable factors in the quest for democratic sustainability, globalisation, public accountability and judicialisation of socio-economic rights in Nigeria.[51] In India, although similar constitutional lacuna of non-justiciability of socio-economic rights exists in Article 37 of the Constitution, judicial activism has been effectively used to bridge this lacuna and globalise socio-economic rights, thereby placing them at par with the status enjoyed by these rights in South Africa. So far, Nigeria remains far behind both these countries with respect to the enforcement of socio-economic rights.

However, by applying the recommendations in this paper with respect to the advances in India and South Africa, Nigeria will vacate the list of Africa's electoral democracies which have been derided for persistent violation of human rights, official impunity, corruption and

[51] *Jacob Abiodun Dada, Impediments to Human Rights Protection in Nigeria,* 18 ANN. SURV. INT'L & COMP. L 67 (2012); *Jacob Abiodun Dada, Human Rights Protection in Nigeria: the Past, the Present and Goals for Role Actors for the Future,* 14 JOURNAL OF LAW, POLICY AND GLOBALIZATION 1 (2013).

abuse of political power.[52] Finally, this paper contends the need for countries around the world to embrace the universality of socio-economic rights, and also to realistically and positively support the quest for "a strong stance to proactively make education of human rights a persistent concern" worldwide.[53]

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[52] Emmanuel Gyimah-Boadi, *Africa's Waning Democratic Commitment*, 26(1) JOURNAL OF DEMOCRACY 101.

[53] Lanre Adedeji**,** *A Review of The Three Generations Of Human Rights*, THE LAWYERS CHRONICLE (Nov 13, 2013), http://thelawyerschronicle.com/a-review-of-the-three-generations-of-human-rights/ (last visited Dec. 12, 2015).

RAJBALA V. STATE OF HARYANA: A CRITIQUE

Ninni Susan Thomas*

INTRODUCTION

In a time and age where the rights of the common man are being systematically taken away for unreasonable considerations, the Supreme Court in *Rajbala v. State of Haryana* has gone a step further by restricting the right of people to contest elections by placing educational and property-based bars.

Article 243F(1) of the Constitution of India, 1950 provides for disqualification of membership to the Panchayat. In addition to these disqualifications, the State Legislature under Article 243F(1)(b) has enacted the Haryana Panchayati Raj Act, 1994 ["Act"], which by virtue of Section 175, provides for disqualifications for membership in the Panchayat. In the said Section, by the impugned Amendment Act, 2015, further disqualifications have been added, which were challenged in *Rajbala v. State of Haryana*. By the amendment to the Act, five more categories of persons were made incapable of contesting elections to the Panchayat. These categories are: (i) persons against whom charges are framed in criminal cases for offences punishable with imprisonment for not less than ten years, (ii) persons who fail to pay arrears, if any, owed by them to either a Primary Agricultural Cooperative Society or a District Central Cooperative Bank or a District Primary Agricultural Rural Development Bank, (iii) persons who have arrears of electricity bills, (iv) persons who do not possess the specified educational qualification and lastly (v) persons not having a functional toilet at their place of residence.

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In the author's opinion, the Supreme Court Bench consisting of Justice Chelameshwar and Sapre while dismissing the writ petition challenging these provisions have acted in a manner antithetic to the spirit of the Constitution and against the larger interests of the society. The author shall go on to discuss as to how democracy is one of the most integral parts of our Constitution and that any bar on the right of enfranchisement based on irrelevant considerations defeats Article 14 of the Constitution. The specific provision mandating educational qualifications shall be discussed in detail and the author shall try to point out how the bar of educational qualifications was never intended by the Constitution makers and that its presence in the legislation is discriminatory and liable to be struck down as being violative of Article 14, under various grounds.

ANALYSIS OF THE JUDGMENT

I. Democracy forming the basic structure of the Constitution

One of the major strengths of a vibrant democracy is the participation of the maximum number of people, as voters as well as candidates contesting elections in order to become people's representatives in elected bodies, be it the Parliament or State Legislatures or municipalities or Panchayats, as in the present case. Such participation is the basic right of a citizen (who is an elector) in a democracy constructed on the edifice of rule of law. Neither the Parliament nor the State Legislatures can keep on adding such disqualifications which curb the scope available for participation of the masses since such an effort will be dangerous to the very survival of the democracy. It was for this reason that the power to add disqualifications by the Parliament or State Legislature outside of what was provided in the Constitution was strongly opposed in the Constituent Assembly Debates.[1] However, ultimately it was opined that for elections in State Legislatures, the power to add further

[1] Constituent Assembly Debates, Book No.3, Volume No. VIII, 2nd June 1949: (Art. 152 (old) equivalent to Article 173 in the Constitution).

disqualifications should only vest with the Parliament and not the State Legislatures. Hence, the Constitution *vide* Article 84 and Article 102 provides qualifications and disqualifications respectively for MPs in Lok Sabha and Rajya Sabha. Article 173 and Article 191 provides qualifications and disqualifications for State Legislatures.

II. Importance of the Panchayati Raj and the choice of the voters

Before we go into the analysis of the judgment, it is essential to look at the importance of the role of the Panchayati system. The aims and objects for making the 73rd and 74th amendments[2] in the Constitution were, *inter alia*, to involve people at the grass root level in the process of development and to ensure that the state policies ultimately result in people having adequate means of livelihood and equality as envisioned in the Constitution. The very purpose of these amendments was, therefore, to focus on issues like poverty, illiteracy, shelter, unemployment at the local level to enable redressal of such issues by the people themselves having a micro-understanding of their issues. Admittedly, the person who is chosen as the representative at the Gram Sabha/Panchayat level should be a person who is aware of these problems so that he can participate in the decision-making powers at the Panchayat level for implementing such schemes and policies which are provided in Schedule XI of the Constitution. But for that purpose, there ought to be complete devolution of powers by the State Legislature by empowering the Gram Sabhas/Panchayat as the units of self-governance. Representation, by contesting elections of Panchayat is, therefore, extremely important at the grass root level and imposing electoral bars based on economic capacity, literacy, living standards, etc. would impair adult suffrage by incapacitating people from contesting elections.

Further, one of the objects of the 73rd amendment is to lessen the "insufficient representation of weaker sections like Scheduled Castes, Scheduled Tribes and women". In line with the

[2] The Constitution (73rd Amendment) Act, 1992; The Constitution (74th Amendment) Act, 1992.

settled law that there has to be a nexus with the object that is sought to be achieved by the legislation, a statutory amendment has to be consistent with the corresponding object of the constitutional amendment or provision authorising such a statute. If one of the objects of the 73rd Amendment itself would be ignored by setting electoral bars so as to pursue goals that are diametrically opposite to the envisaged object, then the object of the Constitutional Amendment would stand defeated.

It has been settled by judgments that it is the choice of the voters to decide the relevance of educational qualifications of a candidate.[3] Therefore, it is the independent choice of the voter that is most important[4] and it is not for the legislature to impose such qualifications and curtail their right to express as guaranteed under Article 19(1)(a). In other words, the wisdom of the voter reigns supreme for strengthening the democracy.

III. Educational qualifications as a bar to contest elections

The specified educational qualifications as promulgated by the impugned Amendment are that a male candidate should be a graduate of Class XII, a woman candidate or a candidate belonging to Scheduled Caste should be middle-pass (Class VIII) and in case of a woman candidate belonging to a Scheduled Caste, the minimum qualification shall be clearing Class V. While it is an admitted position both by the Bench and the State that the provided statistics about how many individuals will be disenfranchised by this provision is not clear, it can be seen that more than 50% of male and female candidates would not be eligible and nearly 70% of Scheduled Caste women would be ineligible to contest elections by this provision alone. Taking into account the other provisions like the mandate to have a toilet, this percentage of disenfranchised individuals keeps steadily rising.

[3] Union of India v. Association of Democratic Reforms, (2002)5 S.C.C. 294.

[4] Mohinder Singh Gill v. Chief Election Commissioner, (1978)1 S.C.C. 405.

It is most appalling to see that the only 'rational' nexus that Justice Chelameshwar sees to support the State Amendment with regard to educational qualifications in *Rajbala* is his blanket assertion that "It is only education which gives a human being the power to discriminate between right and wrong, good and bad". In the light of this statement, it would be relevant to look at Constituent Assembly Debates and cases that dealt with the necessity of education as a qualification.

There was considerable debate in the Constituent Assembly whether education should be necessary for contesting elections. The following observation outlines the intention of the Constitution makers to not consider education as a relevant criterion:

> Alladi Krishnaswamy Iyer: *"Firstly, in spite of the ignorance and illiteracy of the large mass of the Indian people, the Assembly has adopted the principle of adult franchise with an abundant faith in the common man and the ultimate success of democratic rule and in the full belief that the introduction of democratic government on the basis of adult suffrage will bring enlightenment and promote the well-being, the standard of life, the comfort and the decent living of the common man. The principle of adult suffrage was adopted in no lighthearted mood but with the full realisations of its implications. If democracy is to be broad based and the system of governments that is to function is to have the ultimate sanction of the people as a whole, in a country where the large mass of the people are illiterate and the people owning property are so few, the introduction of any property or educational qualifications for the exercise of the franchise would be a negation of the principles of democracy. If any such qualifications were introduced, that would have disfranchised a large number of the labouring classes and a large number of women-folk. It*

cannot after all be assumed that a person with a poor elementary education and with a knowledge of the three Rs is in a better position to exercise the franchise than a labourer, a cultivator or a tenant who may be expected to know what his interests are and to choose his representatives. Possibly a large-scale universal suffrage may also have the effect of rooting out corruption what may turn out incidental to democratic election. This Assembly deserves to be congratulated on adopting the principle of adult suffrage and it may be stated that never before in the history of the world has such an experiment been so boldly undertaken. The only alternative to adult suffrage was some kind of indirect election based upon village community or local bodies and by constituting them into electoral colleges, the electoral colleges being elected on the basis of adult suffrage. That was not found feasible."[5]

The Supreme Court again in *People's Union for Civil Liberties v. Union of India*[6] considered whether education should be a part of the declaration made by a candidate. Rejecting such a proposition, the Hon'ble Court observed as follows:

"Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, I am inclined to think that the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. It is a well-known fact that barring a few exceptions, most of the candidates elected to Parliament or the State Legislatures are fairly

[5] Constituent Assembly Debates, Book No.5, Volume No. X-XII, 23rd November 1949.

[6] People's Union for Civil Liberties v. Union of India, (2003)4 S.C.C. 399.

educated even if they are not Graduates or Post-Graduates. To think of illiterate candidates is based on a factually incorrect assumption. To say that well-educated persons such as those having graduate and post-graduate qualifications will be able to serve the people better and conduct themselves in a better way inside and outside the House is nothing but overlooking the stark realities. The experience and events in public life and the Legislatures have demonstrated that the dividing line between the well educated and less educated from the point of view of his/her calibre and culture is rather thin. Much depends on the character of the individual, the sense of devotion to duty and the sense of concern to the welfare of the people. These characteristics are not the monopoly of well educated persons."

A Full Bench of the Supreme Court of Pakistan had an occasion to examine the very same question of whether education (graduate with bachelor degree) should be imposed as a disqualification in contesting elections for the Parliament or a Provincial Assembly. The Pakistan Supreme Court in its judgment dated 21 April 2008, *Muhammad Nasir Mahmood and Another v. Federation of Pakistan*[7] looked into the legislative provisions of almost thirty developing/developed countries including Argentina, Japan, Australia, Bangladesh, Iran, Italy, etc. where education is not a disqualification. In most of these countries, a person who is qualified to vote is also entitled to contest. The Pakistan Supreme Court noted that the graduation qualification ran afoul since it did not consider the social and economic conditions of Pakistan and the impact on the people while disentitling them from exercising the universal right of suffrage. It also noted that educational qualification as a condition for

[7] Muhammad Nasir Mahmood and another. v. Federation of Pakistan, P.L.D. 2009 SC 107 (Supreme Court of Pakistan).

contesting elections is not present in other countries and such an inclusion would be against the spirit of democracy as enshrined in the different instruments of the United Nations. It was further held that denial of the right to voters to contest elections is against the spirit of democracy. The Supreme Court also mentioned that the acquisition of a qualification is dependent upon physical conditions and the milieu in which a person may find himself. For instance, the urban population always has an upper hand in the sphere of education. It also noted that the State had failed in fulfilling its obligation of imparting education to all the citizens as required by Article 37 of the Pakistan Constitution. It concluded by holding that rendering a vast majority of population ineligible to contest by imposing a requirement of educational qualification is unjust and unconstitutional; it is neither a reasonable restriction nor a reasonable classification and therefore, void.

A bare reading of the following paragraph in the *Rajbala* judgment is enough for us to understand the gross misunderstanding of the law that has been employed in this judgment:

> *"If it is constitutionally permissible to debar certain classes of people from seeking to occupy the constitutional offices, numerical dimension of such classes, in our opinion should make no difference for determining whether prescription of such disqualification is constitutionally permissible unless the prescription is of such nature as would frustrate the constitutional scheme by resulting in a situation where holding of elections to these various bodies becomes completely impossible."*

It is the duty of a welfare government to ensure that illiteracy is eliminated and people attain basic education. Article 21A of the Constitution has made education up to the age of 14 a Fundamental Right. It is a fact that due to poverty and inaccessibility, families are not able to provide education to their children and therefore, the illiteracy rates are very high in a number of states. For them, the basic needs are food, clothing and shelter and any effort to make

education as a bar ultimately weakens the democracy which thrives on *en masse* participation. Education as a goal for a welfare state is laudable but the absence of education cannot be imposed as a disqualification to voters as such an imposition applies in a totally different field, that is having a direct nexus with the democratic participation. Therefore, the contention of the State that today maximum MPs and MLAs are educated, despite education not being a criterion, is a self- defeating argument. If the welfare State makes an endeavour to ensure that everybody is educated, the requirement is fulfilled without having to introduce it as a disqualification. Education, thus, should not be made as a coercive factor against people, to deprive them of their basic right in a democracy, either as a voter or as a candidate contesting elections. Accordingly, the entire approach by the State of Haryana is faulty and legally unsustainable.

Another reason why the impugned provision is arbitrary, unreasonable and violative of Article 14 of the Constitution is that the State has not conducted any study or shown any material to the Hon'ble Court in support of its legislative action that the educated members of the Panchayat are better equipped to discharge their obligations. The only argument which has been advanced by the State is that elected members of the Panchayat have to discharge certain obligations for which it is required that they are educated, but there is no justification advanced as to why there is no educational requirement either for President, Vice-President, MPs and MLAs who have to discharge sensitive functions of national importance as per the Constitution. The fact is that all these important constitutional functionaries have been discharging their functions properly without imposition of educational criteria as a disqualification. If today, education is put as a necessary requirement for all these constitutional functionaries, it is doubtful whether it will be acceptable in the democratic set up and will be constitutionally tenable.

The making of laws and discharging of obligations under Lists I, II and III cannot be less demanding than what is listed in Schedule IX of the Constitution. So, the idea that a person contesting elections in the Panchayat level, who has to deal with things at a smaller scale, has to be more educated than a person who is contesting to be an MLA or an MP, legislating for the entire country, is wholly unreasonable.

Yet another reason for striking down this provision is that though the state government is trying to justify the imposition of education by taking support of the argument that the Panchayat members have to discharge important functions, it has failed to produce any material before the Hon'ble Court as to what level of minimum education is required for discharging those functions. A bare look at the impugned provision shows that matriculation qualification is required for a general male candidate, whereas for a general woman candidate and for a Scheduled Caste male candidate, middle pass is required. It is further provided that for Scheduled Caste woman candidate, only fifth standard pass is required. Even among the educated, various classes have been created which have no nexus with the object sought to be achieved. As the provision cannot be read down to mean that for all the candidates, the requirement will only be fifth pass, the entire provision is liable to be struck down, because the court cannot substitute the legislative intention in reading down a provision. Thus, the provision besides being arbitrary and unreasonable is also discriminatory and therefore, violates Article 14 of the Constitution.

IV. Challenge under Article 14

(i) 'Arbitrariness' - a facet of Article 14

One of the grounds on which the impugned Amendment was challenged was that it was arbitrary and hence, violative of Article 14. It was contended that the new provisions are vague and that they have no nexus with the object that was sought to be achieved by the Act,

discriminating against a class of people without any substantial reason, especially rights that are necessary for the proper and effective functioning of a democracy.[8]

While choosing not to rely on the precedents submitted by the Petitioners, the Hon'ble Court relied on *State of Andhra Pradesh & Others v. McDowell & Co*[9] to hold that *"it is not permissible for this Court to declare a statute unconstitutional on the ground that it is 'arbitrary'"*. In the opinion of the author, the Hon'ble Court has misconstrued the judgment in *McDowell* to reject the ground of 'arbitrariness'; *McDowell* only seems to imply that arbitrariness alone cannot be the reason why a challenge should hold, but that there must be another 'constitutional infirmity' on the basis of which the legislation is challenged. *McDowell* also goes on to assert that one cannot simply claim that a legislation or executive action is arbitrary, but that the claim must be on a constitutional basis. Following exactly that, the claim that has been made by the Petitioners in the case, has been that the amendments strike at the root of Article 14 while relying on factual and legal grounds and not just solely arbitrariness. At best, what the two-judge bench in *Rajbala* could have done is to have referred this rather muddy area of 'arbitrariness' to a larger bench to decide whether a new method ought to be evolved for checking the validity of a statute or to prescribe guidelines for using arbitrariness as a ground of challenge. In fact, by wrongly deciding that the ground of arbitrariness itself is not a valid ground of challenge, the Court has basically denied a proper right of hearing to the Petitioners as most of the arguments advanced hinged on the idea that the amendments made to the legislation were arbitrary.

Moreover, the Supreme Court while writing the judgment seems to have overlooked many previous seven-judge bench decisions that categorically state that arbitrariness is against the idea of Article 14 and that if a statute is found to be arbitrary in nature, it must be struck

[8] Minerva Mills Limited v Union of India, (1980)3 S.C.C. 625.

[9] State of Andhra Pradesh & Ors. v. McDowell & Co, (1996) 3 S.C.C. 709.

down. Courts have time and again commented on the multi-faceted nature of Article 14 and that it cannot be constrained within traditional limits. For instance, the dynamic content of Article 14 with its many aspects and dimensions was explained in *EP Royappa v. State of Tamil Nadu*[10] as follows:

> "*The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant*

[10] EP Royappa v. State of Tamil Nadu, (1974)4 S.C.C. 3.

> *considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Aricles 14 and 16. Mala fide exercise of Power and arbitrariness are different lethal radiations emanating from the same vice; in fact the matter comprehends the former. Both are inhibited by Articles 14 and 16."*

In *Maneka Gandhi v. Union of India,*[11] the principle of reasonableness being an essential element of equality and non-arbitrariness was highlighted by reiterating that equality is a dynamic concept with multiple dimensions and cannot be imprisoned within traditional and doctrinal limits.

It is interesting to note that Justice Chelameshwar in *Rajbala* takes note that according to *Royappa* and *Maneka Gandhi*, arbitrariness is antithetical to the concept of equality, but chooses not to rely on their constitutionally celebrated jurisprudence because these were only pointed out by the Petitioners by way of a dissenting opinion in the case of *RK Garg & Ors. v. Union of India.*[12]

In the case of *Bachan Singh v. State of Punjab*,[13] Justice Bhagwati, though speaking on the question of death sentence, made pertinent observations in relation to Article 14. It was pointed out that Article 14 was liberated in *Maneka Gandhi's* case from the confines of classification theory and it was held that Article 14 primarily ensures guarantee against

[11] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

[12] RK Garg&Ors. v. Union of India, (1981) 4 S.C.C. 675.

[13] Bachan Singh v. State of Punjab, (1982)3 S.C.C. 24.

arbitrariness. Besides holding that if a law is arbitrary and unreasonable and violates Article 14, it was decided that if unguided power is conferred on an authority, the law will be violative of article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason. It was further held that any law which is arbitrary and irrational would be invalid, under Articles 14, 19 or 21, whichever be applicable.

(ii) Prevailing circumstances

The most important aspect of the entire case that the Court has ignored is the situation of the affected person at the ground level. While the State has not effectively acted to improve the conditions of poverty, illiteracy and sanitation, it is unjust to shift the onus to the downtrodden and punish them by taking away their democratic right of contesting elections. Ironically, what the Court has done is to take away the chance of empowerment people in the lower classes of society have had in the garb of empowering them with role models who can in turn give future generations a possibility of being educated and sanitary-positive. By this, lower classes and castes get more suppressed as they have no representation and their voices are never heard. If their participation is blocked by legislation at the grass root level, the changes that could have been brought about will be stunned and lead to an endless cycle of despair.

It has been held by the Hon'ble Supreme Court that a law which is uncertain, vague and unintelligible and capable of wanton abuse can be struck down as being violative of Article 14.[14] This enunciation of Article 14 has to be applied in the context of the legislation which is

[14] State of MP v. Baldev Prasad, (1961)1 S.C.R. 970; KA Abbas v. Union of India, (1970)2 S.C.C. 780; Harakchand Ratanchand Banthia v. Union of India, (1969)2 S.C.C. 166 at 183; Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569; Shreya Singhal v. UOI, (2015) 1 S.C.C. 1.

under consideration. The relevant considerations when a legislation is challenged has been highlighted in the decision of *State of Madras v VG Row:*[15]

> *"……the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case."*

The above view was reiterated by another Constitutional bench of the Hon'ble Court in *Hamdard Dawakhana Wakf v. Union of India*[16] and in *MRF Ltd. v. Inspector Kerala Govt. & Others.*[17]

(iii) Onus of providing supporting evidence

In *Lily Thomas v. Union of India*,[18] the Hon'ble Court held that the other facet of Article 14 is that the reasonableness of a statute is to be judged on the basis of whether the State has

[15] State of Madras v VG Row, A.I.R. 1952 S.C. 196.

[16] Hamdard Dawakhana Wakf v. Union of India, A.I.R. 1965 S.C. 1167.

[17] MRF Ltd. v. Inspector Kerala Govt. & Others, (1998)8 S.C.C. 227.

sufficient material to support the rationale of the impugned legislation.[19] If the reason given for the impugned legislation is not supported by any material, such legislation can be struck down as arbitrary and violative of Article 14 of the Constitution.

It is against the background of these settled precedents mandating presence of clear material on record that we must look at the remarks made by the Court in this case. In many a place where the State has provided data regarding education and the number of toilets, the Court acknowledges the fact that the data is not clear or that it has not been made available. In a serious situation such as this where individuals are disenfranchised, the State must be made to bear the burden of proving without any doubt that the legislation not only has a reasonable nexus with the object sought to be achieved but also sufficient material must be placed on record so that the rationale may be judged. In this case, the Court acted lackadaisically while treating the available data. In the author's opinion, it was of utmost importance that the Court analysed the exact percentage of people getting excluded from practicing their right to contest due to the legislation before deciding that educational criteria constitute a valid disqualification.

V. Right to vote and contest: Constitutional Rights

After relying on the case of *People's Union for Civil Liberties (PUCL) & Another v. Union of India & Another*[20] and the dissenting opinion of Justice Chelameshwar in *Desiya Murpokku Dravida Kazhagam & Another v. Election Commission of India,*[21] the Hon'ble Court reached the conclusion that the right to vote and right to contest are both constitutional rights and not

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[18] Lily Thomas v. Union of India, (2007) 7 S.C.C. 653.

[19] Indian Council of Legal Aid and Advice v. Bar Council of India, (1995)1 S.C.C. 732.

[20] People's Union for Civil Liberties (PUCL) & another v. Union of India & another (2003) 4 S.C.C. 399.

[21] Desiya Murpokku Dravida Kazhagam & another v. Election Commission of India (2012) 7 S.C.C. 340.

simple statutory rights. This exercise was necessary because the level of restriction of a right is integrally related to its nature. After deciding that the right to contest is a constitutional right, the level of scrutiny that had to be employed by the Court would naturally have to be much higher as the State cannot be allowed to take away rights guaranteed by the Constitution without a compelling interest. Though this compelling interest or a rational nexus was not shown by the State, the Court went on to validate the legislation.

While it is a great step forward that the right to vote and contest have been declared as constitutional rights, what the two-judge bench in *Rajbala* seems to have ignored is a five-judge bench in *Kuldip Nayyar v. Union of India*[22] which categorically stated that the right to vote in an election and the right to contest an election are both simple statutory rights and not constitutional rights. *Stare decisis* and judicial propriety demanded that the two-judge bench followed the decision made by a bench of a higher strength or in case of a disagreement, referred this important question to a larger bench so that the question may be answered. It has been settled in the matter of *Central Board of Dawoodi Bohra Community v. State of Maharashtra*[23] that the law laid by the Supreme Court in a decision delivered by a bench of larger strength is binding on any subsequent bench of lesser or co-equal strength and that a bench of lesser quorum cannot doubt the correctness of the view of law taken by a bench of larger quorum. It is therefore unfortunate that the two-judge Bench in *Rajbala* was unaware of the judgment in *Kuldip Nayyar*.

CONCLUSION

When a law is arbitrary and is based on extraneous or irrelevant considerations which are outside the scope of permissible considerations, it ought to be struck down on the basis of

[22] Kuldip Nayyar v. Union of India, (2006) 7 S.C.C. 1.

[23] Central Board of Dawoodi Bohra Community v. State of Maharashtra A.I.R. 2005 S.C. 752.

violation of constitutional provisions and in the interest of the society. The entire scheme of reasoning, or the lack of it, followed in the *Rajbala* judgment only points to a very superficial and idealistic interpretation of the social milieu of the villages in India. As a witness to the oral arguments, it was very saddening to experience at first hand the kind of apathy meted out by the Union and Judiciary, almost mocking the rural poor by asserting that if they lack an alleged necessity, it is not because of their poverty but because of a lack of their requisite will to gain it. The social circumstances that are present in the rural areas of the country were greatly ignored. While claiming to be for the betterment of these areas, what this piece of upheld legislation has done is to work with other forces of the society in ensuring that India's future does not lie in its villages.

EQUALITY BEFORE LAW AND AFFIRMATIVE ACTION UNDER THE CONSTITUTION OF INDIA: WHETHER THE CREAMY LAYER CONCEPT IS STILL RELEVANT?

Srishti Aishwarya*

NOTION OF EQUALITY

Man is a peculiar mix of bee and bear. While society and state form part of his need, individual interest forms his basic instinct.[1]

Ivor Jennings said, equality before the law means that among equals, the law should be equal and should be equally administered, that like should be treated alike.[2] Further, equality before the law denies any special privilege, status or disability of any person in the sphere of enforcement of law.[3]

However, such a notion of abstract equality cannot be attributed any value to, given its formal notion, as the focus stays on maintaining equality, rather than achieving it. This very idea differentiates formal equality from substantial equality. This paper aims at discussing the ambit of equality, distinguishing between formal and substantive equality, thereafter shedding some light on the concept of equality as it is, in the United Kingdom and the United States. Trailing ahead, we will look at the Indian approach towards equality that aims at substantive equality, seen vis-a-vis Articles 14, 15(4) and 16(4). Further, we shall discuss the approach of

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[1] Sheela Rai, *Social and Conceptual Background to the Policy of Reservation*, 37 ECONOMIC AND POLITICAL WEEKLY.4309-4318 (2002).

[2] IVOR JENNINGS, THE LAW AND THE CONSTITUTION 5 (1963).

[3] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION193(1961).

affirmative action and reverse discrimination and the classification made for the same, elaborating on the system of reservation, probing to find, if, like equality, reservation *per se* forms a fundamental right and whether it has achieved the purpose of substantive equality it was purported to achieve.

Formal Equality and Substantial Equality

Formal Equality, also known as the Jeffersonian concept of equality, postulates that each individual needs to be protected in the exercise of his civil liberties, thus concentrating on equal protection and opportunity with regard to *what is*, side-lining equality of achievement. In consonance with this theory, is the notion of colour blindness that decries the institution of classification as the basis for doling out benefits. Such classification on the basis of race, colour and sex for providing benefits and burdens goes against the idea that every individual is free and equal.[4] Justice Powell in *Regents of the University of California v. Bakke*[5] averred that defining diversity as "some specified percentage of a particular group, merely because of its race or ethnic origin is not permitted." The notion of classification was categorically rebutted by the United States Supreme Court in *Fisher v. University of Texas*[6] stating that "… government must treat citizens as individuals and not as members of racial, ethnic, or religious groups [....] we must subject all racial classifications to the strictest of scrutiny." The division of people into classes for determining rights, it is argued, undermines individual

[4] Sanjay Jain, *Reservations, Equality and the Constitution- I: Origin*, (Jan. 19, 2014, 4:54 PM), https://indconlawphil.wordpress.com/2014/01/19/reservations-equality-and-the-constitution-i-origins/

[5] *Regents of the University of California* v. *Bakke*438 U.S. 265 (1978).

[6] *Fisher* v. *University of Texas*570 U.S. __ (2013)

rights of a person.[7] This theory lays emphasis on the idea that by recognizing people on the basis of their race, ethnicity, community, we are effectively reinforcing these boundaries and propagating inequalities. Thus, the focus should be on formal equality where no one is treated differently from another.

Proportional Equality or the Jacksonian concept of equality, on the other hand, focuses on *what ought to be*. It concentrates on not equal treatment but providing opportunities that helps individuals in realisation of the full value of personal liberty. The affirmative action mechanism of equality is averred in the group subordination theory which denounces the notion of colour blindness. This theory of fairness where likes are to be treated alike indicating different treatment for groups which aren't alike,[8] was affirmed by Justice Brennan while dissenting in the *University of California Regents v. Bakke*[9] as discussed above. Justice Brennan stated that "government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." Positive action under the school of affirmative action is seen as furthering the interest of diversity and not against equal protection.[10] Such measures are seen as "plus factor" for promoting diversity but are supposed to be "narrowly tailored".[11] However, the

[7] *See* Guy-Uriel E. Charles, *Affirmative Action and Color Blindness from the Original Position*, 78: 2009, TULANE L. REV. (2010), *See also City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

[8] Ronald Dworkin, *Taking Rights Seriously*, http://philosophyfaculty.ucsd.edu/faculty/rarneson/DWORKINTakingRightsSeriously.pdf

[9] *Supra* note 5.

[10] *Shaw* v. *Hunt*, 517 U.S. 899, 908 (1996); *Grutter* v. *Bollinger* 539 U.S. 306 (2003)

[11] *Id.*

US Supreme Court in *Grutter v. Bollinger,*[12] while advocating affirmative action, did state that eventually there should be a shift to a colour blind policy.

In general, the United States focuses on ensuring lack of discrimination, treating everyone *as it is,* as equal. For instance, in the *earlier mentioned Allan Bakke case,*[13] the Supreme Court struck down a special minority admission programme of the university as it provided race based quota. It held that this system offended the requirement of treating each applicant as an individual without insulating them from comparison and competition, further underlining the fairness to the individual as an ultimate value of equality. Again, in *Richmond v. Croson*,[14] the Court stated that while dealing with the affirmative action taken in favour of minority, the equal protection clause which conferred individual rights has to be kept in mind.

However, the US is not free from debates as far as affirmative action is concerned and is divided into two factions, fair shakers and social engineers, while the former wants equality of opportunity i.e. a level playing field for all, social engineers demand equality of result.[15]

As far as the United Kingdom is concerned, it earlier provided for the UK Race Relation Act, 1976, wherein Section 35 provided that it is not unlawful to provide persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefit.[16] It is worth

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[12] *Supra* note 10.

[13] *Supra* note 5.

[14] *Richmond v. Croson* 488 U.S. 469 (1989).

[15] Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99HARVARD L. REV. 1312 (Apr., 1986)

[16] P. ISHWARA BHATT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 191 (2004).

observing that the focus was not on reservation, but on strengthening the capacities of individuals discriminated against. For instance, in *Riyat v. London Borough of Brent,*[17] the court held that the employer has infringed the Act by discriminating in favour of black applicants in employment.

The Act has now been replaced by an all-inclusive, Equality Act, 2010 which focuses on treatment as an equal, thus focussing on equal protection before the law. The UK principle of equality is evident from the policy itself that is assistance oriented, limiting reverse discrimination by general principle of equality in a formal sense.[18]

The formal notion of equality provides for the negative role of the government, whereas the proportional form of equality focuses on the positive role of the government.[19] As far as the former is concerned, the State is supposed to not hinder the supposed *status quo* of equality or discriminate on any ground, while for the latter, the State needs to take affirmative measures to bring in equality.

The Indian methodology of equality is the Jacksonian one, while if we look at the right to equality as provided in US and UK, from where the Indian concept of equality has been derived,[20] the US on one hand guarantees equal protection of law under the fourteenth amendment,[21] and the UK on the other hand emphasises on equality before law.[22]

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[17] *Riyat v. London Borough of Brent*, 1983 COIT 1405/ 59.

[18] *Supra* note 8.

[19] *Supra* note 1.

[20] *Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws.*

[21] 14th Amendment to the U.S. Constitution, http://www.law.cornell.edu/constitution/amendmentxiv(last visited Sep. 23, 2013)

Indian Notion of Equality: Focus on Substantive Equality

India, a country embedded with myriad motifs in terms of communities, under the aegis of a more than a hundred-year-old orthodoxy, is divided into castes, where many communities are castigated as low castes or "untouchables".[23] Working with this background, the main concern of the constitution makers was to bring the "untouchables" at par with other communities, and thus, the focus on substantive equality. The main goal was to utilise preferential treatment to correct social inequalities accumulated due to historical reasons.[24] Thus, combining equality with justice, the idea of equality was not only concerned with equality of consequences, but with equal treatment of equals.[25] Justifying classification, in terms of providing for reservation, treating equals as equals; provides for affirmative action by the removal of social and economic disadvantages.

The basis of categorisation for reservation can possibly draw inspiration from the doctrine of classification which is an exemption to the general principle of equality before the law[26] and provides for the system of classification for achieving substantive equality. Not necessarily limited to reservation, the scheme of classification, as propounded in *State of W.B. v. Anwar*

[22] U.K. Right to Equality, http://www.sitios.scjn.gob.mx/instituto/sites/default/files/documentos/equality_before_law_and_precedent.pdf (last visited Sep. 3, 2015)

[23] Sukhdeo Thorat & Chittaranjan Senapati, *Reservation Policy in India: Dimensions and Issues*, http://www.dalitstudies.org.in/download/wp/0602.pdf (last visited Sep. 3, 2015).

[24] *See* the views of Dr. B.R. Ambedkar and Alladi Krishnaswamy Ayyar, CAD, Vol. 7, p. 701.

[25] *Supra* note 8 at 43.

[26] D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, (19th ed., 2012).

Ali Sarkar,[27] provides for the nexus test that is, (a) classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others (b) the differentia must have a rational relation to the object sought to be achieved by the law in question. This principle holds true for achieving substantive equality and affirmative measures taken for the same and it is important that the action serves the desired purpose of achieving equality.

In India, the classification as predominantly recognised for the basis of reservation, is based on castes. However, there is also another approach to reservation in the form of domicile reservation, which is reservation in educational and other institutions depending on the geographical location. In *Pradeep Jain v. Union of India,*[28] it was held that reservation should not be based on residential requirements but having "regards to broader considerations of equality of opportunity and institutional continuity in education." Further, the court emphasised on admission solely on the basis of merit. In the recent case of *Dr Sandeep v. Union of India,*[29] it was argued that reservation based on residence compromises on the merit, though the technicalities did not allow the court to overrule such reservation, the court nevertheless expressed hope for progressive change. Such reservation, it is submitted, does not qualify as a means for achieving substantive equality, but, acts as a force strengthening regionalism, creating more of a region based identity than an egalitarian national identity.

[27] *West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).

[28] *Pradeep Jain v. Union of India*, (1984) 3 SCC 654 (India).

[29] *Dr. Sandeep v. Union of India*, [Writ Petition (Civil) No.444 of 2015] (India).

INDIAN APPROACH TO SUBSTANTIVE EQUALITY

In India, the marginalised class of people are categorised as the Scheduled Castes[30], Scheduled Tribes[31] and Other Backward Classes,[32] given the background of historical oppression leading to social, economic and educational backwardness; affirmative action to emancipate them became a necessity. This led to two-fold action, first to ensure that they are not discriminated against, and second to provide for the system of reservation to ameliorate their condition.

The Supreme Court had, initially, in the *State of Madras v. Smt. Champakam Dorairanjan,*[33] held that caste based reservation violates Article 15 which prohibits discrimination on the grounds of religion, race, caste, sex or place of birth thereby affirming that the Indian Constitution favoured a colour blind notion of equality. This judgment led to the First Constitutional Amendment, leading to the addition of Article 15(4) which allows the State to make special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

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[30] THE CONSTITUTION (SCHEDULED CASTES) ORDER, 1950, http://lawmin.nic.in/ld/subord/rule3a.htm (last visited Sep. 3, 2015).

[31] National Commission for Scheduled Tribes, *Guidelines for dealing with matters received in the Commission*, http://ncst.nic.in/writereaddata/linkimages/Agenda22022010-I590394170.pdf(last visited on Sep. 3, 2015) ("Criteria for being ST: a. Indications of primitive traits, b. Distinctive culture, c. Geographical isolation, d. Shyness of contact with the community at large, and e. Backwardness."). *See also* THE CONSTITUTION (SCHEDULED TRIBES) ORDER, 1950, http://lawmin.nic.in/ld/subord/rule9a.htm (last visited on Sep.3, 2015).

[32] Mandal Commission Report, http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161 (last visited on Jan. 13, 2016) ("Decided on the basis of social, economical and education indicator as given by Mandal Commission while also taking into account Article 340 of the Constitution.").

[33] *Madras v. Smt. Champakam Dorairanjan,* AIR 1951 SC 226 (India).

In *M.R.Balaji v. State of Mysore*,[34] the Supreme Court was of the view that caste was a relevant factor to determining social backwardness but it cannot be made the sole criterion, and *ultimately economic backwardness is the root cause of social backwardness.* The Court also emphatically declared that Article 16(4) is an exception to the general rule of equality of opportunity enshrined in Article 16(1). In other words, the legitimacy of affirmative action and reservations cannot be derived from Article 16(1) and has to be confined to the exception provided in Article 16(4). Thus, the apex court interpreted equality of opportunity mentioned in Article 16(1) in a colour blind manner and favoured the notion of formal equality.

However, the first sign of a different interpretation was given through a dissenting opinion in *T. Devadasan v. Union of India.*[35] Justice Subba Rao in this case made a strong point in favour of affirmative action stating that Article 16(4) is not an exception of Article 16(1), but a facet of the latter - "*the expression "nothing in this article" in Art. 16(4) of the Constitution of India is a legislative device to express its 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 reserved a power untrammelled by the other provisions of the Article"*. This point of view provided by Justice Subba Rao was accepted in totality in the case of *State of Kerala v. N.M. Thomas*[36] by all the judges.

The Court also added that, *".... those who are similarly circumstanced are entitled to equal treatment. Classification is to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved".* The court

[34] *M.R. Balaji v. Mysore,* 1963 AIR 649 (India).

[35] *T. Devadasan v. Union of India,* AIR 1964 SC 179 (India).

[36] *Kerala* v. *N.M. Thomas,* AIR 1976 SC 490(India).

justified differential treatment on the basis of backward castes, averring it to be a reasonable basis of classification and held it to be within the ambit of equality.

The notion of reservation vis- a-vis equality evolved further in the nine judge landmark judgment in *Indra Sawhney case,*[37] which stated that caste does determine backwardness. The Court in *Indra Sawhney* cited the Kaka Kalelkar report that provides eleven indicators of backwardness, categorizing them as social, educational and economical.

It is pertinent to note here that the focus in the categorisation was on the living conditions, educational levels and occupation for determining backwardness where caste is used as a means to facilitate that rather than forming the very basis of division for bestowing benefits.

In *M. Nagaraj v. Union of India*[38], the court avers that the affirmative action is to fulfil the objective of "justice, social, economic and political" as stated in the directive principles. The court, in this case, held that caste cannot be the mere criteria for determining backwardness, stating that "reservation is necessary for transcending caste and not for perpetuating it". The court further demarcated the difference between Article 16(1) and 16(4), marking yet another shift in stance, holding that Article 16(4) tries to address the inadequacy of representation by means of reservation whereas Article 16(1) addresses equality at an individual level: "*Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist*". Thus, both the Articles imbibe different ideas of equality, having their own parallel

[37] *Indra Sawhney* v. *Union of India,* AIR 1993 SC 477 (India).

[38] *M. Nagaraj*v. *Union of India,* AIR 2007 SC 71 (India).

existence, showing a shift from the earlier position where Article 16(4) was deemed to be a facet of Article 16(1).

The usage of caste as the basis of reservation was identified in *Ashok Kumar Thakur v. Union of India.*[39] However, the court added that "classifications on the basis of castes in the long run have a tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply". The court further underlined the importance of social backwardness along with the caste in determining the poverty level which in turn ought to act criteria for reservation. Further, in the recent case of *Ram Singh v. Union of India,*[40] the court emphasised on social backwardness as the basis of reservation. The Court held that:

> *"backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste."*

The scheme of the Indian Constitution further provides for Article 16(4) which allows the State to make reservation provisions with regard to appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately

[39] *Ashok Kumar Thakur* v. *Union of India,* Writ Petition (civil) 265 of 2006 (India).

[40] *Ram Singh* v. *Union of India,* WRIT PETITION (CIVIL) NO. 274 OF 2014 (India).

represented in the services under the State. In addition, there is Article 16(4A)[41] that allows reservation in matters of promotion. Article16(4B)[42] adds further substance by allowing vacancies with regard to which reservation has been made specifically, to be treated separately.[43]

It is important to note that Article 16(4B) was introduced as a result of the Supreme Court's judgment in *Ajit Singh II v. Union of India*[44] where the Court limited the powers granted under Article 16(4A) as it stated "the Constitution has laid down in Articles 14 and 16(1) the permissible limits of affirmative action by way of reservation under Articles 16(4) and 16(4A). While permitting reservations at the same time, it has also placed certain limitations by way of Articles 14 and 16(1) so that there is no reverse discrimination". The Court in this case refused to grant seniority to the candidate who reached a level up owing to the reservation vis-a-vis a general candidate, providing for a catch up rule, stating that:

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[41] Brought via the 77th Amendment to the Constitution to permit reservation in promotion to the Scheduled Castes and Scheduled Tribes. Thus, by amending the Constitution, the Parliament has removed the base as interpreted by Supreme Court in Indira Sawhney that the appointment does not include promotion.

[42] Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

[43] The Constitution (Eighty- First Amendment) Act, 2000 has added Article 16(4B) to the Constitution. The Amendment envisages that the unfilled reserved vacancies are to be carried forward to the subsequent years and these vacancies are to be treated as distinct and separate from the current vacancies during any year. The rule of 50% reservation laid down by the Supreme Court is to be applied only to normal vacancies. This means that the unfilled reserved vacancies can be carried forward from year to year without any limit, and are tobe filled separately from the normal vacancies. This Amendment also modifies the proposition laid down by the Supreme Court in Indira Sawhney.

[44] *Ajit Singh II* v. *Union of India,* 1999 AIR 3471 SC (India).

> *"when the senior general candidate got promoted under the rules, - whether by way of a seniority rule or a selection rule- to the level to which the reserved candidate was promoted earlier, the general candidate would have to be treated as senior to the reserved candidate (the roster-point promotee) at the promotional level as well, unless, of course, the reserved candidate got a further promotion by that time to a higher post."*

The overall effect of these provisions allow the State to make reservations in governmental services and institutions, with the purpose of ameliorating the state of the deprived factions of the country, namely, the scheduled tribes, castes and other backward classes.[45]

III. IS RESERVATION A RIGHT PER SE?

The other argument that arises against reservation and in favour of the right to equality *per se* is that while the right to equality forms a fundamental right, reservation forms a matter of policy and does not come within the horizon of fundamental rights. The extensive policy of reverse discrimination, thus, infringes on the fundamental right of equality.

The stance on this seems to be divided. M.P. Singh, has argued in cogent terms that reservation forms a fundamental right that;

> "*Right as interpreted in the context of Article 14 is not the right to uniform or identical treatment. It is a right to be treated equally among equals. Unequal treatment of equals is as much violation of that right as equal treatment of unequals. Every difference of treatment is not inconsistent with that right just as every identical treatment is not*

[45] *See also* Article 46 which states that: "The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the SC and ST, and shall protect them from social injustice and all forms of exploitation."

consistent with it. "Ronald Dworkin has distinguished between the right to equal treatment and the right to treatment as an equal. According to him, the latter is the fundamental right while the former is only a derivative right. The right to treatment as an equal consists in equal respect and concern while the right to equal treatment consists in identical treatment. But, as we have seen, identical treatment is neither possible nor consistent with the right to equality. Therefore, what the right to equality requires is equal concern. As long as that concern exists, difference of treatment is consistent with the right to equality".[46]

On the other hand, it is suggested that;

"*The notion of equality, as a matter of policy has to be kept distinct from the notion of equality as a matter of right. A policy stipulates a collective goal which a community seeks to pursue. A right is an individual claim which seeks to protect an individual's interest. In a sense, Articles 16(4) and 15(4) could be treated as 'authorising' norms in Kelsenian sense, justifying encroachment of the individual's right to equality for achieving real equality for the members of the disadvantaged groups. Right is a matter of principle and thus every citizen has a right not to be discriminated against on racial grounds and has a right to be treated with equal concern and respect and has adequately been embodied in the non-discrimination clauses of Articles 15 and 16. Thus what can be justified is preferential treatment but not a fundamental right to*

[46] Mahenendra P. Singh, *Are Articles 15(4) and 16(4) Fundamental Right?* (1994) 3 SCC (Jour) 33. *Note that* Kapil Sibal, former law minister, earlier stated that reservation forms constitutional right. http://www.indianexpress.com/news/govt-will-bring-amendment-to-nullify-sc-verdict/1155672/ (last visited Sep.3, 2015).

reservation[47]*."*

As far as the judicial approach in concerned, in 1962, in *M. R. Balaji v. State of Mysore,*[48] as well as *C.A. Rajendran v. Union of India,*[49] the Supreme Court observed that Article 15(4) as well as Article 16(4) wherein the nature of an enabling provision and imposed no positive obligations on the State. This position was upheld in *SBI ST/SC Employees' Welfare Assn. v. SBI.*[50]

However, in *Ashok Kr Gupta case,*[51] the Court put forth the proposition that the liberal and positive construction of the reservation clauses and their connection with the right to livelihood and social justice makes the right to reservation a fundamental right. Following this case, the Court in *Jagdish Lal v. State of Haryana,*[52] observed that rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights.

All the speculations were put to rest by a 5 judge bench in *Ajit Singh v. State of Punjab.*[53] It spoke of Article 15(4) and 16(4) as enabling provisions and held that: "*In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in*

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[47] Parmanand Singh, *Fundamental Right to Reservation: A Rejoinder*, (1995) 3 SCC (Jour) 6, www.escr-net.org/usr_doc/Fundamental_Right_to_Reservation.doc (last visitedSep. 3, 2015)

[48] *M. R. Balaji*v. *Mysore*,1963 AIR 649(India).

[49] *C.A. Rajendran* v. *Union of India*, (1968) 1 SCC 721(India).

[50] *SBI ST/SC Employees' Welfare Assn.* v. *SBI*, AIR 1996 SC 1838 (India).

[51]*A.K. Gupta* v. *Uttar Pradesh*, (1997) 5 SCC 201 (India).

[52]*Jagdish Lal* v. *Haryana*, (1997) 6 SCC 538 (India).

[53]*Ajit Singh* v. Punjab, AIR 1999 SC 3471 (India).

the nature of enabling provision vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those Articles so warranted". Fundamental rights calling for affirmative action in the form of reservations, ergo, can be asked for or implemented only when it fulfils the given criteria and cannot be, thus, claimed as a matter of right.

IV. SYSTEM OF RESERVATION: EFFECTIVE OR DEFECTIVE?

The system of reservation, as held in *Jagdish Lal v. State of Haryana*[54] was seen as an affirmative action and a mode of achieving real equality. The Court held that, prima facie, affirmative action allows giving of preferential treatment to socially and economically backward classes by apparently inflicting handicaps on those who are more advantageously placed. However, though affirmative action appears discriminatory, it is supposed to produce equality on a broader basis, by eliminating de- facto inequalities, by bringing weaker sections on a footing of equality with the stronger sections.

The question which needs to be answered, currently, is whether such an extensive process of reservation has been effective in achieving the goal of substantive equality or has been just affecting the masses and leading to the criticism by general castes as being vote bank politics and futile measures with statements that castigate the government in strong terms, postulating that such measures might lead to complete boycott of STs, SCs and OBCs.[55]

[54] *Supra* note 52.

[55] Hitesh Pundir, *Reservation based Politics* ,http://indiaopines.com/reservation-politics/ (last visited Jan. 14, 2016)

It further leads to a debate on issues such as incubation v. over protection, integration v. alienation, secularism v. communalism, development v. stagnation.[56] For instance, in the *AIIMS Students Union case,*[57] the system of reservations was questioned as being a protective push or prop. Additionally, reservation on the basis of residential attributes, which though generally not questioned, does not qualify in sphere of aide helping the cause of substantive equality and is more of a statutory prerogative.

While those belonging to the general category feel discriminated against, due to the extensive reservation policy and feel that it actually infringes their right to equality as guaranteed under Article 14 and as practiced in US and UK[58], the claims of the socially and educationally backward classes are no less. It seems that the goal that the reservation policy was supposed to achieve got lost somewhere, and the classification made for achieving substantive equality got blurred. As rightly observed by Mr. M. Hidayatullah:

"*In spite of the consistent commitment to minority rights, there is insufficient awareness of the laws on the subject, not only among the people directly affected, but also among some of those who are concerned with the administration of these laws*."[59]

[56] MARC GALANTER, COMPETING EQUALITIES LAW AND BACKWARD CLASSES IN INDIA 80-83 (1984). *See* Marc Galanter, *Competing Equalities: Law and the Backward Classes in India*, Review by: C. J. Fuller, 49 THE MODERN L. REV. 400-403 (May, 1986), http://www.jstor.org/stable/1096131?seq=2.*See also* Shyama Nand Singh, *Anti Reservation Agitations in Bihar,* 52 THE INDIAN JOURNAL OF POLITICAL SCIENCE, 24-42 (Jan. - March 1991), http://www.jstor.org/stable/41855533 (last visited Sep. 3, 2015)

[57] *AIIMS Students Union* v. *AIIMS*, (2002) 1 SCC 428 (India).

[58] Kanchan Srivastava, *Caste discrimination in India's elite institutions: Students*, http://www.dnaindia.com/mumbai/report-caste-discrimination-in-india-s-elite-institutions-students-2016745 (last visited Jan. 12, 2015),

[59] Dr. I. Satya Sundaram, Review: *Competing Equalities: Law and the Backward Classes in India*, , 4,5 & 6 REVIEW PROJECTOR (INDIA),

It is further argued that, "*reservations alone are not enough to mainstream the SCs and the STs to the levels of the other sections of the society. The system of reservations meant to uplift the weaker sections, has in fact, succeeded in the creation of creamy layers within the marginalized social groups to the extent that the percolation of the benefits has been marginal and differentially accessed. The vision of Ambedkar, Phule, Periyar, and Sahuji Maharaj, as initially envisioned under the aegis of the reservation policy and reforms in the structure of governance were to completely negate the deleterious impacts of caste-based discrimination and exclusion".*[60]

Problem of Creamy Layer

Though, affirmative action and reverse discrimination did achieve redistributive effect, it is as it appears, not spread out evenly. The socially and economically better placed among the beneficiaries enjoy a disproportionate share of upliftment measures. Though the constitutional mandate for compensatory discrimination has frequently been extended by schemes providing for preference in promotion, their effect in advancing protected classes to higher levels has been limited.[61] As has been argued, compensatory discrimination has succeeded in accelerating the growth of a middle class within these disadvantaged groups[62] whereas the condition of the poorer members among the Scheduled Castes and Tribes are yet

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http://marcgalanter.net/Documents/reviews/competing%20equalities/sundaram_reviewprojectorindia.pdf (last visited Sep. 3, 2015)

[60] *Supra* note 23.

[61] Richard Power, *Competing Equalities: Law and the Backward Classes in India*, 63WASHINGTON UNIV. L. REV. (1985), http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=2200&context=lawreview

[62] M. GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA, 551 (1984), http://marcgalanter.net/Documents/reviews/competing%20equalities/sundaram_reviewprojectorindia.pdf

to improve.[63] Many believe that reservation has helped the more affluent members of the backward communities to improve their socio-economic conditions while not reaching the members at the grass root level who are actually in need of such affirmative actions and provisions. The benefits of affirmative action, if availed mostly by the creamy portion of the factions provided with reservation, the very goal of the affirmative action to ameliorate condition of the downtrodden ST/SC and backward castes remains unfulfilled.[64]It is further averred that reservation in educational institutes is by and large availed by the creamy layer of the reserved population rather than reaching to the lower strata population for whom the system of reservation is actually formulated.[65]

It was first pointed out by, in *State of Kerala v. N.M. Thomas*[66], that 'benefits of the reservation shall be snatched away by the top creamy layer of the backward class, thus leaving the weakest among the weak and leaving the fortunate layers to consume the whole cake'. This term was cited again by Justice Krishna Iyer in *Akhil Bhartiya Soshit Karamchari Sangh v. Union of India.*[67] The roots of this concept are traced back to the case of *K.S.*

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[63] Prakash Louis, *Scheduled Castes and Tribes: The Reservation Debate*, 38 ECONOMIC AND POLITICAL WEEKLY, 2475-2478(Jun. 21-27, 2003), http://www.jstor.org/stable/4413699.*See also Selected Socio- Economic Statistics India*, 2011, http://mospi.nic.in/mospi_new/upload/sel_socio_eco_stats_ind_2001_28oct11.pdf.

[64] Aimee Chin & Nishith Prakash, *The redistributive effects of political reservation for minorities: evidence from India*, IZA Discussion Papers, No. 4391, http://www.econstor.eu/bitstream/10419/36079/1/612641589.pdf (last visited Jan. 13, 2016).

[65] *Impact of Reservation on Admissions to Higher Education in India*, http://www.eledu.net/rrcusrn_data/Impact%20of%20Reservation%20on%20Admissions%20to%20Higher%20Education%20in%20India.pd(last visited Jan. 13, 2016)

[66] *Kerala* v. *N.M. Thomas*,1976 AIR 490 (India).

[67]*Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of* India, 1981 AIR 298 (India).

Jayashree v. *State of Kerala,*[68]wherein the people belonging to backward classes, but whose family income exceeds Rs. 10000, were denied the benefit of reservation.[69]

The matter was finally settled by *Indira Swahney case*[70], where a demarcation was made between the creamy and non- creamy layers as far as OBCs were concerned, providing reservations just for the latter, the Court categorically laid down that no such distinction needed to be made for STs/SCs. However, in the 2006 *Nagraj* judgment, inferred that affluent STs/ SCs should be taken out from the ambit of reservation.[71]The court in this case averred that the backwardness of scheduled castes and tribes is required to be showcased first for providing benefits in terms of quota in promotions. This is an affirmation of the broader concept of creamy layer, albeit discreetly. However, the court in *Ashok Kumar Thakur v. Union of India*[72] categorically refused to introduce the concept of creamy layer in case of reservation for ST/ SC. Further, to extricate the idea suggested in M. Nagraj case to demonstrate backwardness, the 117th Amendment Bill was brought in, which stated that all ST/SCs would be deemed to be backward and no further determination is required.[73] It is

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[68] *Jayashree* v. *Kerala,* 1976 AIR 2381 (India).

[69] **Rashmin Khandekar& Sunny Shah, *The History, Rationale and Critical Analysis of*** *Reservations* ***under the Constitution of India*,** http://www.indialawjournal.com/volume3/issue_2/article_by_rushminsunny.html. *See Anil Kumar Uppal* v. *Punjab State Electricity Board*,Civil WRIT PETITION NO. 7660 OF 2004 (India).

[70] *Indira Sawhney & Ors* v. *Union of India*, AIR 1993 SC 477 (India).

[71] Additionally, the Supreme Court issued Notice to Centre on a PIL Seeking Exclusion of Creamy Layer among SC & ST, http://www.jagranjosh.com/current-affairs/supreme-court-isued-notice-to-centre-on-a-pil-seeking-exclusion-of-creamy-layer-among-sc-st-1314186916-1. *Note that* the petition has been dismissed, see,*4 years post-notice, SC dismisses PIL for denying reservation to SC/ST creamy layer*, http://onelawstreet.com/2015/04/4-years-post-notice-sc-dismisses-pil-for-denying-reservation-to-scst-creamy-layer/ (last visited Jan. 13, 2015).

[72] *Ashok Kumar Thakur* v. *Union of India*, WRIT PETITION (CIVIL) 265 OF 2006.

[73] Constitution 117th Bill (2012), http://www.prsindia.org/billtrack/constitution-one-hundred-seventeenth-amendment-bill-2012--2462/ (last visited Jan. 13, 2015)

submitted that the Bill ignores the nexus between reservation as a mean of achieving equality, as it does not require the inadequacy of representation as a ground for affirmative action but provides for the blanket presumption of backwardness in relation to ST/ SC.[74]

The Court's reluctance coupled with legislative unwillingness to implement creamy layer among the ST/SC's questions the very basis of reservation. Reservation is basically class subordination action in line with the Jacksonian concept of equality. The goal of such affirmation action school of equality is the removal of disparity and caste system in this regard, whereas the caste is used as mean to provide reservation to achieve this goal. The introduction of creamy layer to limit reservations is thus supposed to help in achieving a casteless society where substantive equality has been achieved.[75]Therefore, if the faction of a particular Scheduled Caste has achieved educational, financial and social wellbeing, extricating them from the ambit of reservation appears appropriate. The refusal to introduce the notion of creamy layer, which would help in gradually obliterating caste demarcation and reservation by putting creamy layer at parity with others, reinforces caste boundaries and inequalities.[76]The Court in *K.C. Vasanth Kumar v. State of Karnataka*[77] held that "caste-based reservation does not go well with our secular character as enshrined in the Preamble to the Constitution". If we want to remove the inequalities enforced by castes, mitigating it

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[74] Anup Surendranath, *Legitimate Aim, Unconstitutional Means*, THE HINDU, (Dec. 20, 2012), http://www.thehindu.com/opinion/lead/legitimate-aim-unconstitutional-means/article4218437.ece

[75] *Rethinking Equality*, http://law.wustl.edu/Library/Guides/Equality/11session1.html, *See alsoReservation, Equality and the Constitution: X- Untidy Endnotes,*https://indconlawphil.wordpress.com/2014/04/09/reservations-equality-and-the-constitution-x-untidy-endnotes/

[76] *Id.*

[77] *K.C. Vasanth Kumar* v. *Karnataka* 1985 AIR 1495 (India).

slowly by increasing the gamut of creamy layer seems apt. If we read the Constituent Assembly debates, the focus is clearly on equality of opportunity that is being provided through reservation rather than on maintaining class and caste distinctions *per se*.[78]

The refusal of the Indian courts to introduce the notion of creamy layer vis- a-vis Scheduled Castes shows the intention to keep group based identities intact which is contradictory to the court's own position with regard to the OBC's where the concept of creamy layer finds a hearty presence. This dual treatment to two categories of reservation where both are meant to address equality of opportunity seems conflicting and ironical.

Nevertheless, another section of scholars argue that the goal is to provide equality of opportunity among various factions while keeping the boundary lines between them intact, as M.P. Singh avers[79]:

> *"The unity of the nation is not secured and ensured, but rather it is endangered, by not recognizing the existing historical inequalities and injustices in our society. It is against such inequalities that existed in our society on caste lines that discrimination on grounds of caste was prohibited in the above clauses. The clauses prohibit discrimination; they do not derecognize castes just as they prohibit discrimination on the basis of religion or sex or place of birth but they do not abolish or derecognize them. Prohibition of discrimination in its nature, content and objectives is different from de-recognition of differences."*

[78] Clause wise discussion on the draft constitution, http://www.ambedkar.org/ambcd/63B3.CA%20Debates%2015.11.1948%20to%208.1.1949%20Part%20III.htm

[79] M.P. Singh, *Ashoka Thakur* v. *Union Of India: A Divided Verdict On An Undivided Social Justice Measure*, http://nujslawreview.org/wp-content/uploads/2015/02/prof.m.p.singh_.pdf

It is important for the court to reach a position with regard to the system of reservation. Are we aiming at forming a uniform, egalitarian casteless society or providing equality within various groups while keeping the group identities intact? Further, is reservation to be seen as a fundamental right or just a means of achieving the fundamental right of equality? It is respectfully submitted that the aim of the constitution makers was to achieve an egalitarian society[80], whereas reservation was deemed as means of achieving the same. It is submitted that keeping group identities intact, would not only hinder that, but also lead to communal differences and skirmishes. As Ram Manohar Lohia said, "caste restricts opportunity. Restricted opportunity constricts ability. Constricted ability further restricts opportunity. Where caste prevails, opportunity and ability are restricted to ever-narrowing circles of the people".[81]

CONCLUSION

The Indian approach to equality that concentrates on equality in terms of outcome lead to the classification and provision of reservation, however, the above analysis leads to a deduction, that classification made in terms for the purpose of reservation so as to achieve substantial equality, has, as it seems, failed to achieve equality *per se*. As first of all instead of leading to assimilation, it is leading to segregation. The better off factions from the reserved category are reaping the benefits of reservation while the bottom rung stagnates in poverty. Reservation is being used more as the weapon for caste based politics and as a means to woo various communities. The affluent and the creamy layer of such backward castes gain access to power and use the reservation as a garb to cover real economic and social issues faced by

[80] Sathwik N.N., *Working towards a classless society*, THE HINDU, (Apr. 22, 2013), http://www.thehindu.com/features/education/issues/working-towards-a-casteless-society/article4637249.ece

[81] 2 LION M.G. AGARWAL, FREEDOM FIGHTERS OF INDIA 212 (2008)

poor faction of the society.[82]Many factions of society, agitated by the push to the rear faced by them owing to reservations are now claiming reservation as a way of climbing up the social ladder. The Patel community, led by Hardik Patel, is now claiming reservation because of the downfall faced by them due to reservation given to certain other strata of societies, is one example of this situation.[83] The entire system of reservation seems to be becoming a mechanism to manipulate the governmental system to reap benefits. Somewhere, the rhyme and reason of reservations is losing its relevance whereas it is demanded as a matter of right by one and all. As decided in the *Ajit Singh case*[84], reservations do not form fundamental right, hence extensive reservation leads to reverse discrimination in the name of affirmative action and is violative of the fundamental right of equality.

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[82] Pradipta Chaudhury, *"The 'Creamy Layer': Political Economy of Reservations"*, 39 ECONOMIC AND POLITICAL WEEKLY.1989-1991, (May 15-21, 2004).

[83] Shikha Trivedi, *The Real Story of What Hardik Patel, 21, Wants and Why?* NDTV, (Aug. 24, 2015), http://www.ndtv.com/india-news/the-real-story-of-what-hardik-patel-21-wants-and-why-1210424 (last visited Dec. 19, 2015). *See also*, *The Patel's Crusade*, THE HINDU, (Sep. 23, 2015), http://www.thehindu.com/news/national/hardik-patel-and-the-agitation-for-obc-reservations-in-gujarat/article7599847.ece

[84] *Supra* note 54.