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RECENT DAMAGES TO INDIA'S SOCIAL JUSTICE ARCHITECTURE

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Abstract Part XVI of the Constitution of India enumerates special provisions relating to the general welfare of the Scheduled Castes ('SCs'), Scheduled Tribes ('STs'), and Other Backward Classes ('OBCs'). These provisions form the basic architecture of India's social justice commitments to its citizens. This article argues that in recent years this architecture has been diluted to the detriment of the interests of the SCs, STs, and OBCs. This article critiques the approach of the Indian judiciary towards the welfare of SCs and STs by arguing that its actions are guided by the majoritarian public opinion, rather than the constitutional principles of equality and justice. It particularly criticizes the Supreme Court of India for convoluting the reservation system in India at the expense of the SCs and STs. This article also argues that by incorporation of Article 338B in the Constitution of India the government has transmogrified OBCs into SCs and STs. It also analyses the recently enacted Constitution (One Hundred and Twenty-Fourth Amendment) Act, 2019 which granted reservations to the economically weaker sections among the upper castes. The article hopes that the provision of quotas for the upper castes will help in reducing the stigma faced by the SCs and STs.

I. INTRODUCTION

Of late, profound changes have been taking place with regard to India's social justice architecture but, unfortunately, they could not get the attention of political leaders or even community activists. Part XVI of the Constitution of India deals with 'Special Provisions Relating to Certain Classes', wherein the

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nation's philosophy of helping historically-marginalised groups is enshrined.[1] The structural changes to this Part must trouble scholars who pay attention to their long-term consequences. This has particular relevance for those committed to the Constitution, in letter and spirit. This essay seeks to flag three of those changes, each of which pertains to the Scheduled Castes and the Scheduled Tribes ('SC/STs'), the Other Backward Classes ('OBCs'), and others or those upper castes now known as the Economically Backward Classes ('EBCs'). One can instinctively see the moral descent of the nation's conception of and commitment to social justice. This paper argues that this overused and abused expression meant, in the past, our obligation to uplift the people most discriminated against and excluded, later it was cheapened as a political slogan to bring in backward groups, and finally, it has now been used to equate the poor among the upper castes with the other two groups.

While inserting Part XVI, the Constituent Assembly had proceeded with three assumptions. One, since the SC/STs were victims of social prejudices, especially the caste system, they needed special provisions to help them reap the benefits of full citizenship.[2] Two, the Assembly felt that even though there weren't any other clearly identifiable social groups that required special provisions, an effort needed to be made to identify 'classes' that might be in need of State support by way of additional financial resources for their upliftment.[3] Three, it felt that constitutional governance in independent India would over time improve the social and economic conditions of all groups.[4] For long, the above three assumptions enjoyed a broad national consensus, though there were claims laid by non-SC/STs to special provisions such as job quotas. Since 1950, these claims coupled with resentment against special provisions for the SC/STs, amounted to a serious challenge to the social justice philosophy of the Constitution. But, those challenges were largely confined to public debates and street protests, and never acquired traction in courts or in the Parliament.

Since 2014, a slew of policies, verdicts by the higher judiciary and amendments to the Constitution have turned our understanding of social justice, as enshrined in the Constitution, upside down. In order to present a broad context, Section II briefly discusses Part XVI of the Constitution and its centrality to India's social justice project. Section III flags two issues that are thought

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1 Constitution of India 1950, pt XVI.

2 'Constituent Assembly of India Debates (Proceedings) – Volume VII' (30 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-23> accessed 21 August 2020.

3 'Constituent Assembly of India Debates (Proceedings) – Volume VII' (30 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30> accessed 21 August 2020; Marc Galanter, 'Who Are the Other Backward Classes?: An Introduction to a Constitutional Puzzle' (1978) 13(43/44) Economic and Political Weekly 1812, 1814.

4 'Constituent Assembly of India Debates (Proceedings) – Volume VII' (30 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-23> accessed 21 August 2020.

to be inimical to the SC/ST rights, namely the alleged misuse of the SC/ST Atrocities (Prevention) Act, 1989 ('the Atrocities Act'), and the issue of creamy layer among SC/STs. Section IV highlights how the newly-formed National Commission for Backward Classes ('NCBC') is problematic, as it militates against the spirit of Part XVI. Section V discusses the extension of job quotas to the poor among the upper castes, or the EBCs. Section VI concludes the analysis in the paper.

II. PART XVI OF THE CONSTITUTION OF INDIA (ARTICLES 330 TO 342)

This Part guarantees representation for the SC/STs in the Lok Sabha and the State Legislative Assemblies,[5] as well as quotas in public employment (job quotas).[6] Anglo-Indians used to be the third social group mentioned in this Part, but the same rights and protections for them were allowed to be lapsed, as the Constitution treated these provisions in their case as transitory.[7] Though Article 334 stipulated that political reservations were to be lapsed after 10 years,[8] it has been amended several times to extend these reservations till now and their discontinuation appears unlikely. In popular perception, job quotas too were to be ended after ten years, but Article 335 doesn't mention any time limit for them.[9] Article 338 originally created a 'special officer' for the SC/STs, to monitor constitutional guarantees, attendant legislation and policies for them, and make recommendations to the President;[10] the institution has now evolved into two National Commissions, one for the SCs and the other for the STs.[11] Article 339 provides for the administration of Scheduled Areas, where the ST population is predominant, and the Fifth and the Sixth Schedules to the Constitution stipulate an elaborate mechanism for this purpose.[12] Article 340 was meant to provide a mechanism to identify groups, other than the SC/STs, that might be in need of State support for their social and educational advancement (more on this Article in Section IV).[13] The two other Articles (341 and 342) pertain to the SC/STs; the former contains the lists of the SCs and the latter contains those of the STs.[14] Of late, a few features from this Part have been stretched beyond their original intent due to electoral politics, or sought to be diluted to the detriment of SC/ST interests. A recent example is the attempt by the Uttar Pradesh government in 2019 to add some backward castes to the SC list, even though it is the prerogative of the President of India to do so under

5 Constitution of India 1950, arts 330, 332.
6 Constitution of India 1950, art 335.
7 Constitution of India 1950, arts 331, 333, 336, 337.
8 Constitution of India 1950, art 334.
9 Constitution of India 1950, art 335.
10 Constitution of India 1950, art 338.
11 Constitution of India 1950, arts 338, 338-A.
12 Constitution of India 1950, art 339.
13 Constitution of India 1950, art 340.
14 Constitution of India 1950, arts 341, 342.

Article 341.[15] The sum and substance of the trend appears to adversely affect the SC/STs, the intended beneficiaries of Part XVI in the first place.

III. HOW THE JUDICIARY MISSES THE FOREST FOR THE TREES

On March 20, 2018, the Supreme Court framed guidelines on how to deal with a non-SC/ST person falsely accused under the Atrocities Act.[16] In a way, this was the judiciary's nod to a longstanding and vocal demand that, since the misuse of the Act was so rampant, there was need for a mechanism to protect the innocent, if not repealing the Act altogether.[17] While delivering its verdict in *Subhash Kashinath Mahajan v State of Maharashtra*, a two-judge bench of the Supreme Court noted that the Atrocities Act was never meant to be (but, by implication, became) "a charter for exploitation or oppression,"[18] and "an instrument of blackmail or to wreak personal vengeance."[19] It resulted in unrest and loss of life but after eighteen months on October 1, 2019 a three-judge bench of the Court recalled the verdict.[20]

The above saga is a reflection of the trend among all three branches of government having a unity of mind on social justice provisions, that is not always in consonance with the Constitution. It all started in December 2014, when a Report of the Parliamentary Standing Committee on Social Justice and Empowerment recommended for "an inbuilt provision" to protect those falsely implicated under the Act.[21] Leaving aside a few minor infractions of the verdict, the whole affair reeks of unreasonableness and impropriety. Foremost among the issues is that the Atrocities Act is no more or no less misused. As the Court noted in its 2019 judgment, the rate of misuse of the Act is comparable to that of any other Act.[22] Since no other Act contains a similar provision that *ipso facto* inhibits a complainant from invoking the Act, why should the Atrocities Act be burdened with such a provision? The bench in 2018 did

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15 'Uttar Pradesh Adds 17 OBC Groups to Scheduled Castes List' *The Hindu* (Lucknow, 30 June 2019) <https://www.thehindu.com/news/national/other-states/up-adds-17-obc-groups-to-sc-list/article28231615.ece#> accessed 21 August 2020.

16 *Subhash Kashinath Mahajan v State of Maharashtra* (2018) 6 SCC 454.

17 Anand Teltumbde, 'Why the Misuse of the SC/ST Act is Nothing but a Bogey' *The Economic Times* (6 April 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/why-the-misuse-of-the-sc/st-act-is-nothing-but-a-bogey/articleshow/63648662.cms?from=mdr> accessed 23 August 2020.

18 Subhash Kashinath Mahajan (n 16) [64].

19 ibid [72].

20 *Union of India v State of Maharashtra* (2020) 4 SCC 761 : 2019 SCC Online SC 1279.

21 Standing Committee on Social Justice and Empowerment, *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014 - Sixth Report* (Ministry of Social Justice and Empowerment 2014) <http://164.100.47.193/lsscommittee/Social%20Justice%20&%20Empowerment/16_Social_Justice_And_Empowerment_6.pdf> accessed 21 August 2020.

22 Subhash Kashinath Mahajan (n 16) [48].

not ask why the provisions of the Indian Penal Code, 1860, in case of false accusations or testimony, were found to be inadequate in tackling false cases under the Atrocities Act. The government did, in fact, suggest that invoking the IPC provisions would address the issue of false cases.[23] It is also ironical that the impetus for the original judgment came from a Parliamentary Panel which is entrusted with safeguarding the interests of SC/STs.

The failures of the larger system are no less glaring. Neither the Standing Committee in 2014 nor the Supreme Court in 2018 cared to ask relevant ministries/agencies the pertinent question: Is the misuse of the Atrocities Act so widespread and rampant to warrant inbuilt safeguards against such misuse?

The Court took the Committee's report as the final word, whereas the Committee, being attached to the Ministry of Social Justice, took most inputs from the Ministry.[24] Curiously, although officials from the Ministries of Home and Law and Justice did attend the Committee's proceedings, the Report carried little by way of their responses and inputs, except reiterating their past positions on the subject.[25] This matters because, as per the Allocation of Business Rules, the criminal justice part of the Atrocities Act comes under the purview of the Home Ministry.[26] As the National Crime Records Bureau ('NCRB') — the repository of all crimes, including convictions and acquittals as well as crimes by category and by Act — is a part of the Home Ministry, the latter could have provided comparative information about the misuse of other Acts and that of the Atrocities Act in 2014, or in 2018. The Committee Report cited data from the NCRB merely for the Atrocities Act. Therefore, it is not unfair to assert that both the Committee and the Court allowed themselves to be carried away by gossip and conjecture, to determine an issue that affects the life and limb of more than 300 million Indians. They could have asked, but did not, for data on the extent of misuse, and how and why those found to have filed false cases did not receive punishment under the law, or how that punishment was found to be ineffective.

The litany of omissions and commissions that militate against the Constitution must include two omissions: One, if asked, the Home Ministry could have clarified how many 'public servants' suffered due to false cases against them under the Atrocities Act, and what happened to those SC/ST

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[23] Dhananjay Mahapatra, 'False Cases: Govt Says won't Tweak SC/ST Act' *The Times of India* (14 February 2018) <https://timesofindia.indiatimes.com/india/false-cases-govt-says-wont-tweak-sc/st-act/articleshow/62908142.cms> accessed 21 August 2020.

[24] Standing Committee on Social Justice and Empowerment, *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014 - Sixth Report* (Ministry of Social Justice and Empowerment 2014) 28 <http://164.100.47.193/lsscommittee/Social%20Justice%20&%20Empowerment/16_Social_Justice_And_Empowerment_6.pdf> accessed 21 August 2020.

[25] ibid.

[26] Government of India (Allocation of Business) Rules 1961, sch II.

government employees who slapped false cases against colleagues and higher-ups, and; two, the neglect meted out to the two National Commissions, one each for the SCs and STs, setup under Articles 338 and 338A. Clause 9 of both Articles makes it mandatory for both the central and the state governments to consult these National Commissions "on all major policy matters affecting" the SC/STs.[27] There is no record to show that the government(s) consult these august Constitutional bodies.

Another major issue on which the judiciary allowed itself to be guided by the public opinion, rather than the Constitution, is the question of whether or not the so-called 'creamy layer' among the SC/STs should be allowed to access job quotas. The government holds that the SC/STs are entitled to reservations, irrespective of their economic status, because the caste system that throws hurdles in their way is not a mere economic arrangement.[28] However, since the 1951 *Champakam Dorairajan* case, which was the first case to challenge caste-based reservations as being in conflict with the Right to Equality (under Article 16),[29] the judiciary has been grappling with how to balance the Fundamental Right to Equality in public employment with reservations by way of preferential treatment in favour of the SC/STs. The Apex Court remains unimpressed by the fact that (a) the Constituent Assembly was mindful of the tension but expected the nation to strike a balance, and (b) the innumerable amendments to the Constitution (beginning with the First Amendment in 1951 which was necessitated by the *Champakam Dorairajan* verdict against caste-based reservations) seek to frame reservations as a justifiable exception to the equality rule.[30] Such divergence in approaches is not unnatural, but its persistence leads to prolonged litigation. The result is that in public consciousness, reservations are unfair as they benefit either 'meritless' or well-off groups among the SC/STs. At least since its 2006 verdict in *M. Nagaraj v Union of India*,[31] the Court has been entertaining purely political arguments, against reservations or in favour of barring the 'creamy-layer' among the SC/STs either from receiving promotions under the quota[32] or from accessing reservations at all. As a result, in litigation involving service matters like promotions,

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27 Constitution of India 1950, arts 338(9), 338-A(9).

28 *Union of India v State of Maharashtra* (2020) 4 SCC 761 : 2019 SCC Online SC 1279.

29 *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

30 The Constitution (First Amendment) Act 1951; The Constitution (Seventy-Seventh Amendment) Act 1995; The Constitution (Eighty-First Amendment) Act 2000; The Constitution (Eighty-Second Amendment) Act 2000; The Constitution (Eighty-Fifth Amendment) Act 2002.

31 (2006) 8 SCC 212.

32 *Jarnail Singh v Lachhmi Narain Gupta* 2018 SCC OnLine SC 1641; Samanwaya Rautray, 'Governments kept Ignoring SC, ST Creamy Layer Order: Supreme Court' *The Economic Times* (4 December 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/governments-kept-ignoring-sc-st-creamy-layer-order-supreme-court/articleshow/72358280.cms#:~:text=NEW%20DELHI%3A%20The%20Supreme%20Court,have%20yet%20to%20implement%20it.&text=The%20top%20court%20has%20since,nine%20times%20in%20various%20cases.> accessed 23 August 2020.

thousands of employees are denied their promotions, as the litigation results in stay of proceedings. Citing the *Nagaraj* verdict, for example, the High Courts of Rajasthan and Allahabad set aside the provision of reservations in promotion in favour of the SC/STs in Rajasthan and Uttar Pradesh respectively. In fact, the Supreme Court upheld those judgments.[33]

The popular angst against reservations hinges on two kinds of arguments. During the first three or four decades after Independence, the argument was that since not many 'qualified' SC/ST candidates were available, many officer-grade posts and jobs technical in nature were *de facto* kept outside the purview of reservations. Now, the argument is that the creamy-layer is grabbing all quota jobs at the cost of its less-privileged brethren who were, in the earlier period, found to be meritless.

In allowing itself to be an arena for this contestation, the Supreme Court is unfair to the SC/STs in two respects. First, the creamy-layer filter came into judicial vogue in the context of OBC Reservations.[34] Entertaining litigation that seeks to equate the SC/STs with the OBCs is problematic, because the lack of adequate representation for the OBCs in government employment is thought to be due to their poverty, and hence, quotas are for the poor among them. In the case of the SC/STs, they are given quotas, without which they cannot enter public employment due to the discrimination they face. It should not matter whether a group among the SC/STs is excluded from the purview of quotas, so long as their overall quota is filled. The second folly of the Court is to treat job reservations as if they were a poverty-alleviation measure. There could be some merit if we removed the creamy-layer from all public employment, but restricting quotas only for the poor among the SC/STs has no logic. In fact, the creamy-layer among the SC/STs helps us fulfil the 'efficiency' condition attached to job quotas under Article 335.

The long and short of the quota litigation since 1951 is that the whole reservation system for the SC/STs is kept alive as a disputed matter rather than as a feature of the Constitution that deserves to be preserved, nurtured and protected against corrosion from within and assaults from without.

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[33] Committee on the Welfare of Scheduled Castes and Scheduled Tribes, Action Taken by the Government on the Recommendations Contained in the Twenty Sixth Report (Fifteenth Lok Sabha) of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes on the subject "Review of Representation of Scheduled Castes and Scheduled Tribes in Senior Positions of Government of India" – Third Report (Ministry of Personnel, Public Grievances and Pensions 2015) 17 <http://164.100.47.193/lsscommittee/Welfare%20of%20Scheduled%20Castes%20and%20Scheduled%20Tribes/16_Welfare_of_Scheduled_Castes_and_Scheduled_Tribes_3.pdf> accessed 4 April 2018.

[34] *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

IV. THE USE, MISUSE, ABUSE AND MUMMIFYING OF ARTICLE 340

As already mentioned, the Constituent Assembly was conscious of the possibility that there could be classes of people who were socially and educationally backward and would require State support. Under Article 340(1), the Assembly stipulated the appointment of a Commission to "investigate the conditions of socially and educationally backward classes…and to make recommendations as to the steps that should be taken…to improve their condition and as to *the grants that should be made for the purpose*" [emphasis added].[35] This Article has proved to be the most contentious since 1950, and it resulted in the setting up of two Commissions to identify the backward classes (the Kaka Kalelkar Commission in 1953 and the Mandal Commission in 1979), and a permanent, statutory NCBC in 1993, which was accorded a Constitutional status in 2018 under the new Article 338B, far away from Article 340.[36] To be sure, there were and are groups who are not in the league of SC/STs as victims of caste discrimination and untouchability, but they are backward socially and educationally. "May I ask," T.T. Krishnamachari queried in the Constituent Assembly on November 30, 1948, "who are the backward class of citizens?" He also declared, "It does not apply to a backward caste."[37] Krishnamachari reflected the sense of the Assembly that the backward classes would never mean castes but an amorphous group(s) of people who are not SC/STs. They could be upper castes in remote, inhospitable or barren areas, or victims of vicissitudes of nature. The intended purpose of the Article was for the Commission to study "the difficulties under which they labour" and suggest "the steps that should be taken…to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose."[38] The Assembly clearly thought that Article 340 would result in programs and schemes to improve the educational and social welfare of the OBCs and no stretch of the Article could yield the implication that it somehow envisaged job quotas.[39] Some members in the Assembly, such as H.V. Kamath, were certain that the operation of Article 340 would not go beyond ten years after the commencement of the Constitution.[40] The straying away from the letter and spirit of the Article started with the 1955 Report of the Kalelkar Commission (also known as the First Backward Classes Commission), which recommended job quotas for the OBCs, even though its terms of reference ('ToR') made no

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35 Constitution of India 1950, art 340(1).

36 The Constitution (One Hundred and Second Amendment) Act 2018.

37 'Constituent Assembly of India Debates (Proceedings) – Volume VII' (30 November 1948) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30> accessed 21 August 2020.

38 Constitution of India 1950, art 340.

39 'Constituent Assembly of India Debates (Proceedings) – Volume VIII' (16 June 1949) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-06-16#8.106.169> accessed 21 August 2020.

40 ibid.

mention of job quotas.[41] Granted, national commissions being statutory and high-level bodies can go beyond their ToR and one cannot blame this or its successors for doing so. But, such a deviation requires the invention of fictitious forms of discrimination and exclusion. That is exactly what happened with the operation of Article 340. The justification for OBC job quotas forced their votaries to argue that the OBCs face discrimination and exclusion on par with the SC/STs!

The trend culminated in the creation of a new NCBC in 2018, with the insertion of Article 338(B), as a sibling of the two National Commissions, one for the SCs and the other for the STs.[42] The government did not trouble itself for drafting a new Article, but instead photocopied Article 338 and rechristened it as Article 338(B), replacing the words "the Scheduled Castes" with "the socially and educationally backward classes." If the NCBC is identical to the NCSC or the NCST, the OBCs ought to be identical to the SC/STs. Thus, through this legislative sleight of hand, the government has flattened the caste hierarchy by transmogrifying the OBCs into the SC/STs.

Just like the NCSC or the NCST, the NCBC will have all the powers of a civil court to summon anybody, requisition evidence and receive evidence on affidavits in discharge of its functions.[43] Under Article 338B, it can also "investigate and monitor all matters relating to the safeguards provided for" the OBCs and "inquire into specific complaints with respect to the deprivation of rights and safeguards of" the OBCs.[44] Since the OBCs have not been granted any 'safeguards' under the law, operationalization of this feature may in future require a law similar to the Atrocities Act.

The new NCBC is different from its predecessors in two respects. One, it is no longer expected to identify the backward classes (the Parliament will do that job for the central list),[45] and two, it has no role in defining backwardness.[46] Presumably, politics will determine who is an OBC. With the new NCBC coming into being in 2018, the *raison d'etre* for Article 340 has disappeared but the government did not even accord the Article the dignity of a repeal. In a way, the Article remains mummified.

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41 Government of India, *Report of the Backward Classes Commission* (1955) I(viii) <https://dspace.gipe.ac.in/xmlui/handle/10973/33678> accessed 21 August 2020.

42 Constitution of India 1950, arts 338 and 338-A.

43 Constitution of India 1950, art 338-B(8).

44 Constitution of India 1950, arts 338-B(5)(a), 338-B(5)(b).

45 Constitution of India 1950, art 342-A(2).

46 Constitution of India 1950, art 366(26-C).

V. JOB QUOTAS FOR THE POOR AMONG THE UPPER CASTES

In a rare instance of efficiency and speed, the government passed the Constitution (One Hundred and Twenty-Fourth Amendment) Bill a few months before the 2019 general elections,[47] to grant 10% reservations in educational institutions and in public employment to 'economically weaker sections' among the upper castes and implemented them forthwith.[48] In the same month as the Bill was passed and became a law, the Department of Higher Education and the Department of Personnel and Training issued notifications granting reservations for this category in educational institutions and in public employment at the central level.[49] The Amendment inserted new clauses to Articles 15 and 16, by way of exceptions to the Fundamental Right to Equality. The government justified its action by citing the need to give effect to Article 46, which is a Directive Principle, and deals with the "promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections."[50] Neither Article 46 nor any other Article in the Constitution envisages extending reservations solely on the basis of poverty. This step, therefore, is a radical departure from the general consensus that economic backwardness (poverty) cannot be a criterion for granting quotas.

The history of India's quota system post-Independence may be divided into three phases. In phase one, quotas were given to the SC/STs who were the victims of caste discrimination. In 1950, there was a consensus over the need to put them as a special category. In phase two, however, the quotas were given to the OBCs, who may be the left-outs of the caste system but not its victims; at least, not to the same extent as the SC/STs. In the third and final phase, the poor among the upper castes were allowed onto the quota bandwagon.

Despite apparent incongruities of the move, one must accept that even if the Constitution is silent on the poverty criterion, the government has the right to insert such a condition if the situation so warrants. If there were electoral calculations that might have influenced the decision, that could be explained away

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47 The Lok Sabha passed the Bill on the same day it was introduced (January 8, 2019) and the Rajya Sabha passed it the next day. 'The Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019' (*PRS India)* <https://www.prsindia.org/billtrack/constitution-one-hundred-and-twenty-fourth-amendment-bill-2019> accessed 3 September 2020.

48 The Constitution (One Hundred and Third Amendment) 2019.

49 'Annual Policy Review: April 2018 – March 2019' (*PRS Legislative Research*, April 2019) <https://13.232.170.12/sites/default/files/policy_peviews_pdfs/APR%202018-19.pdf.> accessed 3 September 2020.

50 Constitution of India 1950, art 46; Apurva Vishwanath, 'EWS Quota Law: What a Five-Judge Constitution Bench will Look into' *The Indian Express* (New Delhi, 7 August 2020) <https://indianexpress.com/article/explained/ews-quota-law-what-a-five-judge-constitution-bench-will-look-into-6543170/> accessed 21 August 2020.

as a part of democracy. In any case, all quotas carry the stigma of being driven by vote-bank politics.

Now that the 10% quota for the poor among the upper castes has become a *fait accompli*, one can focus on its logical outcome in the years to come. Consider one possibility: for decades, the SC/ST reservations were sought to be delegitimized as they were thought to affect merit. 'Quota boys' has been a term of derision. Now that others, the OBCs and the upper castes who did the ridiculing, have entered the quota tent, hopefully the reservations will enjoy popular support.

We must also consider one more consequence. Poverty matters, and whether one is from urban or rural area matters. One's proficiency in English matters. While candidates for public employment from the SC/ST and the general categories come from the widest possible catchment, the candidates from the OBC and the poor among the upper castes come from the lower strata from each segment. In this group, candidates tend to be poor, from rural areas and less proficient in English. Their educational attainments, compared to the other group, will be modest.

One is not certain how these matters will percolate into public consciousness. Unlike the received wisdom, one may confront a very articulate SC/ST officer because she is drawn from a large pool of educated and well-off candidates (the creamy layer), and a very inarticulate Brahmin officer drawn from a limited pool because of the poverty filter. How must one process such an encounter?

A question to ponder: What is it that we, as Indians, seek to accomplish through all the measures of social engineering? Have we succeeded?

VI. CONCLUSION

Change is constant. In matters of social change and mobility, subjective arguments may take precedence over substantive matters of justice, law and the imperatives of nation-building. It is not an accident that Marc Galanter, who produced a seminal book on Reservations, titled his book, *Competing Equalities*. Being a democracy, India cannot setup an expert committee which uses an objective scale to measure backwardness to recommend who must get priority in public employment. The challenge for democracy is to balance competing interests, to persuade all to come along even though the ensuing bargain suits no one fully. Such a task requires tact, honesty and vision, which are in short supply in India.

TRANSCRIPT – XIII NLSIR SYMPOSIUM

I. SESSION I – RESERVATIONS: RETHINKING ROOTS IN CONSTITUTIONALISM

The first session sought to achieve a re-imagination of the constitutional understandings of substantive equality, dignity and opportunity, as informed by recent political and jurisprudential thought. The panel for this session consisted of Dr Sudhir Krishnaswamy,[1] Prof N Sukumar[2] and Dr Sumit Baudh, with Dr Sumit Baudh[3] also acting as the moderator for the session.

Dr Sudhir Krishnaswamy began the session with the problem of justification of reservation, which was often seen as unimportant in academic discourse. This problem is not considered foundational since there is a tendency to think that the issue has been historically settled. However, the original model of justification for reservation does not hold in 2019. Dr Krishnaswamy posited that it is unclear whether the basket of what we call the reservation policy, under Article 15(6) and Article 16(6) of the Indian Constitution, when read with what came about during independence and the Constitution in 1950,can be held together by a single model of justification. He suggested that there are serious tensions between the various models of reservation and we might explore why that is so and inquire into the contemporary pressures on the reservation policy in India.

Dr. Krishnaswamy suggested that reservation policy should be forward looking and intersectional. With respect to the issue of justification, he raised the question of where the justification takes place and before which forum. He hypothesised that constitutional lawyers would answer that it takes place in the Supreme Court of India. On the other hand, more robust debates take place in the Parliament and are centred around Article 15(5) of the Indian Constitution. Such debates also rigorously take place in the op-ed pages of the newspapers, academic journals, rallies and manifestos of political parties. However, over the years, the Supreme Court has been avoiding the question altogether.

Dr. Krishnaswamy then talked about the kind of justification we may be looking for. For analytical clarity, he categorised it into three types: (i)doctrinal

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2 Professor, Department of Political Science, University of Delhi.

3 Associate Professor and Executive Director, Centre on Public Law and Jurisprudence, Jindal University.

and constitutional interpretation; (ii) empirical evidence; and (iii) political and moral justification.

He reminisced that in his days as a university student at the turn of the century, the primary model of justification was a purely textual interpretation of the relationship between Article 14, Article 15 and its sub-clauses, and Article 16 and its sub-clauses. Questions about reservation policy and its impact on the phenomenon of caste were not within the domain of lawyers. Lawyers merely needed to address the interpretation of the word 'only' in the first clause of Article 15, without any deeper analysis. A similar strategy is adopted by the Supreme Court in its interpretation of Articles 15(3), 15(4) and 15(5) where the focus is on the relationship between the clauses *inter se*.

In India, in the executive and political space, the justification provided is empirical – the second kind of justification. If a particular community is under-represented in a particular branch of service or educational institution, it is a sound basis for reservation. This model used by the bureaucracy can be traced back to the 1920s.

The third kind of justification is scarce in the Indian discourse, but it must be confronted squarely. Dr. Krishnaswamy contended that justice and equality as enshrined in the Constitution, morally, call for a reservation policy. Such an outlook is uncommon in Indian courts and classrooms. Moral justification has been conveniently avoided through the enactment of Article 15(6) and this has impoverished the discourse on the issue.

Dr. Krishnaswamy then talked about the inter-relationship between different kinds of justification. While the Indian debate has come close to exploring this relationship, it has skirted around it. Dr Krishnaswamy proceeded to raise some questions on it. Are moral justifications related to doctrine in a legal sense? Do empirical justifications have anything to do with the moral conclusions we may reach? These are very important questions when it comes to the types of arguments we further to justify reservations. A conclusion on the empirical front may support the legal and moral domain. However, a further study of the same is required. The arguments furthered must be coherent, consistent and a web of integrity must be maintained. In the interim, reaching a loose inter-dependence on these arguments will also work.

Dr. Krishnaswamy then focused on the moral justification of reservation. Dworkin presents two dominant kinds of justification for reservation policy – the forward-looking model and the backward-looking model. The general premise in India, at least since the Poona Pact, is that historical wrongs need to be addressed. But unlike other jurisdictions such as the United States of America ('USA'), the findings of historical wrongs in India are not judicial findings. Rather, they are political and bureaucratic findings– political

leaders agree that there are historical wrongs which need to be corrected. Policy flows from that political compact. The absence of the court in the finding of this justification implies that the court has not even recognised that the backward-looking justification drives much of the structure of the Indian Constitution.

Backward-looking justification is compensatory and part of restorative justice. This kind of justification has dominated the Indian political discourse. However, it changes by the time we reach the Article 15(5) debates. Here, we move from a backward-looking perspective to an arguably forward-looking justification. For instance, when Prime Minister VP Singh said that Other Backward Classes ('OBC') should be better represented in educational institutions and public services, what he essentially said was that going forward, all people of this country should participate in public institutions. He made no arguments about the past wrongs. Contrasted with the backward-looking justification, a forward-looking justification requires two things. *First*, we need to empirically identify that mal-distribution has existed. *Second*, we need to advance reasons as to why that mal-distribution must be corrected. At least in Article 15(5) and Article 15(6), the arguments of discrimination and structural disadvantage are starting to wane in the Indian model of reservation policy.

If we are neutral to the reasons for mal-distribution, there is no need for a concept of discrimination at all. Dr Krishnaswamy then cited the book written by Rajiv Dhawan on OBC reservation analysing parliamentary debates in 1995. He said that he was initially sceptical about the ideas presented, but later he felt that the book recognised that the model of justification of reservation was changing.

Dr. Krishnaswamy then discussed intersectionality in India's reservation policy. The categories, Scheduled Caste ('SC') and Scheduled Tribe ('ST') are inclusive of a large number of actors. It is also known as an empirical fact that some groups have been better represented in these categories itself. This question mainly came up in the OBC category. It is known that within the policy design, it is the OBC category that has been classified in several ways. This category, in many states, includes Muslim communities and Christian communities. The OBC policy has taken the brunt of classification. This has created pressure on even the SC and ST communities in respect to the question of sub-classification.

Dr Krishnaswamy then moved on to the creamy layer question, which began with the *Indira Sawhney* case.[4] But now, with the reference by the union government, this will become a very important question in the Supreme Court. The issue is whether the creamy layer concept will apply to the SC and ST

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

categories. Creamy layer and sub-classification pressures can be analytically called as intersectionality. This is the idea that any citizen's legal claim to reservation policy is contingent on their particular location in the social sphere. That particular location is a combination of gender identity, caste and class. It also includes social, physical and cultural disabilities. The moment we add complexity to the question of who can benefit from reservation– by moving from purely a group identity question to being a question of a citizen's claim – we must deliberate over intersectionality. In the last 20 years of reservation policy, the questions of moral justification and intersectionality have driven the bulk of policy formulation and issues before the judiciary.

The next speaker was **Prof N Sukumar**. He focused on the significance of reservations from an empirical vantage point. He raised the question of how to de construct the language of merit in higher educational institutions. He stressed that his focus would be on the new roster system in universities as he has been on the frontlines in this regard. The ideas of equality and justice have been widely debated when there was discussion on affirmative action policies. This is important because it motivates students from lower socio-economic sections and disadvantaged groups to strive for better positions. Prof Sukumar then shared his personal experience of reservation policies in recruitment in Delhi University. He was asked by the Delhi University's Vice-Chancellor to sit as an observer in the recruitment panel for guest faculty. When he saw the relevant notification, he found that there was no reservation. He questioned the kind of social justice the University was aiming for. It took 6 hours for Prof Sukumar to convince the Dean and Vice-Chancellor nominee about the implementation of reservation policy in the guest faculty recruitment.

Prof Sukumar then talked about the crisis in Delhi University where the proper implementation of reservation policy has been denied. The crisis deepens as the freedom of Jawaharlal Nehru University and other public universities is being cut down. These universities are accountable for the reservation policies.

Prof Sukumar then went on to discuss Uma Chakravarty's support for anti-Mandal agitation in Delhi in the 1990s. It reinforced the idea that some jobs are meant for a certain class and caste of people. He said that it showed the prejudices of the people as well as their unwillingness to relinquish their hold on intellectual resources. The constitution of reserved and unreserved categories is highly prejudiced in the university spaces. Prof Sukumar shared his personal experience of how his Head of Department was only an observer for 17 years. When questioned why he was being given the observer spot, he received the response that he was seen only as an observer in this department. Prof Sukumar tied this to prejudice against reservation in higher educational institutions.

Prof Sukumar then talked about the struggle for the roster system. This roster system has not been followed in the Delhi University or in any other public university. He discussed a 2017 judgment of the Allahabad High Court[5] that the public universities should not follow the 200-point roster. The court held that individual departments instead of the university should be taken as a unit for implementing the roster for the purpose of reservation. The 200-point roster creates many more positions for reservation. The judgment suggested that the 13-point roster be implemented. The universities started the recruitment process almost immediately. He discussed the statistics of 10 central universities, such as those in Rajasthan, Haryana, Banaras, and Tamil Nadu. These universities wanted an almost immediate implementation of the 13-point roster. This was because under the 200-point roster, in universities like Rajasthan central university, 33 positions were advertised, out of which 16 were unreserved, whereas 17 positions were reserved for SC/ST/OBC categories. Under the new 13-point roster, all 17 reserved positions became unreserved. Not a single seat was left under reservation. Similarly, in the Atal Bihari Vajpayee Hindi University, all reserved seats were converted to unreserved under the new 13-point roster system. Such statistics can be seen across the country. In smaller departments, which have less than 14 positions, the 13-point roster cannot be implemented. No reservation in favour of the marginal sections will be seen.

Prof Sukumar then presented data from the Indian Institutes of Technology ('IITs') in the country. There are 8856 sanctioned positions in 23 IITs, out of which 149 and 21 are given for SCs and STs. He raised the question about what happens to the rest of the positions. There is a lacunain the implementation of reservation in universities.

A joint struggle was led under the banner of the joint forum for social and academic justice in Delhi University. Many different student and non-student organisations lent their support to the fight against the 13-point roster. The 10% reservation for economically weaker sections ('EWS') added fuel to the anger of the groups. The communities legally entitled to reservation are not receiving it and the EWS reservation was brought in without any debate or discussion.

The government succumbed to the pressure and issued an ordinance in March 2019. The 200-point roster system was reintroduced. Prof Sukumar posed a few questions that require further deliberation: Whether permanent faculty will be recruited in the Delhi University? If yes, will they follow the 200-point roster in the Delhi University? How do we ensure that the safeguards provided by the Constitution and through policies will be implemented? For the past 2 decades whenever there has been an attempt to implement the

[5] *Vivekanand Tiwari v. Union of India*2017 SCC OnLine All 2729

affirmative action policies in their entirety, various legal contradictions have emerged. This threatens the idea of social justice. Alternatives like reservation in private sector must be seriously debated at this juncture where public university reservations are under threat. With this thought, Prof Sukumar ended his discussion.

The final speaker on this panel was **Dr Sumit Baudh**. His focus was on the understanding of reservations in terms of a theoretical framework and critical race theory. He stated that in order to further our research on the issue, we must raise certain questions and then in the pursuit of our enquiries, we must attempt to answer them. Our conceptual and theoretical understandings might be helpful in guiding our answers to these questions. The manner in which other scholars and peers have responded to similar questions may also be useful. Dr Baudh described the flow of the session as fitting as it began with a discussion on the various models of justification of reservation and then steered towards an empirical perspective with the central focus on Delhi University. He would continue by exploring conceptual frameworks which may aid in responding to the questions raised.

Focusing on the title of the symposium and the name of the session, Dr Baudh posed certain questions. When we view reservations in India, we must understand what we are unpacking. Is this unpacking telling us something about reservations in India? Dr Baudh then posed the question,is reservation a bag? Is it a package? If yes, then what kind of a package is it and what are its contents?

The focus then shifted to the word 'roots' in the name of the session. Are these roots of a plant or a tree? If yes, what kind of a tree is it? Does it bear any fruits or only ornamental flowers?

Dr Baudh then went on to question what reservation is. Is it a benefit?

He then drew attention to the manner in which the word 'reservation' is used in common parlance. The way in which the term benefit is attached to reservation is dismissive of what reservation is. Is it entirelya benefit? Is it a function of a welfare state? Is it that the welfare state is interested in the welfare of the people? Is it a matter of pity and sympathy that it is part of the welfare state? Or is it a remedy against discrimination?

Through these questions, Dr Baudh sought to tie together the models of justification as presented by Dr Sudhir. If it is a remedy against discrimination, can we understand reservation without studying discrimination?

Often, reservation is studied in an isolated manner without an understanding of discrimination. Therefore, a number of these grounds of justification are,

at best, confounding because this becomes an exercise in abstraction. We are not looking at the ways in which reservation may be a remedy not only to historic wrongs, but also to the current and on-going forms of discrimination.

Dr Baudh then steered the focus on to the 'Theory, Practice and Beyond' part of the symposium title. While theory and practice are understood, Dr Baudh explored the impact of the word 'beyond'. As academicians and practitioners, what could be beyond theory and practice? Thinking about 'beyond' can be unsettling as theory and practice are what engage us all are lives. The word 'beyond' opens up the avenues for new knowledge production. This 'beyond' may exist in literature, poetry, fiction, and in the personal narratives and experiences, which have largely been ignored by the conventional means of knowledge production. 'Beyond' becomes important to push and broaden the contours of existing knowledge production.

The next word Dr Baudh drew attention to is 'constitutionalism'. A critical examination of the constitutional provisions must be undertaken to understand what they reveal and to identify the gaps. This exercise is different from rethinking the roots. This way, we would be presupposing that roots exist. It may not supply sufficient grounds for us to be able to sharpen our understanding. Rethinking roots of constitutionalism will not solve all problems in the present and the future. This is because we would be placing excessive reliance on a text that is dated and dynamic. It is dated in the ways in which the constitutional amendments come about and by way of judicial interpretation. It is dynamic to the extent of our interpretation and reading. Articles 14 to 16 of the Constitution are understood as the right to equality. Under that we have an understanding of formal, substantive and egalitarian equality. An examination of the landmark Supreme Court decisions will reveal a robust discussion on egalitarian equality. We must be able to develop a critical lens to examine judgments because they may not always lead us to the previously anticipated conclusion. Articles 15 and 16 talk about reservation in educational institutions and public employment. Dr Baudh here disagreed with Dr Krishnaswamy on the point of lack of engagement by the Supreme Court on the question of justification of reservation. The ways in which the Supreme Court has engaged can be seen from the *Indira Sawhney case*[6] where it examined whether reservation is a provision or exception to the right to equality. This question continues to be discussed in the judicial discourse. The Supreme Court has ruled that reservation is not an exception but a provision to ensuring equality. It also brings in the view of how Article 15(3) and Article 15(4) are seen as special provisions. However, this does not do justice to remedying discrimination. The engagement of Supreme Court with the question of individual and group rights has also produced robust discourse.

[6] AIR 1993 SC 477

Dr Baudh then proceeded to discuss Article 15 of the Constitution. He described it as a ground that is often hallowed by academics and constitutional scholars. It allows them to present to the world that the Constitution of India does not only guarantee vertical but also horizontal equality. That horizontal equality goes to show that it is not only the state that is bound to not be discriminatory, but that the same applies to private parties as well. Recalling Prof Sukumar's question, Dr Baudh questioned whether reservation in private sector can have any constitutional backing based on this horizontal equality.

Articles 330 and 333 of the Constitution outline the reservation in the Lok Sabha and the Parliament. We should also look to reservations in the judiciary. In the op-ed pages, we see discussion around under-representation of various groups like Muslims, SC, ST and women in the judiciary.

Article 335 takes us to the side of efficiency. This is another troublesome root. This Article requires deliberation as it implicitly implies that reservation is opposed to efficiency. This idea needs to be examined and challenged.

Coming to the conceptual understanding of diversity, Dr Baudh said that we need to have a comparative constitutional law reading of the constitutions of USA and India. This study is a good way for us to look beyond the jurisdiction of India.

Dr Baudh then raised concerns about the different ways in which intersectionality must be read. For example, there is a patriarchal composition of the SC category. SC women are made invisible. The government perpetuates this as the SC certification process gives sole reliance to the father's status as a SC to certify the new applicant as an SC as well. The status of Dalit Muslim and Dalit Christians is also one of importance as the reservation is limited as per the constitutional order of 1950. The very definition of SC is limited to Hindu, Buddhists and Sikhs. It rules out the possibility of Dalit Muslim and Dalit Christians availing reservation.

Towards the end of the session, Dr Baudh steered the focus to epistemology and method. He used the illustration of the book, 'The Cracked Mirror' by Gopal Guru. This book focuses on theory and academia. He discussed the lack of representation in academia and how that impacts theory building. This leads us to examine legal academia and the ways in which experience influences the work of academicians. The essay titled 'Invisibility of "Other" Dalits' by Dr Baudh explores experiences and positionality and their application in legal theory.

Dr Baudh also raised the question of the composition of the editorial board of the National Law School of India Review itself ('NLSIR'). We must also explore the questions of stigma around reservations when engaging with the

subject. A level of personal engagement is required. Is there is a feeling of resentment to reservation policies? This resentment has a way of seeping into the way in which a certain body of work is viewed. Dr Baudh also posed a question to Dr Krishnaswamy about the reservation policy and constitution of the faculty at the National Law School of India University ('NLSIU'). Dr Baudh reasoned that as a journal which is discussing the subject of reservation, it is becomes imperative to examine the composition of the editorial board as well as the faculty of the institution.

The panellists then held a round of discussion amongst themselves. Dr Krishnaswamy began by responding to the question posed by Dr Baudh about the composition of the NLSIU faculty. The NLSIU faculty is surprisingly diverse without ever having implemented a formal reservation policy. The next step would be issuing a formal notification implementing the reservation policy. The manner of implementation is also far from the legal terrain. However, there are conflicting judgments regarding the manner of implementation.

Dr Krishnaswamy posed a question to Prof. Sukumar about the emergence of the 200-point and 13-point roster. He asked why such contestation emerged at this point of time and not earlier. He also asked if the formal ordinance would be settling this question conclusively.

With respect to Dr Baudh's point about the judiciary's engagement with the models of justification, Dr Krishnaswamy pointed out that these issues are doctrinal explorations of Articles 14 and 15. The doctrinal resolutions are unsatisfactory as they do not explain the meaning of Article 15(6). Is Article 15(6) also an explanation to Article 15(1)? A serious question about the future of reservation policy can be answered only by focussing on its proper scope. The scope will lead us to explore what reservation is for and such justifications will have to be moral in nature. The question of caste blindness (which was brought up by Dr Baudh) becomes important to this enquiry. Referring to the point made by Prof Sukumar about historical wrongs, Dr Krishnaswamy pointed out that if the Indian Constitution in Article 15(3) had even embraced the historical self-consciousness, the discourse on these topics would have been very different. While giving prognosis of the rest of the 21st century, the majority groups which are not historically disadvantaged will be vanguards of the reservation policy.

Prof Sukumar proceeded with the question asked by Dr. Krishnaswamy about the timing of the roster issue and why it has occupied centre-stage at this point. He began by explaining that the implementation of reservation began only in the 1990s. The Allahabad High Court did not even consider the importance of implementing rosters in the university system. The view taken by the Allahabad High Court gives the idea that implementation of the 200-point roster will take over the opportunities of the unreserved category. Social justice

should be everyone's responsibility and not just the responsibility of the people who belong to the reserved communities. We need a positive outlook towards reservation policies. Besides the roster issue, the process of promotion within universities and the Kale Committee's recommendations become a topic of debate in the judiciary. Should reservations exist in promotions? Prof Sukumar bluntly put his point across that these issues have made the judiciary jittery. The contradictions brought up by various judicial decisions stall the implementation of the roster system in recruitments. Even if the recruitments takes place in various departments, the approval is stalled and no justification is provided. The institutions do not seem to be interested in implementing reservations.

Prof Sukumar presented his observations in relation to the roster issue. He observed the socio-economic differences that existed across the country. During the roster agitation, a Bharat *bandh* was called in Rajasthan, Bihar, Uttar Pradesh and Haryana. He found that South India was non-reactive to this movement because the investment in software and technology enabled the youth in these states to access alternative sources of education and employment. This investment is not seen in the northern states, therefore hampering their upward social mobility. The sole source of leading a good life becomes, getting a government job. The roster system has a much larger impact on their prospective livelihood.

This was followed by Dr Baudh answering Dr Krishnaswamy's question by exploring if the Indian Constitution is caste blind. He stated that the Indian Constitution is actually caste conscious. It is caste conscious to the extent that it mentions the category of SC. It is also class conscious as it mentions the category of OBC. The specificity of these claims proves that the Indian Constitution is not caste blind. The trajectory of reservation is one which begins with caste consciousness but ends in caste blindness. Addressing the issue of 50% ceiling limit set out in the *Indira Sawhney* judgment,[7] Dr Baudh pointed out that this could be a matter of debate. While some may view it as a rigid limit set by the court, others may see that certain exceptions could be made to this. It is not such a clear caste rule is as it is perceived to be.

Dr Baudh then went onto discuss the relationship between caste blindness and creamy layer. Creamy layer focuses on income level but ignores wealth disparities within the particular community. It is very selective in its outlook. It looks at advancement by way of income levels. Assets and property are not the best indicators of social advancement. This kind of caste consciousness which creates such a prejudiced outlook is moving towards caste blindness. This caste blindness ignores the kind of discrimination one may undergo even after attaining certain income levels.

[7] AIR 1993 SC 477.

In the discourse on reservation, we see a shift from caste consciousness to caste blindness. Dr Baudh explained that in the *Indira Sawhney* judgment,[8] while reservation was allowed at entry level positions, the same was not extended to promotions. Later, it was clarified by the addition of Article 16(4A),introduced by way of the 77th constitutional amendment,that there can be reservation in promotions as well. This became a subject of judicial scrutiny in the *Nagaraj* case.[9] The outcome of the *Nagaraj* case is that the 77thconstitutional amendment is upheld. However, it is upheld in a very restricted manner and is subject to judicial review. This scuttles any move towards public employment units providing reservation in promotion. This is an extension of caste blindness. This ties back to the point previously made by Dr Baudh that people may continue to suffer from discrimination in workplaces which hinders them from performing to the best of their abilities. Positioning also becomes important in the discourse. When we speak, one must position themselves. We must acknowledge and attach meaning to that. When we engage in academic writing, we must find a way to locate ourselves within it.

Dr Baudh then moved on to talk about diversity. Diversity may be a discursive way by which one engages with reservation. However, nowadays it is used as a veil. In neo-liberal set ups, the first form of diversity is gender. This is where the questions about diversity stops. The question of caste is a troubling question to ask. There is also the issue of institutions having an inward-looking view. As feminist ideology has taught us, personal is political. To engage with ourselves, we must engage with the outside as well. However, a balance must be struck between the two.

Responding to Prof Sukumar about reservation in the judiciary, Dr Baudh provided an illustration from USA. He then talked about the most contested appointment of Justice Clarence Thomas. He used this example to support his argument that the question of identity alone will not solve the question of consciousness.

The panellists then opened the floor to questions. Dr Gurpreet Mahajan (a panellist for Session III) elaborated on the idea of experience. Expanding the experiences can extend consciousness to beyond just membership and identity. She then spoke about the idea of 'beyond' as raised by Dr Baudh. The concept of equality, historically, has been an abstraction. In India, when the Constitution was being written, there was an effort to steer away from abstraction and stick with historically embedded contextualised meaningful concepts. The concept of equality is one such example. The language of the articles of the Indian Constitution focuses on concrete kinds of inequalities that exist.

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[8] Ibid

[9] *M. Nagaraj & Others vs Union of India* (2006) 8 SCC 212

Prof Mahajan went onto appreciate that the language of historical wrongs was not used. This idea can give way to creating many new wrongs. Prof Mahajan appreciated Prof Sukumar's point about the difficulties in implementation of reservation and the concerns about the shrinking space. Prof Mahajan pointed out that the roster system was never followed properly in North India. She talked about the difficulty in filling out these positions. She applauded the effort of the judiciary in directing universities that all advertised positions must be filled. When this happened, it was observed that "soft departments" were filled first. The SC and ST category applicants were not getting a fair chance of employment in departments like science.

Prof Mahajan raised a point with respect to Dr Krishnaswamy's response about the faculty composition. She questioned whether the rationale or justification provided on grounds of diversity was same as that of equality. Addressing the points raised by Prof Mahajan, Dr Krishnaswamy clarified that he used diversity as a principle in moral philosophy which is very well established. Forward looking justification for any equality, justice distribution must specify in advance what the ideal distribution is. The concept of diversity is used to explain what that ideal distribution is.

Dr Ajay Gudavarthy (a panellist for Session III) asked for a clarification on the point raised by Dr Krishnaswamy that policy flows from the political and not from the bureaucratic. To this, Dr Krishnaswamy responded that in the case of OBC identification, the process was carried out by political executives. This is uncommon in other jurisdictions in affirmative action policies. The findings are carried out by the court like in USA. Therefore, the standard of proof in courts is very different from that in a political executive framework. The proof of this is the EWS reservation. There is no Mandal Commission style enquiry into who these people are and what is their overall representation in the population and in institutions. In a political framework of enquiry, the answers are very different from the answers obtained in the judicial framework. He made that distinction because the Indian system stands out in contrast to other systems in this respect.

In response to Dr Baudh, Dr Gudavarthy pointed out that there was circularity in what he was building. He compared this circularity to the current political context. He provided an example of a Muslim professor wanting to teach Sanskrit. This should have been met with praises, but instead it was met with outrage. He talked about creation of a stigma in Dalit Bahujan politics. In erasing a certain caste, Hindu location in Dalit Bahujan discourse, it creates a stigma on its own, within the discourse. In a sense, it denies anti-caste politics in anti-caste politics. A reflection on this point is required.

Dr Baudh responded to this question by talking about the circularity of positions being such that questions could be raised on the involvement of a

segment of a constituency that might be thus excluded from making a meaningful intervention. He tied this to the example of the Muslim professor wanting to teach Sanskrit and the uproar about it. Any advancement of knowledge production on caste issues could be so limited to Dalit, Bahujan and Adivasi that someone who does not belong to these categories may not be able to contribute meaningfully here.

Prof Sukumar talked about the 200-point roster. The University Grants Commission allows for 6 positions: 1 professor, 2 assistant professors and 3 associate professors. If a 7th post is not there, there is very little scope for reservation in these posts. Another issue is that only some departments may get reservations and in the others, all positions are unreserved. He reiterated his point that in smaller departments which have less that 14 positions, the 13-point roster will not be possible at all. Addressing the point of stigma raised by Prof Gudavarthy, Prof Sukumar questioned who creates this stigma? Is it self-created? The stigma is created within. This kind of stigma around reservation defeats the ideals of the social justice and constitutional morality. Reservation must be understood in the context of history and society. It is an attempt to provide educational and employment opportunities to certain sections which till now have been denied the same within this society. We need to be sensitive enough to accept these policies without prejudice. Prof Sukumar questioned can our society be truly democratic if we cannot accept the vision of a particular policy?

The floor was then opened to questions from the attendees.

A comment from an attendee was that in the discussions, there was focus only on one aspect of reservations.

Mr Shyam Babu provided an answer to Dr Baudh's question that whether reservation is a root or a grafting. He answered that it was a grafting. This is where the problem lies.

Another attendee requested a clarification from Dr Krishnaswamy about the contemporary political justification for providing reservation in India. He elaborated that today reservations are being used as a way to win or lose elections. He requested for an opinion of the panel on the shifting of beneficiaries from generation to generation. Do we want to restrict the benefits to a generation or should these be passed on? Should the system be ended or do we want it to end at one point of time?

One of the participants raised a concern that there was not enough emphasis on the 'unpacking' part of the topic of the symposium. He found that most of the discussion was centred around repackaging reservation and not enough discussion was held on doing away with reservations. The focus should be drawn

to alternatives to reservation and how we can achieve an egalitarian society where our identities are not tied to our castes. Another question was raised about the politicisation of the reservation policy and how should we realise the main aim of this policy and the justice it aims to carry out. Another question was raised about the scope of reservation in private sector. What would be impact on the freedom of trade and on the autonomy of the private sector? What kind of an impact would this have on efficiency, if any?

A question was also raised on the efficiency and effectiveness of the Backward Classes Commission. Prof Sukumar answered that though the Backward Classes Commission was a constitutional body, it was not carrying out their duty. It was being restricted in its working. Educational institutions are being politically influenced which is a major problem. This is hindering social justice. The public needs to be aware and demand accountability from these institutions. There is a sense of bias and selectivity when it comes to the constitutional values. Social justice is overlooked.

Prof Sukumar stressed that the merit of the candidates from the reserved categories is questioned time and time again. We need to change this way of thinking and stop questioning their efficiency constantly. While addressing the question of reservation in the private sector, Prof Sukumar pointed out that these private companies have thrived on benefits provided by the state. There is a need to change our mindset and the ways in which we view reservation. Talking about merit, Prof Sukumar pointed out that it is highly subjective and prejudiced. Addressing the question on alternatives to reservation, he brought up the point that as political equality has not led to social and economic justice,it is the responsibility of the state to take steps to establish this equality. Prof Sukumar raised the point that if in this symposium, so many contrasting points are being brought up, then our task is cut out for us to discuss an alternative to reservations in a multi-layered, hierarchically constructed society.

Dr Baudh brought up the new emerging groups, namely the transgender community. Providing reservations to these groups is a zero-sum game because it means taking away caste-based reservations. This move creates competition between two disenfranchised groups which is bound to raise more critical questions of intersectionality. While reservations may have many problems, we must engage with them to correct them and not to undo the entire mechanism. We must aim for reform. Reservations are already the less radical alternative to separate electorate as was proposed earlier.

Dr Baudh raised the point of reserved categories contesting reservation due to the stigma attached to them. What is missing in this discourse is the ways and means of dealing with this stigma. We must be able to institutionally address this stigma and shame. He gave the example of the LGBTQIA pride parades, where the response to stigma is to parade. That is one way of

addressing the stigma. We have to be able to engage with this. For example, organise talks and bring visibility to it. Our identities will not ensure heterogeneity in ideology. We need to engage with some of these issues. There needs to be open dialogue and debate.

Dr Sudhir concluded by answering the question about implementation of these policies and their future. If we continue with the reservation policy,untethered to the problem of moral justification, reservation policy will become a form of political majoritarianism. If the question is about who has political numbers, then micro-caste voting constituencies will emerge.

He then went on to address the economic basis in social and educationally backward classes. He clarified that economic criterion has been included in the identification of SC, ST and socially and economically backward classes. This criterion has always existed. It has just differed in the weight attached to it. Dr Krishnaswamy finally emphasised that we need devise plausible implementation plans so that the main issue is not missed.

II. SESSION II –MAPPING THE RESERVATIONS LANDSCAPE: POLICIES AND PRECEDENTS

The second session sought to utilize the discussions in the first session and the normative frameworks around reservations to assess India's reservation policy as well as the associate Supreme Court jurisprudence. The panel for the second session consisted of Ms Kiruba Munusamy,[10] Mr D Shyam Babu,[11] and Dr Anup Surendranath.[12]

Mr Shyam Babu began the session by highlighting that many a times, people do not realize the basic units of a policy and go into irrational arguments, without going to the core of a policy. Contextualising in this manner in relation to the imminent topic of reservations, he emphasized upon the difference between equality of opportunity and quality of outcomes. According to him, policy making should have a signaling effect. He pointed out that no one is talking about reservations solving the problem of each and every person entitled to reservation.

According to him, while cultural norms might say that the Dalits are merit less (in societal terms, untouchables), the Constitution, however, does not accept that. He argues that if we accept that all of India is of one genetic stock, the problems of merit permeate all classes and castes. Thus, as per him, the differences are in education and structural problems. He drew parallels

[10] Social activist and advocate, Supreme Court of India.
[11] Senior Fellow, Centre for Policy Research, Delhi.
[12] Executive Director, Project 39A and Assistant Professor, National Law University, Delhi.

with the American civil rights movement, and stated that in India, while we accomplished something with the freedom movement, we did not fully achieve freedom.

He then drew focus towards Part 16 of the Constitution. Our framers borrowed what they thought was right from other constitutions. When they could not get a template, they had to invent it. Part 16 is one such example of a *sui generis* invention, made by Indians. He focused specifically on two aspects: Article 335 (in the context of job reservations and the debate around creamy layer) and Article 338. Reservations in jobs and legislature are only mentioned in this Part for SCs and STs. Article 335 requires that reservation should be consistent with administrative efficiency. According to him, creamy layer would only increase the number of SCs and STs in service, and not decrease it. Thus, creamy layer is a must and should not be removed, if Article 335 is seen as one unit. Just claims of SCs and STs must be satisfied and administrative efficiency must be maintained. He further argued that merit is a matter of generational change. Numbers are not important, signaling effect is what is important. According to him, caste problem will not be solved by public employment reservation. It is a signal to the community and the society.

He then turned to Article 340 of the Constitution and stated that under Article 340, the government is mandated to appoint a commission to check backwardness and take necessary measures. According to him, with the 123rdconstitutional amendment, Article 340 has been subverted and the equation of OBCs, SCs and STs has been made incorrect. He argued that National commissions for SCs and STs are required and it is necessary to inquire into the grievances of these communities. According to him, the inclusion of the OBCs will result in absurdities like National Commission for Backward Classes or a legislation for atrocities against OBCs. He stated that the equation of backwardness of OBCs, SCs and STs is an absurdity which gets further stretched with the economic quota.

Following Mr Babu, **Dr Anup Surendranath** commenced his arguments by contextualizing that the purpose of the discussion was to compare and contrast normative difficulty between constitutional provisions and the court judgments. He specifically enumerated the following Articles of the Indian Constitution to be relevant to the discussion: Articles 15(4), 15(5), 15(6) and16(6), 334, 335, 243D and 243T.

In legislature, panchayats and municipalities, it is a proportionate representation. Interesting ntersectionality with one-third representation of women at panchayat level.

Standards:

Proportionality (Legislative Sphere) v. Adequacy (Employment) v. No metric (Art 15)

Framework:

Sites	***Groups***	***Rationales/Justifications***
Education	Women	Equality of Opportunity
- Primary	SCs	Historical Compensation
- University	STs	Resolving Structural Exclusion
Employment	OBCs	Diversity
- Entry	Muslims	Presence Simpliciter
- Promotion	Poverty	Signaling
Legislative	Weaker Sections	Redistribution
	Disadvantaged Groups	Sharing power

According to him, if we start mixing and matching sites, groups and rationales, it leads to great normative disparities. Each site has differing rationales, as does each group. This leads to normative confusion. Supreme Court decisions are the most common example of not resolving these issues.

He then discussed Article 335 and stated that it raises concerns of efficiency only with reference to SCs and STs and not all backward classes of citizens. According to him, the drafting history of Article 335 is the problem. It was a provision meant to acknowledge the claims of all minorities. The Constitutional Assembly debates took a break during the partition violence and then the original phrasing was dropped. This, as per him, is at the base of the lack of normative coherence.

He then turned his discussion towards the decision in the *Indra Sawhney* case[13] and the notion that reservation as a facet of equality, as a means of furthering equality. He raised a few questions such as: What is the justification for the 50% cap on reservations if reservation is in furtherance of equality? Why is there a limitation on equality? According to him, the message then becomes that a cost is being paid due to reservations and hence, the 50% rule. He further raised the question as to why there are no reservations in the promotion if the justification of reservation is that reservation is the facet of equality? He highlighted that super-specialty courses and defence organizations, such as the Defence Research and Development Organisation,seem to have emerged as areas where we should not have reservations. He questioned the justification to exclude them. According to him, the language of these judgments indicates that there is a social cost to reservation. It belies an unresolved constitutional tension.

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

He then turned his discussion towards the concept of creamy layer in the context of the decisions in *Nagraj*[14] and *Jarnail Singh*[15] cases. He stated that the proposition that creamy layer should not apply to SCs and STs is *obiter dictum*. It is not a binding position. He raised fundamental questions on creamy layer for SCs and STs. If the argument is that SCs and STs should have creamy layer because OBCs have creamy layer, then there is great confusion on the justification for reservations for these groups. He reiterated the normative disparities caused due to the mixing of sites, groups, and justifications in the above framework. Social discrimination faced by the SCs and STs is radically different from that faced by the OBCs. Creamy layer is based on the economic criteria; that, as per him, being applied to a social discrimination construct of SCs and STs does not make sense.

He then turned to the argument of linking reservations with poverty in light of the recent constitutional amendment. He stated that it is a very curious and untenable amendment. He argued that inadequacy of representation does not have to be shown. There exists great incoherence between various articles of the Indian Constitution. He raised certain questions such as whether it is a basic feature of the Constitution that reservation in India is group based? If it is answered in the affirmative, then if the poor are a group, can there be reservation for them?

He then turned to the issue of sub-classification for the purposes of reservation. He argued that the courts struggle with the fiction of homogeneity within Dalits, SCs and STs. However, this homogeneity does not really exist. The courts rely on the creation of this constitutional fiction of homogeneity. When viewed externally, there seems to be homogeneity. However,when viewed from the inside, there is obvious heterogeneity. This dichotomy has to be resolved. He argued that a balance has to be achieved and an intersectionality-based-model should be devised.

He then contrasted the stance taken by the Andhra Pradesh High Court and the Bombay High Court on the questions of Muslim reservation and Maratha reservation respectively. The Bombay High Court looked at the Gaikwad Commission on an empirical basis in relation to the Maratha reservation. In its judgment, it accepted Gaikwad Commission's recommendations, on the basis of proportionality on basis of population. The court applied the test of proportionality, not adequacy. There was no conversation on the social discrimination angle. He contrasted this with the decision of the Andhra Pradesh High Court with respect to Muslim reservation, where there is a great demand for empirical basis, without resolving or addressing normative coherence with respect to social discrimination.

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[14] *M. Nagaraj & Others v. Union of India*2006 8 SCC 212.

[15] *Jarnail Singh &Others v. Lacchmi Narain Gupta* (2018) 10 SCC 396.

The last panelist for the session, **Ms Kiruba Munusamy** began her discussion by pointing out that in Tamil Nadu, there was reservation for non-Brahmins and Dalits from the1800s till 1920s. It was on the basis of proportionality. After that,a communal government order gave reservations on the same basis for all the groups. Champakam Dorairajan filed a case preemptively. The Madras High Court decided that due to the communal government order, she had lost her claim to the seat in the medical college.[16] Another case of Sreenivasan[17] was in relation to an engineering college. Here, the communal government order was found to be against the Constitution, due to violation of equality. After this, Champakam and Sreenivasan were given admission. Champakam had not even applied.

Ms Munusamy then turned to the *MR Balaji* case.[18] Here, a similar proportional reservation system was present in Mysore. 68% seats were reserved for non-Brahmins. It was struck down since there was no basis for decision on the number of percentages. The Supreme Court also laid down a 50% limit to the reservation.

Ms Munusamy then discussed several case laws dealing with the judicial treatment of reservations. She first discussed the *T Devadasan* case[19] where the carry forward rule was considered. She then discussed the *Chitralekha*case[20] which held that identification/classification without reference to caste is permissible. Ms Munusamy then addressed the *P Rajendran* case[21] which held that social and educational backwardness can be decided just on the basis of the caste of the group. A similar view was taken in the *Trilokinath* judgment.[22] She then mentioned the *NM Thomas* case[23] which held that merit includes good governance.

Ms Munusamy also elaborated on the decision in the *KC Vasanthkumar* case.[24] According to her, the approach of the judges does not seem to have really changed from the view that reservation is for the non-meritorious. Social backwardness can be identified with reference to a person's caste. Poverty is not a disparate element. Similarly, when discussing the *Indra Sawhney* case,[25] Ms Munusamy argued that though this judgment discussed the plight of SCs, STs and OBCs over history, it was still conservative in the sense that it limited the scope of reservation. According to her, it seemed that the judges still

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16 *Srimathi Champakam Dorairajan and anr v The State of Madras* AIR 1951 Mad 120.
17 *Ibid*.
18 *M. R. Balaji and Others v. State of Mysore* AIR 1963 SC 649.
19 *T. Devadasan v Union of India* AIR 1964 SC 179.
20 *R. Chitralekha v. State of Mysore* AIR 1964 SC 1823.
21 *P. Rajendran v. State of Madras AIR 1968 SC 1012*.
22 *Triloki Nath Tika v. State of Jammu & Kashmir* AIR 1969 SC 1.
23 *State of Kerela v. N. M. Thomas* AIR 1976 SC 490.
24 *K. C. Vasant Kumar v. State of Karnataka* AIR 1985 SC 1495.
25 *Indra*n (13).

seemed to think that reservation was against merit. The last case that she discussed was the recent decision in *Pavitra's* case.[26] In this context, she argued that merit is nothing but a myth. Making an assumption of lack of merit without even allowing a person to take up a position and discharge responsibilities, is another form of caste prejudice.

Ms Munusamy then brought up the issue of suicides by the students belonging to the SC and ST categories, and highlighted the structural problems faced by them at educational institutions and the stigma associated with availing reservation. According to her, STs should be provided reservation in the elite schools located in the hilly tribal areas.

She then addressed the efficiency argument and stated that reservation is not given to random candidates. Minimum requirements have to be fulfilled. The merit argument, thus, is an argument of prejudice.

In the end, Ms Munusamy discussed the point of reservation for classes which have not been represented so far. According to her,the communal government order in Tamil Nadu which provided proportional allocation for everyone and every class is the best format to go ahead with which no one would have a problem.

This was followed by a panel discussion amongst the panellists. MrBabuposed2 sets of questions. First, he referred to the recent Maratha reservation controversy,and the citing of farmer suicides as a justification. He sought the views of the panellists regarding proportional representation in the scenario that now that more than 70% of the population can claim the 50% reserved quota. He sought the panellists' thoughts on questions such as: What if the pattern of reservation is reversed? What about region based reservation?

The second set of questions that he raised was, according to him,relating to something that we all have experienced at some time. He cited his own experience at the Andhra University, where the SC candidates were marked lower to prevent them from being eligible for faculty positions. He observed that SC/ST candidates tend to do better in objective, anonymous evaluation rather than subjective ones, and posed a question as to whether this can be fixed.

Dr Surendranath addressed the question that why can we not mirror proportional representation across all spheres. He stated that he would be open to the idea that this might work in some spheres. But,according to him, there is the complication that as to how micro will such representation be. What about gender and sub-castes? He further stated that proportional representation also limits opportunities, due to which he was not in complete agreement with it.

[26] *B. K. Pavitra v. Union of India* (2019) 16 SCC 129.

Furthermore, he questioned that if reservation is an equalizing project, should the burden on the government be more and more to justify reservations in public employment? As of now, the burden on the government is same with respect to education and employment. According to him, burden on the government should be differential to justify its actions.

Ms Munusamy then stated that one anti-reservation argument is that even in the SC category, the dominant castes take up most of the reservation. In that regard,she agreed with proportional reservation, that reserved quota should be divided among communities on this basis.

Dr Surendranath then came to the question of how the quota should be divided, and argued that the answer depended on the reason for need of reservation. If it is a distributive reason, then we should go with the proportional reservation option. But, if it is about signalling, then it does not matter which person from the SC gets it. He, however, was indecisive as to what the reason is.

Mr Babu then gave the example of Maharashtra. Artisan and farming communities think that education is a waste of time and do not send their children to school. Even with the same access to facilities, he asked, what explains the disparity in educational attainment such as in the Malas and the Madigas? Where is the agency in this decision to not send children to school?

On this thoughtful note, the discussion was then opened up for questions from the audience.

Prof Sukumar added his observations to the discussion. According to him, when one peruses judgments pertaining to reservation, earlier judgments become references for future ones. The language looks progressive but that is a farce. The problem is in the judgments. The carry forward position is also taken from the judgments. Even advertisements for Indian Institutes of Technology are rolling advertisements and no number of positions is mentioned. All this is done to scuttle reservation. According to him, it is disturbing that 95% of campus suicides are of SCs and STs students, which according to him are institutional murders. He stated that he had collected hundreds of samples from 10 universities and according to his data, discrimination in vivas and marking exists and such discrimination pushes such students to this step. It is important to look at these concerns.

A question was put forth by Dr Baudh in the context of one of the fruits of reservation, *i.e.*, to look at the accomplishments of the members of those communities who have availed reservation. What does that achieve? Is there any trickle down effect? This critical question must be asked when mapping reservations, as to what reservation achieves. He then added a clarification on the

50% rule in context of the *Indira Sawhney* case.[27] According to him, if reservation exceeds 50%, the exception would overrule the rule. He found the *obiter* to also be confusing because the mandate of the court was expanded by the reference.

The next question brought into attention was the recent controversial issue in Karnataka concerning demand for internal reservation. It was asked whether reservation should reflect population changes. As per Mr Babu,reservation quotas are revised as per population changes. He argued that the signalling effect cannot be dismissed and quoted the effect of Ambedkar, and stated that to that extent reservations have succeeded,to tell the community that they are not equal/inferior does not make sense.

As per Dr Surendranath, regarding what reservation is capable of achieving, reservation is an unsuitable tool for ensuring economic inequality, because of shrinking public employment. He concurred with Mr Babu that as to what reservation has achieved is actually the signalling effect, that all these public positions are the legitimate right of marginalised communities. Accordingly, very often, we expect more from reservation than it can deliver. Politically, it is seen to be enough. Egalitarianism is reduced to reservation.

Dr Baudhargued that reservation in public employment is not representation. A public employee is not representing anybody. Dr Surendranath contended that public employment can alternatively be seen as a share of the state power. It is a signalling function. Mr Babu added that through such reservation, the reserved communities also bring in their own experience to public functions. When public institutions reflect social diversity, they are more robust and egalitarian. Prof Sukumar argued that reservation is not just about employment, it is about the representation when you are appointed on the basis of your community. It has also achieved a sense of dignity and assertion,and this is the context one needs to understand.

A question was put forth by an audience member regarding internal distribution of reservation: should it just depend on caste, or should class or gender also be brought in? Ms Munusamy highlighted that there has been a proposal of internal reservation in Tamil Nadu which is pending. Regarding the language of judgments, Ms Munusamy said that the discourse sounds promising but it is not. Justice UU Lalit's bench, for instance, was the same bench which alleged that SCs and STs are misusing the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989('Atrocities Act') delivered by non-Dalit judges, but after one judgment, he turned progressive overnight. She pointed out that we should also not forget that these judgments are being delivered by a court which has had very few Dalit and women judges.

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[27] *Indra*n (13).

Dr Surendranath responded by taking the example of the *Sabrimala* case,[28] and raised the question as to why more women are needed in the Supreme Court. The only woman on the bench dissented, and the same position exists in the review. He wondered whether it is because we expect a more feminist decision or is that not the purpose? What are asking for? Is it a mere representation? He believes that there is a complexity in implementing reservation, what it has achieved and how far reserved candidates actually understand the plight of fellow Dalits.

The panel then took four questions from audience members collectively and addressed them together. The *first* question was about proportionality: states like Tamil Nadu have upto 85% of their population as SCs and STs, then why should they have to settle for 50% of the quota? The *second* question was as to what is the alternative to the 'creamy layer' model. Are reservations better characterised as group rights or individual rights? The *third* question was regarding reservations being considered as a one stop solution. It was highlighted that we have seen a number of commissions being set up to look at alternative methods of social justice. In that light, what options are available there? The *fourth* question was whether the panel thought that reservation itself is promoting discrimination? The Pallar community in Tamil Nadu was cited as an example as it wants to remove the SC tag, saying that it is promoting discrimination.

Dr Surendranath addressed the questions first. On the question of proportionality, he argued that proportionality can be used as a metric for legislative representation, but he was unsure of any justification to use it for employment or education. On the question of individual based versus group-based reservations, he argued that reservations are definitely group based. According to him, making it individual based would say that group membership would not be enough and additional individual proof of discrimination would be required. About alternatives to creamy layer, he stated that he would recast it as a question of internal distribution of the SC and ST quota. He further elaborated that the creamy layer goes back to the fundamental tension of reservation being seen as anti-equality, while reservation is, in fact, a facet of equality. The prevailing idea is that society should be ordered according to individual merit and any movement from that has to be justified.

Ms Munusamy pointed out that 69% reservation was introduced in Tamil Nadu to ensure some kind of access to public institutions. She justified her proposition of proportional representation by arguing that it is to ensure a fair share. Regarding the Pallar community, she argued that their choice of renouncing discrimination is purely political. Rather, she argued, they benefitted the most from reservation when it was introduced.

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[28] *Indian Young Lawyers Association v. State of Kerela* (2019) 11 SCC 1.

Mr Babu pointed out that there is a cynical view about the trade-off as to why converts are not given reservation. He highlighted that caste Hindus wanted Dalits to stay within the religion. Ambedkar did not anticipate the expansion of reservation today. According to him, equality is the principle and exception should not overrule the rule, so a balance is needed.

Prof Sukumar then added that there is no data till date on reservation and still we argue without proper statistics. He pointed out that even the government does not have such data. Mr Babu added that the judgment of the Supreme Court from the last year on the Atrocities Act was, as per him, scandalous. He elaborated that it was based on assumptions; the court did not even ask the National Crime Records Bureau about the number of false cases. According to him, the right parties, such as the Home Ministry and the National Commission for Scheduled Castes, were not consulted. Ms Munusamy added that this was because this is what the bench wanted to believe. She pointed out that no Dalit senior counsel was involved in the matter to represent the community and no *amicus curaie* was appointed from the community. The judges were non-Dalit as well.

Dr Gurpreet Mahajan then pointed out that we do have some data, although little and unreliable, that there is a visible impact of reservation in India. She then cited B R Ambedkar who argued that prejudice works in a way that even institutions for justice will not deliver unless represented. According to her, reservation is representation.

Dr Amitabh Kundu (a panellist for Session III) further added to the discussion by stating that the caste data in India is bad, there is no compatibility. He highlighted that there is data showing equal backwardness of Marathas to other communities. However, he pointed out that there is also political resistance. According to him, some affirmative action outside reservation is needed. He stated that the Sachar Committee seriously considered whether reservation would be enough in an economy opening up to privatisation and globalisation. He further added that he once reviewed a journal paper which found that at entry points of gateway institutions like IITs,the share of SCs, ST sand Muslims was much less than stipulated, and in addition, such share was from the urban areas only. Thus, there is a rural-urban divide as well. According to him, some other intervention in the education system is needed to have a desired impact. Mr Babu then stated after the Sachar Commission, they did a huge survey in Uttar Pradesh about lifestyle changes in Dalits, in the household and villages. They asked questions such as who lifts dead animals, and the response was that now a days, it is mostly Muslims, while earlier it used to be the Dalits.

A final question was put forth before the panel as to whether reservation is a part of basic structure. Dr Surendranath answered by stating that Article

335 is a badly drafted constitutional provision. Courts now use it as a basic structure test, though that is not what was intended when it was drafted. The efficiency consideration in Article 225 is being used to test constitutional amendments, which, according to him, is mind boggling. According to him, the 103rd constitutional amendment would pass basic structure, unless the court agrees with the argument that group based reservation is the only affirmative action as per the Constitution and that poverty is not a group in itself.

III. SESSION III – DEEPENING AND WIDENING AFFIRMATIVE JUSTICE: THE WAY FORWARD

A. Dr Amitabh Kandu

The third session was moderated by Dr. Ajay Gudavarthy and was titled 'Deepening and Widening Affirmative Justice: The Way Forward'.

The first panellist for the session was Dr. Amitabh Kundu, Distinguished Fellow at the Research and Information System for Developing Countries, and former Dean of the School of Social Sciences at Jawaharlal Nehru University. He began by discussing the two commissions that were created with an inclusivity mandate. The first was the Equal Opportunity Commission, which was chaired by NR Madhava Menon. The mandate of this Commission was to deal with any form of discrimination on campus. The second commission was the Diversity Index Commission, which was chaired by Dr. Kundu himself. Dr. Kundu said that the mandate of the Commission was to look at the deficiency in representation for different deprived socio-economic sections, such as the Scheduled Tribe (ST), Scheduled Caste (SC), Women, and Muslims. Thus, the framework of this Commission was much broader than that of the Sachar Committee or the Equal Opportunity Commission. Their job was to build a deprivation index, which could be used at the micro level by private institutions, corporate sector, educational institutions, public health programs etc. It would be set up at the Central and the State level. It would be responsible for rating departments and institutes, including the private sector. The idea was to identify, for example, which company or institute had high or low diversity index.

The Commission headed by Dr. Kundu was appointed under the UPA government, during their last 3 months. Hence, he hurried over this time frame to submit some sort of preliminary report. He stated that the UPA government was impressed by his Commission's report. But when he asked them as to when the report would be implemented, they simply said that they'll see what to do with it. It was evident that the UPA would not be coming back. However, the Commission's term was extended by 6 months, wherein they worked under the NDA government. However, the Commission's report has not yet been implemented.

According to him, the objective behind the index was that when a case is made for affirmative action, the court would ask for data to determine which community is poorly represented in which institution. The Commission would give 'tags' to different universities and institutes. Thus, low representation would determine eligibility for a particular programme. The index was built in a manner so as to compare the eligible population within the total population. It required some mathematical reworking of existing indices.

Since questions of data had been raised in the earlier sessions, Dr. Kundu attempted to clarify some of those concerns. He said that he concurred with the view of other panellists that reservations for the economically weaker sections would not serve any purpose. Dr. Kundu explained the procedure followed by the Commission. The Commission first found the income data for different socio-economic groups. However, income data was available only for household consumption, which they had from the National Sample Survey Office (NSSO). They had this data for upper-caste Hindus, SCs, STs, the Other Backward Classes (OBCs), Muslim OBCs, and Muslim non-OBCs. Pointing to a graph, he explained that the graph showed the per capita consumption expenditure mapping for different communities in rural and urban areas at two points in time. It showed that the most deprived community, in terms of per capita consumption, in rural areas is the STs, followed by the SCs and Muslims. The Commission found that Muslims are the most deprived community in the urban areas, across Class- I and Class- II urban centres. One reason behind this is that the SCs and the STs in urban areas get the benefits of reservation. In fact, a large number of STs who come to urban areas come through reservations.

Dr. Kundu then pointed out the differences between the two points in time and the improvement in per capita expenditure at constant prices. The expenditure was the lowest for the Muslims and the STs. It applied to both Class-I and Class-II urban centres. But the level of deprivation in the gaps had gone up for the SCs, the STs, and Muslims in comparison to the rest of the population.

Dr. Kundu then moved on to the health dimension. There was a very interesting finding from the Sachar and Post-Sachar Evaluation Committee ('Post-Sachar Committee'). With respect to the health dimension, access to healthcare services for the SCs/STs/Muslims was much lesser than the average. Access to vaccinations and ICBS programmes was also quite low. Interestingly, the Sachar Committee also mentioned that if one looked at health indicators such as life expectancy, one would find that despite lower access to public hospitals for Muslims, their health indicators are better than that of the SCs, the STs, and even the upper-caste Hindu population. A Muslim woman lives longer than the average lifetime of a woman, two and a half years more to be precise. The number of malnourished women and children is also lower. According to Dr. Kundu, the non-vegetarian habits of the Muslims is supposedly a reason behind

this. Even the infant mortality rate for Muslims is lower than that of the other communities. There is discrimination against the girl child even in the Muslim communities, but it is lesser than that prevailing in the upper-caste Hindus. Dr. Kundu used the death rate of female children as an example to prove this point. The Telangana government argued that the health indicators were better for the Muslim community and used it to deny them affirmative action in the healthcare sector. Therefore, the Muslim community's access to healthcare services is lower than the others.

Dr. Kundu then moved on to the data from the educational sector. He said that the literacy rate for Muslims used to be higher than that of the SCs/STs in the period 1950-61. However, the 2011 data shows that the Muslim literacy rate is lesser than that of the SC/ST population. He had not done enough research to figure out the extent to which reservation was responsible for this change. However, according to him, one factor responsible for this could certainly be the migration of the upper-class Muslim population to Pakistan. The data also showed that the disparity in education was going up. The dropout rates for Muslims between the ages 6-14 years, and their dropout rates in higher education, are also greater. The difference in technical education deprivation is also sharp between Muslims and the SCs/STs. However, in some other indicators, Muslims are a little better than the SCs/STs. Given this context, the Diversity Index Commission did not directly affirm the Sachar recommendation of 10% reservation for Muslims. Since they had a larger inclusivity index, they submitted a report. However, this report was not accepted by the UPA government because detailed data was unavailable. However, the Commission clarified that the missing data could be found out with some changes in the questionnaire, .

He stated that private sector institutions can choose to provide or not provide the data. However, if they want a rating on the Diversity Index, like in Europe with the Green Index, they would need to comply with these submissions. This suggestion was not accepted. The Commission was told that its recommendations were under consideration, but it was not taken up further.

Dr. Kundu then spoke about the Post-Sachar recommendations, which were three-fold. *First*, though the Committee focused largely on Muslims, it had a larger, inclusive India mandate. It suggested that the SC/ST quotas that apply to other religious communities must be extended to Muslims too. It should be possible to identify caste groups within the Muslims as well, which was also proved by a study done by the Giri Institute in Lucknow. The *second* recommendation pertained to the OBC reservations, which are often hogged by the more privileged communities, like the Gujjars for instance. Justice Sachar had asked to stay away from the religion, thus, the Committee recommended that quotas be sub-divided based on the worst of the worst-affected minority population. This would automatically improve the share of the SC/ST/Muslims and the lower among the OBCs in reservations. While the NDA government

explicitly rejected the Equal Opportunity Commission's report, the Diversity Index Commission's report is still under consideration, but according to Dr. Kundu, this does not mean much. Thus, in essence, the Committee recommended that instead of providing separate reservations for Muslims, the two categories within the OBC category could be sub-divided. Doing so would indirectly benefit the Muslim community. The *third* recommendation was that the Diversity Index ought to be used. This did not mean that every institution must necessarily have 14% reservation for Muslims/SCs/STs. Instead, the Committee recommended that institutions apprise them of the percentage of reservation they have and the criteria it is based on. The Diversity Index was proposed to incentivise public and private institutes. 70% of the institutes are dependent on some form of government subsidy. Hence, there is always an incentive/disincentive system for these corporates. The Committee only recommended that the institutes must get themselves evaluated every 3 years, and this should be done consistently. If the institute complies with this, additional funds can be released and if the institute performs poorly, then disincentives should also exist.

In Dr. Kundu's opinion, giving reservation to the daughter of a Brahmin woman who is selling tea deserves much more attention than providing reservation to the son/daughter of an SC/ST IAS officer. However, according to him, the 10% Economically Weaker Section (EWS) reservation does not target the poorest of the poor. The criteria for EWS reservation require the family income to be below Rs. 8 lakhs. The residential plot owned by the family must also be less than 200 square yards. This means that 75% of the farmers would qualify. Accordingly, the upper-middle class would also qualify for EWS reservation. It would lead to a scenario where the bottom 10% has no representation. One would have to wait and see what view the Court takes of this.

According to Dr. Kundu, the society's attitude has changed over time. The corporate sector would be willing to make trade-offs for a higher index rating. It allows consumers to know which company is discriminating against which community. It makes it easier for them to buy/boycott products of such companies. Thus, the diversity index must promote a culture of greater inclusivity. He was of the opinion that it is a very important and impactful tool of positive action, provided it is implemented properly.

With reference to a question asked in an earlier session, Dr. Kundu said that it would be impossible to define poverty or creamy layer. However, the National Statistical Commission said that it would be possible to work out a definition, provided there is a political will to do so. The Commission worked out a definition and a methodology and said that there are 150 million people in the country who are in extreme desperation. This method was, however, shot down. Even if one took an estimate with 1 or 2 dollars, 80% of the country's population can still be put below the poverty line. According to Dr.

Kundu, there is a lack of political will to do something about this. Even the NITI Aayog said that poverty is not measurable. Dr. Kundu said that although it is difficult to define poverty and it would be an imperfect measure, at least there would be some starting point. In his opinion, there ought to be some criteria with respect to poverty so that vested interests do not take over. However, this is precisely what has happened. Because the moment you say that there are 20 different ways of defining poverty, there would be nothing specific targeted for the most deprived sections of the population.

A member from the audience had a question for Dr. Kundu. He asked whether it would be better to remove the blanket of reservation for all the communities at this point in time. He wondered if it would be better to make a new policy for the communities as and when the need arises, and revoke the same after the need has been fulfilled.

Another question was asked regarding the data that the Muslim community had not been able to perform as well as the SCs or STs with respect to education. The audience member wondered if it would be possible to trace the reasons for this, and why this situation has not changed for a long time. He also had a question regarding the basis on which the OBC category was further divided into the most backward classes and the other backward classes.

Dr. Kundu answered that the authoritarian rightist regime in India had used this data pertaining to the Muslim community to peddle some half-truths and dangerous myths. They argue that there is severe social discrimination against Muslim women. They say that the literacy rate of Muslims is low because Muslim girls do not go to schools and colleges. They also say that the fertility rate amongst the Muslim community is very high, and that in another 75 or 100 years, the Muslim population will overtake the Hindu population.

However, Dr. Kundu stressed that the data does show that a change is afoot. He said that with respect to attendance in schools and colleges, the boys-girls disparity amongst the Muslim community is very low. The dropout rates for both the girls and the boys in the community are equal. Female literacy of the Muslims is also increasing at a slightly faster rate than the other communities. Thus, they are catching up. Secondly, Muslim women's rate of employment and workforce participation rate has gone up over time. Thirdly,Muslim women's unemployment rate has also gone up. This shows that Muslim women are looking for jobs, although there are none available.

Regarding the fertility rate, Dr. Kundu said that it is true that the fertility rate of the Muslims was higher compared to the SC/ST population. However, he submitted that when one looks at the National Family Health Survey (NFHS) data, one can see that the Muslim community has had the fastest decline in the fertility rate.

Dr. Kundu concluded by saying that the NFHS IV data clearly showed that if good primary education facilities and primary health facilities are given, along with an increase in the enrolment rate, there would be a sharp decline in the fertility rate of Muslim women.

There was another question for Dr. Kundu. It was whether the religion-based reservations would lead to social disruptions.

An audience member had a question as to whether SCs can be desegregated into Sikhs and Buddhists, since SCs are ipso facto Hindus. He also asked Dr. Kundu as to how he had collected the data on the Hindu STs. Dr. Kundu replied that the data on SC and ST Hindus were taken from sample surveys and analysed.

The last question was with respect to Dr. Kundu's statement about having a threshold when the incentives must turn into disincentives on no improvement in performance. Thus, the question was where the line after which the incentives would turn into disincentives be drawn.

B. Mr. Ajay Guduvarthy

Dr. Ajay Gudavarthy, Professor, Centre for Political Studies, Jawaharlal Nehru University, was the second panellist for the session. He decided to make an intervention from a political standpoint, since the discussion had, till then, been framed only in legal and constitutional terms. Much of the legal and numerical discussion that had taken place flowed through the political debate that has historically taken place right from the Constituent Assembly debates to neo-liberalism.

According to Dr. Gudavarthy, one would have to look at the larger questions, considering that caste dynamics and relations have undergone a substantial change in the modern times. This has especially been due to a rightward shift in the economy that has ushered in neo-liberal changes.

Dr. Gudavarthy raised 5 important questions pertaining to caste and anti-caste politics. The question of justice has three dimensions: redistribution, representation, and recognition. Representation is needed to be a part of decision making. Recognition is needed for cultural lifestyles, values, and identity. Redistribution is needed for income and property ownership. Political theory deals with these three questions.

It is important to note that the strategies for one dimension are cancelling out and blocking the other dimension. Hence, according to him, the question of reservation must be phrased in terms of these challenges that we are facing. For example, the question of recognition is blocking the question

of representation. An instance of this is when Dalits convert to Islam and Christianity, they become a numerical minority. This affects their capacity to influence electoral outcomes. Thus, they lose representation. However, any of these dimensions can block the others.

According to Dr. Gudavarthy, Ambedkar was also struggling to get these three dimensions together. One can see this when one reads Ambedkar closely. He proposed reservations, conversion to Buddhism, separate electorates, and the question of fraternity in the citizenship agenda. Thus, the issue arises as to where one could possibly place the question of reservation within these three dimensions.

This would lead to the first question, as to whether reservation as a strategy helps in bringing these three dimensions of justice together. Or, whether reservations block solidarity and pose intricate challenges to anti-caste politics.

The second question is a question of cultural recognition. Much of the Dalit-Bahujan politics in India has moved towards an essentialisation of the Dalit cultural identity. This has happened because they're trying to frame the questions of stigma and mobility in terms of the specificity of Dalit culture. Their objective is to fight the question of stigma through identity. Thus, the politics has moved towards creating an exclusive identity. Therefore, Dalit politics has argued that Ambedkar solely belongs to Dalits. Another claim is that only Dalits can speak on behalf of Dalits, and others speaking on their behalf is not only ethically wrong, but it also has epistemological challenges. Thus, over time Dalit politics has moved into exclusivity and specificity.

Dr. Gudavarthy explained that Richard Rorty, the political philosopher, made an interesting intervention. He argued that till the 1960s in the Civil Rights movement, the focus was not on recognition, but on the elimination of prejudice and stereotypes. The displacement of prejudice to bring in the question of cultural recognition happened because of the influence of the second wave of feminism. Women were the first to raise this question of cultural specificity. They prodded into femininity being different than masculine culture. This emerged in the context where women were marginalised but not stigmatised. This led to the demand for cultural specificity and recognition. This led to the emergence of women's study centres that went into specific women's history, what motherhood and femininity stood for, and other such issues.

Through this, Rorty sought to argue that this kind of discourse has misplaced the question of stigma. Therefore, he argued that anti-racial politics, and by extension, anti-caste politics in India should move back to the elimination of prejudice, rather than arguing for specificity of cultural recognition. One of the questions that has created a historical crack is that of prejudice and stigma. We have been dealing with these indirectly, but there is a need to address them

directly in how they emerge in our daily life. Ambedkar tried to address this by suggesting the idea of inter-marriage and inter-dining. However, that did not work.

Rorty suggested that we must not move towards specificity but towards a universal idea of common humanity. This idea needs to be instilled at the school level itself to fight prejudice. Simply asking for cultural recognition without fighting prejudice is problematic. There is no normative case for why they should recognize your culture, but there is one for why they must not prejudice or discriminate you. Thus, the question arises as to whether one should frame the question of prejudice away from cultural recognition. Despite mobility and representation, the prejudice has not been eliminated. The single biggest failure of anti-caste politics has been fighting caste prejudice in education, employment etc. Accordingly, the question is whether we should reframe the question of reservation in terms of prejudice too.

Dr. Gudavarthy's third question was in terms of the equation between difference and fraternity. He said that Ambedkar was one of the earliest and few political thinkers in India to emphasise on the idea of fraternity along with equality and liberty. In fact, he said that without fraternity one cannot fight caste. Therefore, fraternity would mean certain shared thoughts, common cultural practices, a certain idea of a shared history. It is debatable what its specific form could be. Ambedkar made an interesting point that fraternity is an important principle which cannot be converted to a constitutional right. He noted that equality and liberty could become legal principles and constitutional morality, but fraternity could only become social morality.

Thus, one would have to ask whether Dalit politics has paid adequate attention to this third question. According to Dr. Gudavarthy, part of the reason why we have a resurgence in the conservative and neo-right wing backlash in India is a response to not paying attention to the idea of fraternity. The equation between difference and fraternity comes back to us in various ways. If we drop the question of fraternity and pose the discussion only in terms of difference, it would cause a challenge to anti-caste politics. Dr. Gudavarthy referred to Prof. Sukumar and pointed out that he is called a Dalit intellectual. He said that this is not a stigma but is a dilemma. This is because, there is no clarity in public discourse as to whether invoking the Dalit identity amounts to stigmatisation or an assertion of their identity. This confusion remains unresolved in our public discourse because we haven't combined the question of difference with fraternity.

The idea of difference is actually that of distance. How exclusive I am in being recognized as autonomous? This idea of autonomy in itself is sometimes quite a misplaced idea. Michel Foucault argued that under modernity, autonomy determines how power operates and controls you. Part of this discourse

entered Dalit politics. This exclusive idea of being autonomous of everything has resulted in us dropping the question of larger group solidarity. Thus, the third question is the need to bring back fraternity into social justice discourse.

Dr. Gudavarthy also explained the need to examine the shift in voting patterns of Dalits towards the right-wing regimes. According to him, this shift is partly because of the aspirational mood of the Dalits. He spoke about a survey he conducted with the Dalits working in the Akhil Bharatiya Vidyarthi Parishad (ABVP) Unions in Andhra Pradesh and Telangana. All these organizations are headed by Dalits and Bahujans. He was quite intrigued by the idea of Dalits supporting a neo-conservative right-wing group, and wanted to examine as to why they were so critical of the autonomous Ambedkarite idea. One of the problems with the Ambedkarite articulation is 'wearing your differences on your sleeve'. There is a constant requirement of reasserting their caste identity. In contrast, in right-wing organizations, Dalits are relieved of their caste identity. The caste question is not directly delved into, although it is introduced indirectly, for instance, through meals. In the interviews, the Dalits stated that they would be willing to give up beef eating, if it meant that they would enjoy social mobility. This represents an undying need for fraternity and recognition by groups.

In Dr. Gudavarthy's opinion, the idea of difference has its merits when it comes to delving into intricate questions. According to him, reservations have led to an expansion of the idea of merit. Had there not been reservations and scholarships, our understanding of caste would have been limited. It is only the work of three generation of Dalit scholars that has introduced us to intricate questions of caste. This is merit and this is an expansion of the stream of knowledge. However, this question of difference has missed the larger idea of solidarity.

The fourth question was that of reservation amongst the upper-caste. One can always question the legitimacy of the cap and other such administrative questions. However, Dr. Gudavarthy's larger question is through the lens of social transformation. If reservations are not appropriate for the upper-caste, then one has to look at alternate ways of framing and answering this question.

Reservations are crucial but it has become the only aspect of Dalit politics. According to Dr. Gudavarthy, we need to go back to larger structural forces that cause oppression and must frame appropriate strategies. One must not merely try to use reservation to fight discrimination. Instead, one should also try to go into questions of the common neighbourhood schooling system in order to increase inter-generation mobility. We also have to question the model of neo-liberal growth and figure out as to who is benefitting from it. According to him, this model of distribution in multiple pies will only increase the urge

for greater fraternity, and thus promote the rise of authoritarian right-wing regimes.

The discussion was then opened for questions. Adv. Kiruba Munusamy had a question for Dr. Gudavarthy and Dr. Kundu. The question was in reference to Dr. Gudavarthy and Dr. Kundu's statements about rural children, neighbourhood schools and the tribal students who brought up new ideas, but had no methodology or secondary resources for their research. Her question was whether we are becoming linguistic fascists, especially considering that today vocabulary is considered to be knowledge, and concepts and ideas are disregarded. She questioned whether we are exerting intellectual arrogance by adopting conventional methods.

She also asked Dr Gudavarthy regarding his opinion about the requirement for fraternity. She asked whether it would be right to say that fraternity comes in only with the acceptance of differences. She asked whether it would be reasonable to expect society to accept differences too.

Ms Munusamy also remarked on the point of addressing Dr Sukumar as a 'Dalit intellectual', and whether this should be considered as assertion or stigmatization. She spoke about how she had experienced the same situation. She spoke about how she is always referred to as a 'Dalit lawyer', as opposed to being referred to as a Supreme Court lawyer, as other lawyers would be addressed. She has not only taken up cases under The Scheduled Castes and Tribes (Prevention of Atrocities) Act but had also taken up cases on the transgender appointment, promotion in services, amongst others. So, Ms Munusamy spoke about how when a member of her group addresses her as a lawyer who has reached the SC from her community, she feels assertive and respected. But when a person from outside her community addresses her as a Dalit lawyer, she feels stigmatized.

Prof. Sukumar also objected to the statement that reservations have been blocking anti-caste politics. According to him, anti-caste politics has been shaped by reservations. He also wondered whether there was even a possibility of common humanity in a caste society. With regards to the failure of caste mobility and anti-caste politics, he asked whether it was only the agenda of the Dalits to address this failure. According to him, the failure of anti-caste politics is also the problem of the one who created the caste identity. Because, one has to look at who is the person who is against the fraternity, inter-caste marriages and inter-caste dining. It is the person who created the caste identity.

Prof Sukumar also agreed with Ms Munusamy's statement and said that he would like to identify himself as a Dalit. But he would not like it if someone else addresses him as a Dalit. Thus, it would depend entirely upon the context. According to him, everybody has their own agency and one has to recognize

it. Also, in Ambedkarite agitations, the caste identity is asserted. Here, caste is used to argue that equality has been denied. For this, one has to use caste. He also referred to Dr Gudavarthy suggesting a common schooling system. Prof. Sukumar said that the common schooling system already exists, but prejudices continue to prevail in Indian schools.

In response to Ms Munusamy's question, Dr Gudavarthy clarified that when he emphasized fraternity, he did not mean the Rortian, undifferentiated fraternity. He said that this is not desirable in the Indian context. He explained that we would need to keep these differences, as caste is a ladder-like structure. But one must look into ways of reading this difference along with a notion of fraternity. Thus, we need to keep this question of fraternity and the form that it ought to take, alive, especially in this time of surging nationalism.

According to Dr Gudavarthy, this is something that Dalit-Bahujan politics must think about. He said that the caste Hindus would never think about this as they have been historically ruled out. A persuasive answer for this would come from Gyorgy Lukacs who said that when people who have been objects of history become the subjects of history, then we will realise the new universal.

Dr Gudavarthy further explained that if one wants to get a sense of historicity, one would realise that the Dalit-Bahujan perspective is a project on reading the differences between social mobility and the notion of fraternity. This was also the main difference between Ambedkar and Gandhi. Gandhi undermined social mobility and overemphasized collective fraternity. But Ambedkar was trying to conjure a dialectic between difference, mobility, recognition, and fraternity. He said that this was something that was missing in Dalit-Bahujan politics, which was partly under the influence of neo-liberalism.

But Prof. Sukumar disagreed with Dr Gudavarthy on this point. According to Prof. Sukumar, Dr Gudavarthy was questioning anti-caste politics. He also said that one cannot simply say that only Dalit-Bahujan politics ought to look at ways of reading differences along with a notion of fraternity. According to him, caste Hindus must also look into the same.

However, Dr Gudavarthy clarified that he was not questioning anti-caste politics, but was only questioning a variant of anti-caste politics. He also said that in an ideal world it would be great if Brahmins also tried to talk about the fraternity. But historically, they have no reason to do it as they are happy in this current system. Hence, he argued that Dalit-Bahujan politics cannot simply mimic what caste Hindus are doing.

He also responded to Ms Munusamy's point by saying that the issue of identity has two sides to it. This is because the identity of a Dalit is historically

imposed. One can signify it in terms of assertion or rebellion, but one should not forget the fact that this is a historically imposed identity in terms of its discriminatory practice. Often Dalit intellectuals themselves abdicate their Dalit identity, for instance, as seen in the case of Gopal Guru. However, in this scenario, Dalit-Bahujan groups criticized him for this and called him an opportunist. Here, he was actually trying to transcend his identity, but this came across as an abdication of responsibility. Thus, identity raises all kinds of intricate and touchy questions.

Adv. Jayna Kothari also raised a point regarding the issue of common humanity and fraternity that had been brought up. She said that, in principle, she agreed with the idea of moving towards a common humanity. However, her issue was with respect to what possible meaning ought to be given to the term 'common humanity'. She said that the definition could end up being one that did not recognize differences. In an instance like this, the specificities are very important. Referring to Dr Gudavarthy's statement regarding the dilemma which exists, Ms Kothari said that the dilemma would always be there. For instance, should one say that one is a woman or is gender non-conforming? This is because there is no idea of humanity that encompasses everything.

Dr Kundu continued on a point that had been made by Dr Gudavarthy. Dr Gudavarthy had said that we have enriched our understanding with the classification of caste and that we know much more about social and deprivation issues. However, Dr Kundu spoke about how he had been asked multiple times whether the Sachar Committee had even achieved anything, or whether it had helped the Muslim population in any way. In fact, the criticism made against the Sachar Committee was that the greater knowledge and understanding that it had brought about had not really helped the political process, but had instead polarised it. Thus, according to Dr Kundu, this was an important issue, and he said that he agreed with Dr Gudavarthy's point that the larger solidarity issue is important.

Dr Kundu also referred to Amartya Sen and his book 'Identity and Violence'.[29] In that book, Dr Sen said that a Muslim would have a large number of identities. For instance, he/she could be a professor, the chairman of the local resident association etc. But the present politics is such that, whenever it comes to any kind of benefits, only the identity of being a Muslim is upheld. All the other identities are forgotten. Reservation is meant to address all the inequalities in the system. However, capability inequality is very high, and 50% of capability inequality is not because of individual factors; it is because of societal factors. Dr Sen's question was whether society discriminates against individual Muslims or the entire community at large. For instance, you find out that society's discrimination is not against an individual, but is against the

[29] Amartya Sen, *Identity and Violence* (New York and London: W.W. Norton 2006).

whole caste. Here, you would require policies for the whole caste, not for an individual. Individual caste level inequality is a matter which is conditioned by several other things. If social discrimination, historical deprivation, and historical discrimination is a subject that is to be redressed, then one would have to find out how society discriminates. Thus, according to Dr Kundu, just increasing the depth of knowledge is of course very important. But one must also find out on what basis discrimination is being made and try to address that.

An audience member had a question about tackling caste in the private sphere. His question was that since the law does not provide an answer to the private domain, what would be the solution to tackle the logic of caste that prevails in the private sphere.

Another question was whether sustainable development could help solve the problem of reservation. This was in the context of Dr Gudavarthy's statement that there is a need for an alternative for reservation, and Dr Mahajan's statement that due to scarcity of resources, there are a lot of problems in society.

C. Jayna Kothari

The third panellist of the session was Ms Jayna Kothari, Senior Advocate, Supreme Court of India, and co-founder of the Centre for Law and Policy Research. She began the discussion by saying that she intended to look at the topic of reservations based on two emerging themes, but would not get into the 103rd Amendment to the Constitution and reservation based on economic criteria.[30]

She instead decided to delve into two emerging themes, which would chart out a new direction on reservations and would help us think deeper and wider on the reservation and affirmative action debate. Concerning the issue of widening affirmative action, she dealt with horizontal reservation for transgender and inter sex persons. On the issue of deepening affirmative action, she spoke about promoting reservation for people with disabilities. She said that horizontal reservations and reservations in promotions are classical reservation themes. But they take on a new dimension when we speak about it in the context of transgender persons and persons with disabilities.

The Indian society's primary debate on the reservation has always been in terms of caste, and lately based on economic criteria. However, the challenge is to look at reservations based on the claims of transgender persons and persons with disabilities. Their issues have always been sidelined, but they are now entering the reservation debate, legally, in courts. Therefore, we would have to look at how the courts would address this.

[30] The Constitution (One Hundred and Third Amendment Act, 2019).

Ms Kothari first addressed the issue of horizontal reservation for transgender persons. In the case of *National Legal Services Authority v Union of India* (NALSA case),[31] the Supreme Court held that all persons have the right to self-identify their gender as male, female or transgender. It was the first time the Constitution recognized the rights of transgender persons. The Court recognized that there has been discrimination and stigma faced by the transgender community for a very long time. Therefore, they should be provided special provisions and reservations under Art. 15(4) and 16(4), and that they should be recognized as socially and economically backward communities, backward classes, Scheduled Castes (SC) and Backward Classes (BC). Ms Kothari specified that although she used the umbrella term 'transgender', the term covered many non-gender-conforming identities, including intersex persons.

According to her, a problem with the *NALSA* judgment has been that the SC gave very confusing directions in the case. It said that transgender persons should be provided reservations. But it also held that they should be recognized as a socially and educationally backward class and should be provided reservations under Art. 15(4) and 16(4). They specified that. But they didn't go any further to see in what manner the reservation should be provided. It left this issue unresolved and did not provide any directions for the same. According to her, providing reservations under Art. 15(4) and 16(4) was not the right way.

However, following the *NALSA* judgment, nothing much has been done. Most states have yet not provided any form of the reservation to transgender persons. However, Tamil Nadu has taken some steps towards this end. What Tamil Nadu did was, it introduced a government order including transgender persons within the category of 'Most Backward Persons' (MBC). Tamil Nadu simply calls its OBC as MBC. Transgender persons are included within this MBC list. There is no subdivision of percentage within the MBC category. So, for instance, if there is ten percent reservation for the MBC category, and there are 20 different categories within the MBC, the Tamil Nadu government's policy does not say how much each would get. So here, the MBC category becomes a pool.

One would have to look into why there is a demand for horizontal reservation. The horizontal and vertical categories were first defined in the case of *Indra Sawhney v Union of India*.[32] Vertical categories were the social categories of caste, SC, ST, OBC etc. The horizontal categories were the special categories, for instance, women, persons with disabilities, amongst others. And therefore, there could be interlocking or intersectional categories. For instance, if you're an SC woman, you would be assured of some reservation within the SC category, or if you're an ST woman or an OBC woman.

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[31] *National Legal Services Authority v. Union of India and others* [AIR 2014 SC 1863: (2014) 5 SCC 438].

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

However, putting transgender persons within the MBC category as a form of providing reservation could lead to issues because, in such a scenario, transgender persons who are SC or ST would have to give up their SC or ST identity if they want to be recognized as transgender persons under the MBC category. The SC or ST category reservations also have additional benefits and more favourable concessions. Therefore, if individuals belonging to these categories want to get additional benefits, they would have to give up their transgender identity. Thus, one cannot enjoy the benefits of both categories. One can have both only if there is a horizontal category or a special category of transgender, that is made, which would then allow individuals to assert their SC, ST or OBC identity as well.

According to Ms Kothari, this could lead to the problem that Dr Gudavarthy pointed out, wherein people are clamouring for more pieces of the same pie, which could lead to more strife. However, if one looks at the experiences of the transgender community, they really have no other option if they want to get access to public employment. In order to give an example of how the inclusion of the transgender community in the MBC category is working out, Ms Kothari gave the example of a case which she was working on. In that case, three transgender persons had applied for the post of police constables. The post of the police constable is the only post where a majority of transgender people are able to apply for employment. When they apply as trans people, they often fall under the MBC category. However, the age concessions given to MBC persons are much lower than the age concessions given to say, SC or ST people. For example, if you fall within the MBC category, you have to be 24 years old in order to apply, and you can apply up to 26 years of age. If you belong to the SC/ST category, you can apply up to the age of 30, and if you are a destitute widow, you can apply up to the age of 35. The educational qualification for the post of police constable is the 12th standard. However, for most transgender people, it is quite difficult to even complete their 12th standard due to their personal circumstances. A lot of them drop out of their homes and schools and are not able to complete their 10th or 12th standard until they are 27 or 28 years old. Under these circumstances, they may not make it even under the MBC category. Ms Kothari had argued that they did not meet the eligibility criteria as they did not meet the age cut-off, not because of a lack of educational qualifications. Therefore, a first case was filed where it was argued that transgender people should be allowed to apply despite the age cut-off for the MBC category.[33]

The next phase was regarding the marks cut-off. This can be a question of merit. The way reservation policies are framed, every category gets a differential cut-off in marks. For instance, if the general cut-off is 50, for MBCs,

[33] Deccan Herald, 'Transgender seeks age relaxation up to 45 years' (*Deccan Herald*, 15 June 2019) < https://www.deccanchronicle.com/nation/current-affairs/150619/transgender-seeks-age-relaxation-up-to-45-years.html>

the cut-off would be 40, for SC/STs, it would be 30. Hence, we talk about reservation because every category and interlocking criteria that an individual falls under improves their chances of getting into public employment or getting public education. And this is very essential for moving up or to be able to do anything in life. Putting transgender persons in the vertical category is not allowing them to move up. Thus, there is the issue of widening reservations to new categories of transgender persons. A question arises as to whether we must slot them in the horizontal category of the gender of women, or whether there should be another category of transgender persons under the horizontal category.

Ms Kothari then moved on to the issue of deepening affirmative action. With respect to this, she took up the issue of reservations in promotions for persons with disabilities. Reservations for persons with disabilities are not provided for in the Constitution. It has only been done through legislation. Earlier, we had the Persons with Disabilities Act, 1995 (PWD Act).[34] Before that most state legislation and state recruitment service regulations provided for some reservations for people with disabilities in the lowest posts. But the PWD Act 1996 and the Rights of Persons with Disabilities Act, 2016,[35] provide for reservations for persons with disabilities up to 4% in public employment and public education as well. However, they do not talk about reservations in promotions. The issue of reservations in promotions is a hot topic, but when it comes to persons with disabilities, the debate is silent. The statute only says 3% or 4% reservations in employment. The statute does not say reservations 'only in the entry level'. The government has issued several office memoranda or government orders to say that reservations in promotions for persons with disabilities will only be at the lowest post, which is Group C and Group D posts, and not in the upper posts of Group A and Group B which are the highest level posts. This was challenged because persons with disabilities were not able to move up, as many posts could be filled only by promotions. This led to the SC decision of *Rajeev Kumar Gupta v Union of India* in 2017.[36] In this decision, J. Chelameshwar held that the law talks about 'employment' and employment includes promotions as well. Therefore, there is no bar to reservations in promotions. The government then raised an issue saying that this matter should be referred to a larger bench because it didn't interpret *Indra Sawhney* correctly. And now this issue has been referred to a larger bench and is pending hearing in the Supreme Court. It doesn't make the news because issues of persons with disabilities don't make the news.

Going back to the *Indra Sawhney* case, it didn't really focus much on promotions. It overruled the decision in *General Manager, S. Railway v*

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[34] The Persons with Disabilities Act, 1995.
[35] The Rights of Persons with Disabilities Act, 2016.
[36] *Rajeev Kumar Gupta vs Union of India*(2016) 13 SCC 153.

Rangachari that reservations in promotions should not happen for five years.[37] So there was an amendment to the Constitution where a provision for reservations in promotions for SC/ST persons in employment was inserted. That was challenged in *M. Nagaraj v Union of India* and the Supreme Court upheld it.[38] But, despite that being upheld, the issue of merit and efficiency in administration is being raised again, in the context of persons with disabilities and promotions for them.

Ms Kothari explained that she had brought this up to show how the categories of transgender persons and persons with disabilities are always sidelined with respect to the issues of horizontal reservations and reservations in promotions. These issues need deliberation. According to her, we cannot yet do away with reservation, and the widening and deepening have to continue taking place. Categories like transgender persons, persons with disabilities, Muslim minorities, amongst others need recognition and inclusion within the reservation policy. However, she also agreed that there was a need to supplement the reservation strategy with a discourse that focussed on equality. We would have to address both, discrimination and prejudice. She referred to an Equality Bill that had been drafted by the Centre for Law and Policy Research (CLPR).[39] The Bill aimed to address prejudice and to ensure that in addition to reservation, there are positive obligations of equality that are imposed. This could be by means of a Diversity Index or by inclusion in the public and private sphere. Along with this, one should also look at the emerging themes on the reservation.

An audience member sought Ms Kothari's views on the Transgender Bill with regards to the *NALSA* judgment.

Ms Kothari spoke about how there is quite a lot of criticism against the Transgender Bill, which is now an Act. The criticism mostly pertains to the issue of identification. The issue of identification and how it is addressed has a direct impact on all reservations. The Act does not actually provide for any reservations, though it provides for non-discrimination. The Act says that there would be no discrimination against transgender people in employment, education etc. But it makes no provision for reservations. But with respect to the issue of identification, the SC had said that one could self-identify one's gender or identity. But the Act mandates a procedure for identification which includes an application to the District Magistrate. Then, a procedure could be laid down by which an identity card or some sort of recognition will be given. All of this

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[37] *General Manager, Southern Railway, Personnel Officer (Reservation) v. Rangachari* AIR 1962 SC 36.

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

[39] The Draft Equality Bill, 2019<https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-4.pdf>

is right in the face of the *NALSA* judgment. However, one would have to wait and see how this whole procedure will pan out.

However, Ms Kothari said that when the issue of self-identification was brought up in courts, the courts raised the question as to how self-identification could be allowed. Courts said that there could be a possibility that people would misuse it, and try to get an identification of being transgender so that they would get reservation benefits. However, according to Ms Kothari, self-identification would be possible, despite the SC saying that doing so would be difficult.

Another question was regarding the *NALSA* judgment which had directed the state to consider the transgender community in the SC/BC category. The question was whether putting them in the SC/BC categories was justified, or if they're not considered in the SC/BC category, what was the present status of the transgender community.

Ms Kothari replied that the problem with the SC/BC category was that it is very complicated in nature. The SC decisions on the SC/BC category are very confusing and are not clear. Largely, socio-economic SC/BC category is equated more or less to the OBC category. This is what is happening in Tamil Nadu. But according to Ms Kothari, this is not adequate. She said that the SC made a mistake by saying that it should be the SC/BC category. Instead, the SC should have left this open. What is important is that people must not be made to choose their category of reservation.

D. Dr. Gurpreet Mahajan

The fourth panellist in this session, Dr. Gurpreet Mahajan[40], sought to reflect on all the issues that were discussed and engage with them.

Commencing with the issue regarding the policies on affirmative action, Dr. Mahajan pointed out that India has many policies on affirmative action other than those of reservation. However, reservation has been a pivotal component of these policies, and has been the subject of discussion for a long time. Hence, Dr. Mahajan limited her attention primarily on reservation.

She pointed out that throughout the day, the panellists had used three concepts, that is, equality, diversity and justice. One would have to identify which concept would be best suited to understand the idea of reservation in India. The temptation would be to begin with the idea that reservation is placed within the broader ambit of equality. However, Dr. Mahajan submitted that whenever the question of reservation is raised, a challenge is posed to it from

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the discourse on equality,which requires the justification on the need for reservation. Thus, reservation has a very complex and uneasy relationship with the concept of equality. Reservation has entered the debate from the vantage point of formal equality. Here, the idea is about equality before law, non-discrimination and identical treatment of all persons. This has been further discussed in the terms of equality of opportunity which allowed many analysts to bring in the issue of inability to ensure equality of opportunity unless there is a level playing field. This provides an explanation or a justification for differential treatment at times. According to Dr. Mahajan, the analysts argued that formal equality will not really be serving any purpose because that parameter of formal equality is being undermined due to an unfair playing field. So, reservations or the idea of reservations of various kinds or differential treatment for any category of people find their place in this analysis. But it needs to justify itself all the time especially when it is pitted against the discourse on equality. For this, one has to look at the historical context of the idea of equality. The idea of equality came up against the notion of differential treatment or different rights for various categories of people. If one looks at the discussions and debates on equality from the 16th century onwards, people always question the distribution of certain kinds of privileges to a particular category or group of people. This could have been on the basis of property, noble birth, gender or race. The entire discussion on equality has been about doing away with these privileges, and arguing for equal treatment. Moreover, affirmative action of any kind, reservations in particular, put a question mark against that idea that identical treatment serves us well throughout.

Thus, when understood in this historical context, the entire idea of reservation is to say that sometimes differential treatment is required. However, the need for reservation is required to be justified all the time. The questions posed range from the grounds on which this difference is made, its necessity etc. Thus, Dr. Mahajan contended that reservations have always had a very complex relationship with the idea of equality.

However, the question of substantive equality has rarely been the theoretical site of discussion around affirmative action. This is because, here, the contention is not about the equality of the end result. However, equality of opportunity has to ensure that everyone has the same starting point so that they can compete equally with each other. So, if some people are starting from a certain kind of disadvantage from the beginning, then that has to be rectified. Thus, it is not about substantive equality.

She then moved on to the concept of justice which also figures quite prominently around the discourse on affirmative action, reservation and quotas. The term compensatory justice is most often used in the West and North America. This refers to the idea that if some harm has been done to individuals historically, you have to compensate them. Both these terms of ‘compensatory

justice' and 'harm done historically' are something that fitted well within the dominant liberal discourse of Western democracies. Dr. Mahajan said that she was not someone who would make a distinction between Eastern and Western thinking. However, she believes that a historical context makes a difference to the content that is put into the idea of equality and justice. For instance, in America, debates occurred around the possibility of parallel lists to pursue affirmative action for African-American and other groups. Here, the debate was about correcting the harm done and the historical wrongs committed. But the principle of compensatory justice invariably led to debates about who compensates whom. It is very individual-centred and led to all kinds of defence. Dr. Mahajan further asserted that in India, the thoughts about this subject was different and with greater insights because India didn't have the inheritance of a million languages of harm. Today, the idea of justice is understood as the idea of social justice because the point which is sought to be put across through reservation and affirmative action policy is that the social structure needs to change.

This idea is forward looking as it suggests that society in the future must not look like the society that exists at this moment or like the one which was inherited from the past but one which has changed in the best possible manner. So, it was a utopian thinking of the fundamental structure of such a society. However, political utopias play a very positive role in imagining the future. The notion here was that we could perhaps think of ideas like affirmative action and reservations because they would create a different kind of society.

When one looks at the Constituent Assembly Debates regarding reservation, it is visible that the Assembly members rarely use the word 'historical wrong'. Many people in fact use the language of guilt, and they use it often when they talk about collective responsibility. According to Dr. Mahajan, this is an interesting shift in terminology because the language of historical wrongs means that we have to correct it and set it back right.

If one studies the debate on affirmative action in America then one of the issues that comes up is the assertion that if a particular individual did not hurt a person, and they did not hold any prejudice against that person, then why should they be asked to give up something or be denied admission. To this, Dworkin had answered that nobody has a right to higher education. Nobody can argue that they are one of the millions who want to be a lawyer and therefore, there should be one million seats for lawyers. Dworkin says that there is a right to basic education, but there is no right beyond that. The reservation issue thus contends that it does not matter whether a particular individual has been complicit in the system, or whether they did it themselves. However, what matters is that they are a part of a society where they are implicitly benefitting from the structure that exists, because of which they enjoy a positional

advantage. Therefore, the individual is collectively implicated in the manner in which the society has come to be.

According to Dr. Mahajan, we need to put an alternative vocabulary in place with respect to the issue of reservations and the issue of justice. We have to think back apropos the many ways in which we have been advantaged or disadvantaged due to collective actions.

She thereafter flagged the third concept of diversity. She mentioned that the diversity discourse came up in the Michigan University case,[41] where the courts allowed for some parallel lists in the name of diversity but not for past discrimination. Dr. Mahajan maintains that this judgment was very interesting to tell us what diversity arguments often entail. This case did not focus on past discrimination, but instead focussed on how it would be good for the society to have a diversity profile and to have a learning experience with each other among other things. In India, the term diversity is often used to imply that we are a diverse country or that we are culturally plural. But when it comes to the issue of caste or reservation, the term diversity is not used at all. In Dr. Mahajan's opinion, the Western analysts had got this idea, understood this idea, made the difference in the conceptual vocabulary and left it for us to reflect over.

In India, the Constitution making was a process of consensus making. Therefore, one cannot think of any one principle which is at work consistently all through the chapters of the Constitution. With respect to reservations, there are three different logics at work. One is focussed on the idea of discrimination and past social prejudice standing in the way of opportunities being given to those who were the object of the prejudice. The second is concerned with the presence of an inclusion element. Since many tribal communities have a particular way of life, they have learnt to stay away. Hence, there is a need to bring them in and include them. Thus, there are the two different aspects of the inclusion element, that is, discrimination and a distinct way of life.

However, there was a second logic that was at work discussed previously in the session, that is, discrimination, and disadvantages. There was a huge debate around the term which ought to be used; whether it should be backward classes, minorities, or backward castes, classes and minorities. The members finally settled on Other Backward Classes since they were thinking in terms of the different kinds of disadvantages that people might face, and leave it to the government to decide what would be suitable in order to deal with the disadvantages.

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[41] *Gratz v. Bollinger*[2003] 539 U.S. 244.

The third element pertains to the adequate representation. However,Dr. Mahajan asserts that these are separate logics, because they actually pull in different directions. Nonetheless, the Constitution in its present form makes a separation between discrimination and disadvantage. The measures that are given for including people, who on account of social prejudice would not be included constitute one category of people. However, there is also an enabling clause which says that governments can decide how to deal with disadvantages that the people face who come under the category of backwardness. Nevertheless, this then leads to the problem of determining what would be the measure of backwardness. Many court judgments have held that caste cannot be the sole criteria. So, they bring in backwardness in terms of occupation and other kinds of positionality that one would have to give up. Thus, different judgments actually pull out different logics, and most often, there are different kinds of logic at work.

Dr. Mahajan specified that the discussion was regarding central level policies on reservation. The diversity of practices and policies relating to reservation at the state level is enormous. Dr. Mahajan gave the example of Karnataka, and explained how the state made a five-fold classification. One of these was for economically weaker sections which included all other groups. Thus, the idea of disadvantage, which is one part of the Constitution, has been interpreted in many different ways in State Commission Reports on Backward Classes. According to Dr. Mahajan, there as on why the discussions in India actually make a distinction between SC, ST and reservations around them, and the OBCs is that there is a difference in the logic that is being operationalised when we make claims of reservation for both these categories. In the case of SCs, it is discrimination which is the central concernand entails disadvantage of various kinds. These include the social, economic and educational disadvantage.

Dr. Mahajan also brought up the issue of intersectionality and the problems they pose,which are not limited to inclusion and exclusion. She pointed out how the day's discussion majorly revolved in terms of those who think that reservation is necessary versus those who think that it is not necessary. However, there is also a challenge from groups who are the recipients but are questioning as to why their demands for inclusion into the share of people who want to move from one category to another, for instance, from the SC category to the ST category, or from the OBC category to the SC category, are not being fulfilled. According to Dr. Mahajan, some of the most difficult questions in the history of reservations are posed by the people who ask where they ought to be positioned. The second element of this issue is when an individual has already been positioned within a category then how should they be treated within it. Another issue pertains to the framework within which they should take up these issues. There is a historical difference in terms of the orientation of the various groups,and in terms of what they demanded and what they are

seeking now. This is seen with respect to the Valmiki community in Punjab who wanted sub-quotas. They were given the sub-quotas but this was later pulled out.

Talking about the way forward, Dr. Mahajan opines that the identity should not become a permanent asset. A policy has to be devised which works in such a way that no identity becomes a permanent asset. Thus, one would have to find a way of churning internally so that all these sub-group claims that are emergence cannot be met by simply giving sub-quotas. She also said that we need to think in terms of those who are economically vulnerable but do not fall within the ritually lower caste groups. This is something which the Backward Classes Commissions in many states have started thinking about. Here, one would also have to think about weightages. She explained about Prof. Kundu's Department which had devised a category of backward districts. So, for instance, if a person studied in a school in a backward district, they could be given certain weightage, for example, additional marks to offset the person's disadvantage. According to Prof. Mahajan, disadvantages allow for some kind of manoeuvrability in the kind of policies that are enacted. However, for discrimination, stronger measures are needed.

Another issue that was raised earlier in the session had been about the accomplishments apart from all the numbers and figures. India is a country where there is a scarcity of almost all facilities. Rawls had said that no principle of justice can work in a situation of acute scarcity and justice principles can only work in situations of moderate scarcity. However, we do not live in a world of moderate scarcity, but instead, live in a world of acute scarcity. Hence, according to Dr. Mahajan, there is a very good reason to make a distinction between the policies for people who have been discriminated against and the policies for those who have received a variety of disadvantages.

Dr. Mahajan proceeded to give an example for why she believed that a distinction has to be made. This would also help in answering the question which has often been asked regarding the need for reservations. She took the example of a person wants to get into AIIMS or any good public hospital. This is often exceedingly difficult to achieve because of the limited number of beds. In such a scenario, in absence of the ability to meet a specialist, the person might use their group or community network. By using the community network, they will at least try to get an appointment with the specialist. In situations of scarcity, networks are ways in which people have access to basic facilities which they otherwise would not have had. This element of presence of different groups in different spheres, makes a huge difference to the amount of access one can have to the facilities that are available to everyone. If that is a general statement about presence then there is an even greater reason for people who have an added burden of being excluded due to social prejudice and being discriminated against, to assert their presence.

Prof. Sukumar posed a question to Dr. Mahajan wherein he referred to her point that no identity must be permanent. In response, he argued that when it comes to reservation or any other kind of benefits, the identity can be an asset. He further asked that excluding the reservations for SCs, whether hypothetically equality would prevail in the case of stigma. Dr. Mahajan, in this regard, clarified that she had rather contended that there must be no identity at all, and further that discrimination is an issue different from disadvantage.

Ms Kothari raised her difference with Prof. Mahajan regarding the terms,'disadvantage' and 'discrimination'. According to her, sometimes, disadvantage and discrimination may collapse. This can be seen with respect to a person with a disability. Such a person can say that they faced disadvantage, but they might also have faced deep-rooted discrimination. Therefore, one cannot always say that disadvantage and discrimination are such tight compartments.

An audience member raised a question for Dr. Mahajan which pertained to institution-based reservations vis-à-vis department-based reservations. Institution-based reservations might perpetuate ghettoization more than department-based reservations. Thus, it raises the issue regarding the policies that are otherwise really caste conscious, but also leads to perpetuation of the logic of caste in the longer term. To address this issue, the question arises as to whether the answer is within the ambit of reservations or if there is a need to completely rethink the way affirmative action is done?

Another question raised was concerned with whether sustainable development could help solve the problem of reservation. This was in the context of Dr. Gudavarthy's statement that there is a need for an alternative for reservation, and Dr. Mahajan's statement that due to scarcity of resources, there are a lot of problems in the society.

The third question posed to Dr. Mahajan from the audience was whether primary education would help in reducing the reservation criteria. This was in the context of her assertion that primary education plays an important role in the development of the backward classes. Another audience member enquired as to what the government could do to ensure that children get proper primary education.

Dr. Mahajan replied that it is true that reservation is implemented from the level of higher education, and the issue often comes up about how opportunities are being distributed at an earlier level. That is something which must be looked into. For instance, the Delhi government is trying to persuade schools which receive government benefits to take in students from different groups and castes. Government schooling was intended to be something which would be mixed. But when people have economic and other social resources, they

move of out of the government schooling system. Once the middle class left the government system, the education became worse off thus creating multiple levels of disparities which is unacceptable. This is another issue which needs to be addressed. According to Dr. Mahajan, this is where the law becomes important because it gives the victim or the concerned affected party an opportunity to make the claim for justice. While law cannot always change behaviour patterns, it does intervene in the private sphere. This was clearly seen in the bill against domestic violence. Thus, the issue is about effecting a change in attitudes because law can bring some relief to those who are the victims. However, this entire issue of government schooling is also a very complicated issue when one looks at the factors such as weak infrastructure in districts which have a large Muslim population, the factors mentioned in the Sachar Committee Report[42] etc.

Dr. Mahajan also took up some additional issues which had come up from the other panellists. She informed that she was not in favour of merely splitting the population. According to her, the problem associated with thinking in terms of sub-groups is that there is always the possibility of further sub-groups emerging. Thus, she advocated the idea of thinking only in terms of quantitative measures. For her, a good starting point is the distinction between discrimination and disadvantage, wherein the former has a legal and social sanction where as the latter can be accrued due to a variety of reasons. For instance, in the OBC list, there are many groups which were artisans or were engaged in occupations which are no longer tenable, or occupations which have become marginalised because of technology and industry. This shows that disadvantage can have many aspects. Thus, we may need to do similar things like reservation. According to Dr. Mahajan, straight proportionality would also not work.

Dr. Kundu then made a few points on what Dr. Mahajan had spoken about. He referred to Dr. Mahajan's statement that networks often work for getting admission or getting an expert's opinion in a hospital. He said that he wanted to substantiate this point by referring to the urbanisation data. For Muslims, the rural-urban gap is very high in terms of income and consumption expenditure, life expectancy, education as well as in terms of access to quality jobs. In the last two decades, the migration of Muslims from the rural to urban areas had gone down the lowest. However, this is not the case when one looks at the data regarding the SC population. The migration of the Hindu SC population to the urban areas is slightly higher. Similarly, the migration of the non-Hindu SC population percentage share in the urban areas has increased largely because of networks that get created.

[42] Ministry of Minority Affairs, *Sachar Committee Report* (Government of India, 2006).

Dr. Kundu also questioned Dr. Mahajan's point about collective social responsibility based on the idea that there would always be the question of who ought to compensate. Dr. Kundu mentioned a particular instance at a university where he spoke about collective social responsibility while talking about climate change. A student asked him as to why she should be held responsible today for what her grandfather or great-grandfather did with respect to the pollution. Therefore, according to Dr. Kundu, there are not many takers for this idea of collective social responsibility.

Dr. Kundu also questioned on how one could explain collective social responsibility in the backdrop of the Hindutva agenda of efficiency and competition in the global market. According to him, one possible solution for this could be the Diversity Index. For instance, one could tell corporations that the Diversity Index would have to be complied with otherwise they would not get access to concessional land or concessional input. As mentioned previously, there aren't too many takers for the idea of collective social responsibility at global negotiations or national level negotiations. Hence, in order to bring about a movement to celebrate diversity, one could try to recommend the Diversity Index based incentive and disincentive system, and the naming-blaming of certain private companies.

Dr. Mahajan clarified that she did not believe that India needed a set of concepts which was so unique to the country that nobody else could relate to it. Even though the West did not realise it but they were using the idea of collective responsibility. The future generations have agreed to the belief that this is a possible way of thinking. Governments might not agree to this and persuading governments is a different issue.

Dr. Mahajan also mentioned that the issue of desegregation, cultural difference and stigma had come up often. She mentioned that large-scale hostility in sending children to desegregated schools was well-documented. The feminist movement and the African-American movement had tried to turn this negative stigma and cultural difference into a positive one. Thus, there is a need to address the issue of stigma, cultural recognition and differences that came up at that point of time.

She also maintained that she agreed with Ms Kothari regarding the issue of fraternity. She opined that the challenge currently is to think in terms of what notions of fraternity would have a moment of universality and particularity in it. Dr. Mahajan further opined that when we think about fraternity, it has to be a new kind of fraternity which has space for differentiated selves.