Judicial Discourse on India's Affirmative Action Policies: The Challenge and Potential of Sub-Classification

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ABSTRACT

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This thesis is primarily concerned with the distribution of quotas in higher education and public employment within identified beneficiary groups. In a system of quotas based on preferential treatment of groups, the question about which members of the group must benefit over others is a crucial one. One of the main themes in the thesis is to critically analyse the judicial understanding about the nature of these groups. The homogeneity (in backwardness) that is attached to beneficiary groups in differing degrees is challenged in the thesis using the examples of Scheduled Castes and Muslims within the Other Backward Classes category. The differences within beneficiary groups have great significance for the fairness of India's reservation policies. By ignoring internal differences, the most marginalised groups are left behind in terms of accessing the benefits of reservations. I have argued that any attempt to address the issue of sub-classification must begin by recognising multiple axis of marginalisation within the framework of intersectionality. This lack of sufficient engagement with the issue of sub-classification highlights the failure of the Supreme Court of India to develop a normative framework within which reservations might be viewed. This lack of normative clarity informs spheres of reservations like higher education and public employment along with according homogenous treatment to beneficiary groups internally. The Supreme Court has viewed reservations in higher education and public employment as essentially performing the same function. I have argued that reservations in these spheres perform different functions and the resulting obligations on the state in terms of constitutional justifications must also differ. While the demands for sub-classification present an opportunity to make distribution of reservations fairer, it also exposes the limitation of reservations as a tool of social transformation.

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TABLE OF ABBREVIATIONS

AC	Appeal Cases
AG	Advocate General
AIR	All India Reporter
AP	Andhra Pradesh
B.A.	Bachelor of Arts
BomCR	Bombay Cases Reporter
CJ	Chief Justice
Co	Company
Doc	Document
ECR	European Court Reports
ed(s)	editor(s)
Edn	Edition
HRC	Human Rights Committee
Ibid	Ibidem
Inc	Incorporated
J	Justice
Jr	Junior
Ltd	Limited
NSSO	National Sample Survey Organisation
OBCs	Other Backward Classes
Para	Paragraph

PC	Privy Council
Pvt	Private
SA	South Africa
SC	Supreme Court
SCs	Scheduled Caste(s)
SCALE	Supreme Court Almanac
SCC	Supreme Court Cases
SCR	Supreme Court Records
ST(s)	Scheduled Tribe(s)
U.S.	United States
UK	United Kingdom
UN	United Nations
V	Versus
vol(s)	Volume(s)

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INTRODUCTION

The central concern of this thesis is the fairest possible distribution of reservations (quotas) within beneficiary groups in India. The thesis addresses the challenges and opportunities that the issue of internal distribution of reservations presents for India's reservation policy as a whole. Article 15, which is also the general anti-discrimination clause of the Constitution of India, enables the State to make special provisions for certain groups. Articles 15(4) and 15(5) permit the State to make special provisions for Scheduled Castes[1], Scheduled Tribes[2], and 'socially and educationally backward classes' generally and particularly in the context of higher education.[3] Article 16 provides for equal opportunity in public employment while specifically authorising reservations for 'backward classes' in Article 16(4).[4] Along with reservations in legislatures and institutions of local

[1] Scheduled Castes largely belong to the former 'Untouchable' groups. Untouchability has been abolished under Article 17 of the Constitution but it continues to be a serious concern in contemporary India though its manifestations might have changed. Under Article 341, a Presidential Order in 1950 listed the various groups in each state that would be designated as Scheduled Castes. Though Buddhist and Sikh groups can be designated as Scheduled Castes, Christian and Muslim groups cannot be so designated. Complex questions of religious conversion and the existence of caste in these faiths inform this debate.

[2] Scheduled Tribes are considered to be indigenous groups who live on the margins of Indian society. There have been extensive discussions in independent India about the best method to achieve their integration into mainstream Indian society. Reservations in higher education and public employment are meant to give them an important stake in society's progress and the Indian State. Scheduled Tribes are listed state-wise under the powers granted in Article 342.

[3]Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
. . . .
(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

governance, reservations for Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs)[5] in higher education and public employment provide the main framework for the reservations policy in India. However, my focus in this thesis is limited to reservations for SCs and OBCs in higher education and public employment. Though there are many groups within the OBCs, I will be engaging only with the position of Muslims within the OBCs.

The issue of internal differences amongst beneficiary groups and the manner in which such differences influence the distribution of reservations raises significant questions for the legitimacy of the reservations policy. Reservation by the central government is pegged at 15 and 27 per cent for SCs and OBCs respectively in higher education and public employment. Very little attention has been paid to the manner in which reservations are distributed within the beneficiary groups because the legal discourse on reservations has almost entirely proceeded on the assumption that all individuals and sub-groups within SCs and OBCs must have equal access to the 15 or 27 per cent as the case may be. All individual members of the beneficiary groups having an equal claim over the quota set aside for the group as a whole raises significant challenges for India's

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[4]Article 16: Equality of opportunity in matters of public employment
(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.
. . . .
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

[5] OBCs comprise lower caste groups, Dalit (former Untouchables) converts to Islam and Christianity identified on the basis of social, educational and economic criteria.

group-based reservation policy. The issue of the 'undeserving individual beneficiary' within the beneficiary groups is often used in mainstream rhetoric to attack the legitimacy of group-based reservations. The lack of engagement with differences within each of these beneficiary groups has highlighted concerns about the fairness of the distribution of reservations internally. More importantly, it also raises questions about the ability of reservations as a tool to address the concerns of the most marginalised sections within each of these beneficiary groups.

Much of the lack of engagement on the issue of internal differences amongst beneficiary groups can also be attributed to the lack of normative coherence in the legal and judicial discourse on reservations. The Supreme Court has never sought to clarify the normative underpinnings behind the commitments made in the Constitution of India. The failure to establish/identify the normative foundations and subsequently define the consequences of such foundations has led the Court along the path of viewing reservations as playing the same role for all groups in all spheres. The task of addressing the impact of internal differences on the distribution of reservations would first require an exploration of the possible normative foundations of reservations in India. It is inevitable that any attempt to establish any such foundations would have multiple layers and it would be just as important to reflect on the interaction between these layers. The constitutional commitment to reservations must also be viewed in the context of its position in history and the various social, politicaland economic factors that influenced its adoption in the Constitution. Along with a historical and contemporary understanding of beneficiary groups like the SCs, OBCs and Muslim

OBCs, it is equally important to explore the normative relationship between the permissibility of reservations and the constitutional safeguards of anti-discrimination and equality of opportunity. The Indian Supreme Court has grappled with this issue since its inception and from the mid-70s discarded the earlier view that reservations are an exception to the equality protections. However, this declaration that reservations are a facet of equality has not been accompanied by any meaningful analysis of the consequences of such a shift in position. Similarly, there is no normative clarity about the role of reservations in different spheres. Currently reservations exist in legislative bodies, institutions of local governance, higher education and public employment. The Supreme Court has not examined the role of reservations across these different spheres and has proceeded with the assumption that its role in these spheres is the same. Therefore, the Supreme Court has ended up not distinguishing sufficiently between the beneficiary groups along with not providing a framework for understanding the role of reservations in different spheres.

This lack of clarity and normative guidance on the two fronts, beneficiary groups and spheres of reservation, has tremendous significance for the issue of fair distribution of reservations. Unless there is a clear understanding of the role of reservations for a particular beneficiary group in a certain sphere, we cannot begin to address the issue of fairness of distribution in those groups internally. The question of proportional representation illustrates the problem very well. The Constitution mandates reservations on the basis of proportional representation for SC/STs in legislative bodies and institutions of local governance. However, no such mandate exists for reservations in higher education and public employment

for SC/STs. The Supreme Court has carried on the debate on the permissible extent of reservations in higher education and public employment without addressing the aim of reservations in these spheres. Should proportional representation continue to be the aim or should the focus shift to empowerment, compensation redistribution, diversity etc? Without having a normative framework that answers those questions, the distribution of reservations within beneficiary groups cannot be meaningfully addressed. There have been claims from groups within the SCs in different parts of India that certain groups have benefited disproportionately from reservations while internally marginalising other groups. Similarly, Muslims included in the OBC list do not seem to have benefitted as much from the reservation as Hindu OBC groups thereby raising concerns of internal distribution amongst the OBCs.

The thesis attempts to develop a broad framework within which constitutional questions concerning reservations can be placed. It is a framework that accounts for the differences amongst and within beneficiary groups by identifying the original basis for their categorisation and drawing upon their contemporary reality. The nature and extent of marginalisation of the SCs are very different from that of the OBCs. And within the OBCs, the marginalisation of Muslims in contemporary India has led to intense debate about the need for separate reservations for Muslims. Along with a deeper understanding of the beneficiary groups, I have also accounted for the different spheres of reservation. Drawing on normative discussions, debates during the drafting of the Constitution and academic writing on education and public employment, I have attempted to develop a framework that identifies the different normative concerns at play in

higher education and public employment. I argue that reservations in higher education and public employment fulfil different aims and must be seen as occupying different places in a spectrum defined on the basis of equality of opportunity. Ultimately, the framework views reservations as a complex interaction between the nature of marginalisation being addressed and the normative foundations informing reservations in different spheres. It leads us to a much richer and consistent account of reservations in India along with precisely highlighting the shortcomings of the current judicial approach.

In terms of internal differences within SCs and OBCs I argue that distribution of reservations must factor in the role of intersectionality. It would be counterproductive to distribute reservations internally on the assumption that all eligible individuals within a beneficiary group have an equal claim to the benefits of reservation. Depending on the nature of marginalisation and the aim of providing reservations to a particular group, the most marginalised within the group must get preference. The deficiencies of applying merit principles cannot be limited to mere identification of beneficiary groups and allocating quotas to them. Applying the very same merit principles to determine the beneficiaries within the group defies logic. Once the lack of homogeneity within the beneficiary group has been established, it would run counter to the aims of reservations to allocate benefits on a purely 'meritocratic' basis within the group. There has to be a mediating principle within the group that allows the benefits to first flow to the worst off.

However, there is the danger that internal differences within beneficiary groups might be used to question the viability of reservations as a whole. I argue that the marginalisation suffered by the beneficiary groups meets a certain threshold as against all other groups. In that sense, there is a minimum unifying (external homogeneity) factor when the beneficiary group is viewed externally. But that does not preclude acknowledging the differences that exist within the beneficiary group that have a bearing on the distribution of reservations. The case of Muslim OBCs is particularly complex because it first requires us to establish the difference in position of Muslims within the OBC list and then to further address the internal differences of Muslim OBCs per se. While the issue of internal differences within beneficiary groups raises serious challenges for the legitimacy of India's reservation policies as a whole, it also provides an opportunity to achieve a far more targeted approach to the distribution of reservations within the group. The requirement is for an approach that is built on strong normative foundations wherein the fairness in distribution of reservation within the beneficiary group is a central concern.

Chapter One examines three major justifications for affirmative action with the aim of discerning normative foundations for India's reservation policies. While these justifications emerged in contexts different from the one in India, their relevance for India would be hard to ignore. While the diversity rationale as developed in the United States has hardly found any purchase in the Indian context, compensatory justice and distributive justice as bases for affirmative action are of significant import to the Indian discourse. The central concerns in the chapter are the terms on which the departure from the merit principle can be

made and whether groups can legitimately be beneficiaries without addressing the concerns of the most marginalised within those groups. Chapter Two aims tounderstand the motivations for providing reservations for different beneficiary groups in the Indian context through the lens of the Constituent Assembly Debates. The Constituent Assembly Debates (CADs) are a rich source of the multiplicity of views on the desirability of reservations, identification of beneficiary groups, aims of reservations etc. Apart from mapping the diverse positions on these issues, a discussion on the CADs would be incomplete without understanding their appropriate role in the constitutional adjudication of reservation policies. While they certainly bring in important perspectives and contextualise the direction in which reservation policies have expanded, they cannot be used to provide definitive answers on difficult constitutional issues concerning identification of beneficiaries and role of reservations in contemporary times. Chapter Three is in many ways the backbone of this thesis. Building on the possible normative justifications for reservation and the discussions on the CADs, I have developed a framework within which reservation policies might be adjudicated. The strongest aspect of the framework is that it synthesizes the reasons for providing reservations for a particular beneficiary group with normative reasons for providing reservations in a particular sphere. It is specifically designed to avoid the trap of attributing a misleading homogeneity to the discourse on reservations. The different reasons for identifying beneficiary groups along with the different aims of choosing to provide reservations in certain spheres must necessarily inform the framework within which reservation policies are adjudicated. In the context of the Supreme Court adopting the position that reservations must be viewed as a facet of equality rather than as an exception,

Chapter Four analyses the judicial position on critical issues like the upper limit on quotas in higher education, identification of backward classes, and the role of merit and efficiency. The issues analysed serve to highlight the confusion that has resulted from the lack of a normative framework for reservations within the judicial discourse. Though the Court has articulated the relationship between reservations and equality in a progressive manner, the lack of an appropriate normative framework on reservations has prevented it from taking many issues to their logical conclusion. While the emphasis in Chapter Four is on the spheres of reservation, the focus in Chapter Five shifts to the beneficiary groups. The main concern in this chapter is to understand and demonstrate the heterogeneity that exists within the SCs and problems with grouping Muslim OBCs with all other OBCs. Using the framework of intersectionality, I argue for a system of judicial review that would require the State to address internal group differences while designing reservation policies. Only a framework that is sensitive to internal group differences along multiple axes can work towards a fair distribution of reservations.

The challenge of internal differences amongst beneficiary groups is a serious one for reservations in India. Large heterogeneous groups in such a context will continuously raise concerns about the fairness of distribution. In many ways, the challenge is to examine whether a system of reservations can fully address this issue of relative marginalisation within beneficiary groups. But any attempt to address internal differences must occur within the larger normative framework that informs the constitutional project of providing reservations in certain spheres to marginalised groups. It will be crucial to examine the extent to

which reservations as a tool of substantive equality can address the needs of the most marginalised within each of these beneficiary groups. Even if reservations cannot address this issue fully, it is nonetheless critical that reservations be designed in a manner that facilitates the fairest possible distribution of benefits. Homogenous treatment of beneficiary groups does not take us very far and also contributes to harming the legitimacy of reservations.

CHAPTER ONE: AFFIRMATIVE ACTION AND NORMATIVE CONSIDERATIONS

This chapter aims to explore the various normative considerations that inform three major justifications for affirmative action in relation to education and public employment: compensatory justice, redistributive justice and diversity. Access to education and employment is central to an individual's desire to achieve many things in life in addition to being a relevant ingredient of every individual's assessment of her self-worth. Since all individuals have the equal right to pursue their aims in life, and given that education and employment are relevant to such a pursuit, the critical issue is the terms on which the finite opportunities for education[6] and employment must be distributed. It is normally assumed that this function should be performed by a merit principle that awards positions to those who are able to best perform in those positions. This chapter aims to critically assess three sets of justifications for departing from the merit principle.

Part I of this chapter explores the contours of relevant merit principles that may be employed to distribute education and employment opportunities. The remainder of this chapter considers justifications for departing from this principle. Given that justifications for such a departure can be based on a wide variety of reasons, the aim of this chapter is not to normatively justify the departure from those principles per se but to instead consider the precise terms of such a departure when it is based on considerations like caste, religion and gender. The Constitution of India, given the historical experience of caste, gender

[6] In much of the literature educational opportunities are treated as being far less limited than public employment. The distinction that is ignored very often is that not the same value is attached to all educational opportunities.

and religious groups in India and their position in contemporary India, explicitly authorises the departure from the pure merit principle. Therefore my concern in this chapter is to engage with the possible normative contours of this departure as applied to reservation policies in India. As a consequence, this chapter engages with frameworks of compensatory justice (Part II), redistributive justice (Part III) and diversity (Part IV). Normative concerns while identifying beneficiaries within these frameworks, the exact nature of differential/preferential treatment and the principles that must guide the internal distribution of educational and employment opportunities amongst the identified beneficiaries are central issues in this chapter. In Part II, arguments are put forth for group-based compensatory justice. It is also argued in PartII that compensatory justice should not be seen as imposing unjust costs on individuals or on society but in fact contributes positively towards social integration. Recognising the advantages that arise from the use of educational and employment opportunities (over cash compensation) as vehicles for delivering compensatory justice, it is argued in Part II that there is a strong mediating principle that downplays the role of merit in allocating educational and employment opportunities within the beneficiary groups.

Part III lays out the justifications for affirmative action measures within the framework of distributive justice. Even though the strongest justifications are based on the individual rather than any sort of group rights, the argument that 'chronic poverty' provides the only basis for group-based affirmative action is rebutted. In Part IV, the diversity rationale is analysed, leading to the conclusion that it does not provide the strongest justification for affirmative action measures. Diversity ends up placing an unreasonable burden on the worst-off within a

beneficiary group and, therefore, is not ideal for empowering marginalised groups. In particular, the diversity rationale is found to have limited applicability in the Dalit context.

Part-I: Understanding Merit Principles

This part begins with a description of merit principles that preferential admission and hiring policies seek to depart from. The purpose of laying out the contours of a meritocratic system is to only further inform the manner in which we may use compensatory justice, redistributive justice or diversity to achieve a fairer method to fill university places and government jobs. The scope of enquiry in this part is limited by the notions of merit in the context of university admissions and public employment in India. Objective examination scores and formal qualification criteria are dominant factors in admission and hiring decisions and the merit principles explored in this part are those which have the most relevance in such a system. The two main arguments I pursue in this section are: a) The notion of merit need not necessarily apply in the same way for all university admissions and hiring decisions in public employment; b) The differential relevance of merit in university admissions and public employment must be reflected in the identification of beneficiaries.

I-A: Allocation by Merit: Different Meanings

In the most fundamental sense, the use of merit entails a certain quality in an individual by virtue of which it becomes possible to extend a certain kind of

treatment to that individual. It has often been articulated as '*S merits X in virtue of M*[7]where *S* is a person, X a mode of treatment, and *M* some quality possessed by *S*'.[8] Therefore, as an example, in the all-India examination to decide entry into the country's most sought after engineering colleges, an individual with a very high score in the examination will have the 'merit' to be awarded a place.

It is important to note here that the quality possessed by an individual, which merits a certain mode of treatment, can be retrospective, future looking or a mixture of both. It can be retrospective in the sense that what is being rewarded is a past performance or a prior attainment with no real reference to the future. I would characterise allocation of university admissions based primarily on test scores or marks obtained in the previous qualifying examination as rewarding a prior achievement.[9] As far as public employment in India is concerned, the use of previous attainment and forward-looking criteria differs at various levels of the bureaucracy. Irrespective of the level of public employment, significant emphasis is placed on scores in standardised tests/examination scores.

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[7] Richard Fallon, Jr, 'To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination' (1980) 60 Boston University Law Review 815, 822.

[8] Richard Fallon, Jr acknowledges that this formulation has been inspired by Professor Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970).

[9] University admissions in India are conducted primarily through two methods: a) Scores obtained in the qualifying exam as the sole determinative criterion. For example, for admission to B.A. in Economics in Delhi University, the score of the student in the pre-university examinations (equivalent to the A-Levels in the UK) is the basis on which admission is offered. Therefore, if there are 250 places in B.A. (Economics), the applicants with the top 250 scores in the pre-university examination will be offered places; b) Scores obtained in standardised entrance examinations to professional courses like engineering, medicine and law. For example, if there are 80 places to be filled in a particular law school, applicants with the top 80 scores in the Common Legal Aptitude Test (CLAT) will be offered places. As is evident, there is very little evaluation of applicants beyond examinations and standardised tests.

For the purposes of this chapter, I mainly refer to two conceptions of merit though more have been identified.[10]

I-A(i): Merit as Possessing Qualities of General Value

This understanding of merit is perhaps the most commonly used where an individual benefits from a certain treatment (education or employment) because she possesses certain qualities that are generally considered to be indicators of excellence and ability. It is important to note that an individual here merits certain treatment not because the qualities she possesses have any proven or established connection to allocation of university places or public employment. Certain qualities, irrespective of their fit to the purpose for which they are being used, are considered to be fair means of allocating educational and public employment opportunities.[11] In the context of education and public employment in India, this can be seen in the over-reliance on standardised tests and examination scores.

I-A(ii): Merit as Possessing Specific Qualities for a Particular Purpose

Under this conception of merit, an individual's merit is not in possessing qualities that indicate general excellence but in having qualities that contribute towards the performance of a specific task or achieving a particular aim. There is a requirement of a strong fit between the quality possessed by the individual and

[10] Richard Fallon, Jr identifies three conceptions of merit in Fallon (n 7) 826-827 while Christopher McCrudden identifies five conceptions of merit in Christopher McCrudden, 'Merit Principles' (1998) 18 Oxford Journal of Legal Studies 543, 556-567.

[11] Fallon (n 7) 826-827.

the treatment, in terms of education or employment, she is likely to benefit from.[12] The application of this principle is more pronounced in the context of public employment where the question of the efficiency with which tasks are performed assumes significance.

The above two conceptions of merit have significant implications for university admissions and public employment decisions in India. In the context of university admissions, as stated earlier, there exists a system that relies on very little other than examination scores[13] and the same is largely true for public employment. In such a context we have a situation where past performance in examinations and standardised tests are taken as the indicator of an individual's suitability for a place in university or a government job. A good performance in such examinations is seen to merit admission or employment, albeit to a lesser degree in some cases of public employment. I, however, argue that the relevance and importance of such a practice for allocating university places and jobs cannot be uniform. It must be legitimate to depart from this practice to varying degrees depending on the nature of the university places and jobs being allocated.

In the context of higher education and affirmative action through quotas in India, the application of the first conception of merit requires interrogation. The performance of an individual in an examination or a standardised test is not an

[12]McCrudden (n 10) 562.

[13] A possible exception is the admission process to the graduate courses in India's top institutions for management education (Indian Institutes of Management), where in addition to the requirement of very high scores in the standardised tests, group discussions and interviews also play a crucial role.

accurate indicator of the aptitude for a particular course in university and this is particularly true in a system where it is the sole consideration for admissions. In terms of the aims of the compensatory justice, redistributive justice and diversity discourse, this forces the question about the intensity with which we must engage with the merit argument in the various contexts of higher education. While an argument could be made about the shortcomings of using standardised tests for determining aptitude, the strongest challenge for using standardised tests is the retrospective approach it adopts. By relying on scores in an examination it cannot account for the role of advantage/disadvantage (of various kinds) in producing those scores. Unless these factors of advantage/disadvantage can be accounted for, there cannot be a meaningful argument that merit demands that individuals be rewarded with a place in university based on their scores in examinations.

In this chapter, I assume that it is fair to treat those with different starting points differently. Further, I am concerned only with those situations where the individual had no real control over circumstances that prevented her from acquiring the requisite skills and knowledge. It would be fair to argue that we must treat those in such situations differently from those who were in situations that facilitated the acquisition of such skills and knowledge. I do not concern myself with the normative justifications for differential treatment between these two categories and assume that it would indeed be fair to treat the categories differently[14]. My concern is one step further –do all such individuals, who have not

[14] Normative arguments justifying differential treatment for those two categories can essentially be found in the literature surrounding equality of opportunity. For a sample of such literature, see John Schaar, 'Equality of Opportunity, and Beyond' in J.R Pennock and J.W Chapman (eds), *Nomos IX: Equality* (Atherton Press 1967) 228; Bob Hepple, 'Discrimination and Equality of Opportunity – Northern Irish Lessons' (1990) 10 Oxford Journal of Legal Studies 408; Sandra Fredman,

had the fair opportunity to acquire skills and knowledge, irrespective of the reasons that led to it, deserve to be treated in the same way? To clarify, is it necessary to treat an individual who was denied access to quality education, nutrition, health etc by sheer misfortune in the same way as we would treat an individual belonging to a marginalised group like the Scheduled Castes? That forms the central theme of the next part – to what extent is it legitimate to afford preferential treatment on the basis that certain individuals suffered exclusion and marginalisation on account of their caste, gender, race, religion and not accord the same preferential treatment to individuals who suffered injustice based on a completely different set of reasons. Can we ascribe a different moral worth to injustice suffered on the basis of caste, race, gender, religion etc compared to injustice suffered on account of any other reason?

In analysing the second merit principle focused on suitability for a job and efficiency, it must be remembered that the field of public employment is too vast and diverse for this concern about efficiency to apply homogenously. This lack of uniform significance of efficiency in public employment is hardly ever acknowledged in the judicial discourse on affirmative action. The wide range of jobs comprising 'public employment' are not equally affected by concerns of efficiency and hiring the 'best person' available for the job. The application of this merit principle, depending on the context within which it is sought to be applied, must be sufficiently flexible to both give way with relative ease to other important societal interests and trump other interests when required.

'Affirmative Action and the Court of Justice: A Critical Analysis' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000).

Part II: The Basis for Compensatory Justice

At the heart of the normative debate around whether affirmative action can be used to compensate past racial, caste, gender etc discrimination is the question whether characteristics like race, caste and sex can be used as discriminating factors while conferring 'benefits'. The question as posed by Justice Clarence Thomas in *Grutter v Bollinger* is whether '…one can tell when racial discrimination benefits (rather than hurts) minority groups.'[15] The popular argument, emphatically embraced by Chief Justice Roberts in the conclusion to his opinion in the *Seattle School District* case[16], has been that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.' Opponents of affirmative action believe that there can be no difference between invidious and benign discrimination. The tough question that arises in attempts to offset this historical and complex experience of marginalization is the extent to which we can explicitly use caste, race, gender, religion etc as criteria and prioritise injustice on these grounds over injustice suffered on account of various other reasons. It would only seem fair to argue that groups like Dalits, blacks, women etc who have been denied positions of power and share in resources must be entitled to some sort of corrective justice. It clearly would not be sufficient if all that was done was abolish discriminatory practices (even assuming that can be achieved effectively). It would be a requirement of justice that attempts be made to compensate them so as to put them in the position they would have been in had it not been for such discriminatory treatment practiced, facilitated and tolerated by the State. Such an

[15] *Grutter v Bollinger* 539 U.S. 306 (2003) (Clarence Thomas J, Part VI).

[16] *Parents Involved in Community Schools v Seattle School District No.1* 551 U.S. 701 (2007).

argument finds favour even with libertarians who argue strongly for a minimalist State, albeit in a narrow fashion.

The basis of such an argument can be found in Robert Nozick's 'principle of rectification'.[17] When holdings in society, in a historical sense, are unjust, Nozick argues that the current holder is not entitled to the holding and the issue of compensation is inescapable. Nozick identifies many pertinent issues that remain to be resolved while considering issues of compensation[18], but comes to the conclusion that any principle of rectification should lead to compensation where those who have been denied holdings are returned to the position they would have been in had it not been for the injustice inflicted on them.[19]

It might be worthwhile to highlight at this point the issues that Nozick rightly identifies for the project of compensatory justice –

> 'What obligations do the performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, than it would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government?'[20]

[17]Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1999) 152.

[18] ibid.

[19]ibid 153.

[20]ibid 152.

Nozick's reflections further highlight the significance of the two preliminary hurdles addressed in sub-section II-A concerning the use of morally irrelevant criteria and the justifications for prioritising certain injustices over others through group-based affirmative action policies.

After making arguments in favour of compensatory justice in favour of groups based on criteria like race and caste, in sub-section II-B, two further challenges for compensatory justice are identified. It is argued in these sub-sections that the concerns about certain individuals unjustly bearing the cost of providing compensatory justice results from a misunderstanding of the process at work. It must be rightly understood as preventing certain individuals from unduly benefitting from historical advantages, and it is also argued that compensatory justice for marginalised groups must be viewed as a positive contribution towards social integration. Subsequently, the argument whether monetary compensation would be superior to educational and employment opportunities as a vehicle to deliver compensatory justice is considered and rejected. Based on the discussions in II-A and II-B, it is acknowledged that there exist intra-group differences that must be acknowledged when dealing with the question of distribution of benefits within the group that are accentuated in the context of admissions and hiring decisions. In II-C, the argument is presented for developing a mediating principle that acknowledges these internal differences and eases the stranglehold of merit as the controlling principle for distribution of benefits within beneficiary groups.

II-A: Caste, Race, Gender, Religion as Basis for Compensatory Justice

The primary concern in this sub-section is whether characteristics such as caste, race, gender, religion etc can be the basis to provide compensation to groups. The discussion in the United States around racial discrimination and affirmative action provides an interesting account of the debate. As discussed above, one of the possible responses to past discrimination is to abolish the discriminatory practices and do nothing more. This debate arose around the use of race in state-sanctioned policies. In *Plessy vFerguson*,[21] even though the U.S. Supreme Court upheld the 'separate but equal' doctrine in the context of a Louisiana statute that segregated railway coaches, Justice Harlan in his dissent said 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens…….It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.'[22] It was only in 1954 that the U.S. Supreme Court in *Brown v Board of Education*[23] struck down segregation and the 'separate but equal' doctrine. With this, the position that race could not be used for invidious discriminatory treatment was constitutionally settled.

The next question that inevitably arose was whether race could be used as the basis for beneficial treatment. The question first arose in *DeFunis v*

[21]*Plessy v Ferguson* 163 U.S. 537 (1896).

[22]ibid 559 (Harlan J, dissenting).

[23]*Brown v Board of Education*347 U.S. 483 (1954).

Odegaard[24]where the constitutionality of the use of race in a beneficial manner in the University of Washington Law School's admission policy was under consideration. Though the U.S. Supreme Court felt that it was no longer required to decide the case, Justice Douglas in his opinion held that DeFunis, '…whatever his race, had a constitutional right to have his application considered on its individual merits in a racially neutral manner.'[25] In *Regents of University of California v Bakke*[26], Justice Powell was of the view that race alone cannot be used as a factor in affirmative action policies. However, the single opinion by Justices Blackmun, White, Brennan and Marshall[27] explicitly held that there was no requirement for the Constitution to be colour-blind and that racially benign classifications were constitutionally valid. In *Richmond v J.A. Croson*[28], Justice Scalia, in his separate concurrence, held that explicitly race based measures were unconstitutional but neutral measures that had a disparate impact on intended beneficiaries were valid. He held that 'a State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race…….Such programs may well have racially disproportionate impact, but they are not based on race.'[29] However, Justice Scalia was of the view that an individual who had suffered first-order discrimination could be compensated even if it meant withdrawing the benefit from the person who

[24]*DeFunis v Odegaard* 416 U.S. 312 (1974).

[25]ibid 36 (Douglas J, dissenting).

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

[27]ibid 324.

[28]*Richmond v J.A. Croson* 488 U.S. 469 (1989).

[29] ibid 526 (Scalia J, concurring).

benefitted from such discrimination. Justice Scalia believed it would be constitutional 'to (give) a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.'[30]

The level of judicial review that must be applied to affirmative action measures has been the matter of considerable debate in the U.S. Supreme Court.[31] At the heart of this debate has been the question whether all racial classifications, including seemingly benign ones like in the case of affirmative action measures, are suspect and therefore subject to strict scrutiny. While this question in the context of state laws and the Fourteenth Amendment was settled by a 6-3 vote in *Croson* by requiring strict scrutiny to be applied, the level of scrutiny for federal measures still remained unresolved. By a 5-4 vote in *Adarand Constructors Inc. v Pena*[32] the U.S. Supreme Court, through Justice O'Connor's majority opinion[33], held that are all racial classifications are inherently suspect and therefore strict scrutiny was the appropriate standard of judicial scrutiny for all racial

[30]ibid.

[31] For possible conceptual differences within the U.S. Supreme Court in the application of strict scrutiny to affirmative action cases, see Ronald Dworkin, 'Affirmative Action: Is it Fair' in *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002) 409-426.

[32]515 U.S. 200 (1995).

[33]ibid 205-239 (O'Connor J).

classifications[34]. While the decision in *Adarand* was not in the context of higher education, affirmative action measures through the diversity rationale continued to survive but the tensions with using race as a criteria were apparent. In *Grutter v Bollinger*[35], applying strict scrutiny, the U.S Supreme Court by a 5-4 vote upheld the constitutional validity of the University of Michigan Law School's race conscious admission policy that considered race as one of the factors contributing to academic diversity in the classroom. However, on the same day the U.S. Supreme Court in *Gratz v Bollinger*[36], found another University of Michigan policy, giving certain number of points automatically to members of certain under-represented minority groups, to be unconstitutional. The judgment of the court in *Parents Involved in Community Schools v Seattle School District No. 1*[37] saw some very interesting developments. The court struck down a policy that sought to remedy racial resegregation in schools. Chief Justice Roberts along with Justices Thomas, Scalia and Alito argued that such a policy's aim was to simply achieve racial proportionality and that by itself did not satisfy the requirements of strict scrutiny. Though Justice Kennedy found the plans to be unconstitutional, he disagreed with the above reasoning and held that remedying racial resegregation and thereby promoting diversity, even at the school level, amounted to a compelling state interest. Two contrasting statements, one by Chief Justice Roberts and the other by Justice Breyer capture the competing visions on the issue. Chief Justice Roberts ended his opinion with the line, 'The way to stop

[34]ibid 221-226.

[35]*Grutter Case* (n 15).

[36]539 U.S. 244 (2003).

[37]*Seattle School* (n 16).

discrimination on the basis of race is stop discriminating on the basis of race'[38] while Justice Breyer was of the view that it was a 'cruel distortion of history to compare Topeka, Kansas in the 1950s to Louisville and Seattle in the modern day…'[39]

As is evident from the discourse from the U.S. Supreme Court, while the use of race to prohibit discriminatory practices is not controversial, the question whether characteristics like race, caste etc can be used for benign classification and to confer beneficial treatment is extremely contentious. Below, using views and counterviews of different authors, I construct an argument to justify the use of race to accord beneficial measures.

At the heart of this issue lies the question whether in compensating a discriminated group, the individuals comprising this group must be treated as individuals like everyone else in society ignoring their historical (and often contemporary) experience or whether they are entitled to differential favourable treatment on the basis of their caste, race, religion etc. The argument against using characteristics like caste as the basis for compensatory justice has been that in doing so society treats a morally irrelevant characteristic as a morally relevant one. Both Abram[40] and Justice Scalia[41] quote Professor Alexander Bickel with

[38]ibid 768.

[39]ibid 836.

[40] Morris B. Abram, 'Affirmative Action: Fair Shakers and Social Engineers' (1986) 99 Harvard Law Review 1312, 1319.

[41]*Richmond Case* (n 28) 527 (Scalia J, concurring).

approval to demonstrate the reasons why benign discrimination on the basis of race is illegitimate. Professor Bickel argues that

> 'a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant…….The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society .... Having found support in the Constitution for equality, [proponents of racial preferences] now claim support for inequality under the same Constitution.'[42]

There have been a few responses to this criticism and one such response has been that since morally irrelevant characteristics were used to discriminate, it is only apt that such characteristics be also used to compensate. A different response is that of James Nickel who attempts to resolve the dilemma by arguing that the morally irrelevant characteristic is not being used in the same manner as it was being used before. The argument is that the compensation, for example, to a Dalit, is not based on her/his being a Dalit but is instead based on the characteristic that s/he had suffered discrimination on the basis of being a Dalit.[43] Therefore, the basis for the compensation is not the morally irrelevant characteristic per se but is instead a morally relevant characteristic, namely discrimination suffered exclusively by virtue of possessing that morally irrelevant characteristic.

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[42] Alexander Bickel, *The Morality of Consent* (Yale University Press 1975) 133.

[43] James W. Nickel, 'Discrimination and Morally Relevant Characteristics' (1972) 32(4) Analysis 113.

J.L. Cowan rejects this attempt to resolve the dilemma and argues that the reason for the past injustice should not form the basis for compensation.[44] It should only be the experience of injustice, suffered by any individual irrespective of the reason, which should be relevant while considering claims of compensatory justice. Once such an experience of individual injustice is established, there should be no place for an enquiry into the reasons that led to the injustice as far as being entitled to compensatory justice is concerned. Race, gender, caste, religion etc might just be some of the causes and we cannot legitimately distinguish them from the injustice suffered by other individuals on account of various other reasons. The moral worth ascribed to experience of injustice, whatever the cause, must be the same. In that sense, race, gender, caste or such characteristics cannot be the basis to decide entitlement of beneficial measures.

However, Michael Bayles rejects the arguments from both James Nickel and J.L Cowan. Both Nickel and Cowan reject the idea of compensatory justice based on a morally irrelevant characteristic per se. While Nickel argues that compensation for the group is based on the injustice suffered by virtue of the morally irrelevant characteristic and not the morally irrelevant characteristic per se, Cowan argues for individual compensation based only on the injustice suffered without any reference to the cause. Bayles argues that compensation to a wronged group must necessarily be based on a morally irrelevant characteristic and that there is no contradiction in a characteristic like caste being morally irrelevant while discriminating against individuals and being morally relevant while

[44] J.L. Cowan, 'Inverse Discrimination' (1973) 33(1) Analysis 10, 11.

compensating. He argues that if the solution to the injustice suffered is not based on a characteristic like caste, then it can also be argued that the discrimination in the first place was not on the basis of a morally irrelevant characteristic. Giving the example of racists, he highlights the fact that racists claim to discriminate against blacks not because they are blacks per se but rather on the basis that blacks as a group are inferior in some ways. Bayles contends that that argument is a mirror image of the arguments by Nickel and Cowan because the racists could argue that they do not discriminate against blacks on the basis of a morally irrelevant characteristic, but instead rely on morally relevant ones that are associated with being black. There is no contradiction in basing compensation on a morally irrelevant characteristic because there exists no acceptable moral rule that justifies discriminating against a group but there does exist a justifying moral rule for discriminating in favour of a wronged group.[45] The moral rule might well be that there exists an obligation on society to provide compensation for groups it has wronged. Though it does not mention any particular characteristic as morally relevant, a characteristic becomes morally relevant in determining to whom compensation is owed. It is important to acknowledge here that while individuals are compensated on the basis that they belong a particular race/caste, groups are compensated because the group has been wronged.[46] This distinction between the individual and the group is important to maintain.

Dworkin responds differently to the question of whether a symmetrical response is required to the use of race for invidious and beneficial purposes.

[45] Michael D. Bayles, 'Reparations to Wronged Groups' (1973) 33(6) Analysis 182.

[46] ibid.

Dworkin rightly argues that Bakke, in *Regents of the University of California v Bakke*[47], cannot argue that he lost out on being admitted due to prejudice or contempt towards his race. Dworkin rejects the argument that a white male who loses out on admission because of the affirmative action policies of a medical school is being discriminated on the basis of his race. A white man losing out in admissions by virtue of his race is no different from him losing out on the basis of other qualifications – there is no prejudice or public insult attached to it and it is only in pursuance of a rational allocation of limited resources in a manner that is most useful for society.[48] Dworkin advocates the position that the difference between a law that classifies to disadvantage already marginalised and prejudiced groups and one that classifies in order to benefit is extremely morally significant and is a difference that courts cannot ignore while adjudicating the constitutionality of affirmative action measures. Since characteristics like caste are being used to introduce favourable treatment, it is discrimination, albeit 'reverse discrimination'.

II-A(i): Concerns with Groups as Beneficiaries of Compensatory Justice

A common argument against differential favourable treatment of groups to achieve compensatory justice is that groups cannot be the basis for providing compensation. The claim is that only individuals can be compensated and not groups. Authors like Alan Goldman argue that members of groups like women and

[47] *BakkeCase* (n 26).

[48] Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1992) 300-302; Also see Dworkin, 'Affirmative Action: Is it Fair' (n 31) 415-420.

blacks cannot claim that ***all*** members of the group have suffered equal harm or even any harm.[49] Goldman argues that for compensation to be owed to all current members of such groups, it is necessary to show that all members have actually been unjustly denied educational or employment opportunities. While every member of past generations might have been able to show such discrimination, the case cannot be made that the harm is distributed across all members of such groups. Goldman foresees the possible response that 'although not all have been denied a job or superior education, all have been at least indirectly harmed because such practices and the associated stereotypes caused them to suffer loss of ambition, self-respect etc and that preferring members of the group for positions of responsibility is the only means of compensating such motivational damages'.[50] Goldman's response to the argument is to question the assumptions and premises that he believes are inherent in such an argument. The argument based on loss of self-respect, ambition etc, Goldman argues, assumes rather unreasonably that all individuals subjected to such pressures will be affected in precisely the same way. Goldman's main point is that the connection between current members of a group and the injustices in question are extremely tenuous that it serves no purpose to transfer benefits from otherwise qualified candidates.

The opposition to identifying an entire group and all its members as worthy of compensation is based on denying the claim that universal distributive harm exists.[51] As discussed earlier, highlighting the moral irrelevance of race as a

[49]Alan Goldman, *Justice and Reverse Discrimination* (Princeton University Press 1979) 76.

[50]ibid 77.

[51]ibid 80.

criterion for compensation, J.L. Cowan argued that the basis for any compensation should be the experience of the individual and not merely membership in a group. He wrote, 'They should most certainly be treated like anyone else. But this does not mean "their" individual histories should be ignored. As with anyone else, injustices done to 'them' as individuals should be prevented or rectified insofar as possible. But past or future discrimination and injustice done (to) "them" as a group and special advantages to them as a group are both out of the question since in the moral context there is no such group.'[52] Cowan argues that the historical discrimination and marginalisation of certain groups cannot be compensated in the present by identifying all current members of that group as beneficiaries. If it is the consequent harm of the historical experience that is being compensated, then, Cowan argues, there is no coherent way to identify an entire group as a beneficiary because the relevant frame of reference is the individual experience of that injustice.

The question that Goldman and Cowan leave us with is whether an entire group can be identified for differential favourable treatment even if certain members of that group do not share the experience of injustice or do not share the experience to the same extent.

[52] Cowan (n 44).

II-A(ii): Groups as Legitimate Beneficiaries of Compensatory Justice

The obvious response to the arguments in the previous sub-section has been that their membership in a group that has been historically denied opportunities, excluded and marginalised makes it highly likely that they have been excluded from accessing certain other valuable resources and goods in society in leading up to seeking admissions and jobs. Historical marginalisation of groups from positions of power and valuable opportunities like education and employment is very likely to result in deprivation for its current members (even though yet to be denied admissions or a job) in terms of housing, acceptable quality of primary education, health, nutrition etc. And the argument put forth is that compensation is for such deprivation arising out of historical discrimination.[53] The temptation to assume the discrimination and marginalisation affected only past generations of these groups must be resisted. The historical experience of past generations has very real and marginalising impact on members of the current generation in myriad ways.

A possible rebuttal to the criticism that certain experiences of injustice cannot be prioritised over others is that the constitutional commitment is to compensate only individuals belonging to groups that have suffered certain kinds of harms. It is an ineffective argument that X cannot be compensated for being a Dalit (irrespective of economic status) because the State has not provided for differential favourable treatment for Y, a poor upper caste. The State can

[53] George Sher, 'Justifying Reverse Discrimination in Employment' (Winter 1975) 2 Philosophy and Public Affairs 4.

legitimately choose to compensate all Dalits due to the fact that, as a group, Dalits have historically been marginalised with very real and grave consequences in contemporary society. Undoubtedly, there are material and non-material consequences that result from such marginalising treatment. And consequences, both material and non-material, can also arise to a higher or lower extent due to poverty and other factors. However, it would be inaccurate to argue that the commitment made in the Constitution of India is to compensate and remedy all kinds of material and non-material consequences. For if that were indeed the commitment, then there exists a strong argument that all persons experiencing those consequences must be beneficiaries of favourable treatment, irrespective of whether they suffer those consequences as a result of being a poor upper caste or a Dalit.

Another possible response to the criticism that the suffering of a poor upper caste has the same claim to favourable treatment as a Dalit is from a group perspective. It is the claim of different groups that must be compared and not the experience of individuals within those groups. The claim for compensation is based on treatment that has been accorded to the group rather than based on an individual paradigm. In such an analysis, the experience of the poor upper caste cannot constitute the basis for a group claim for upper castes. In that sense, justice dictates that Dalits have a strong claim for compensation as opposed to a doubtful claim for the upper castes. Responding to Cowan's article in *Analysis*, Paul Taylor[54] argues that it is essential that compensation be given to members of a beneficiary

[54] Paul W. Taylor, 'Reverse Discrimination and Compensatory Justice' (1973) 33(6) Analysis 177, 181-182.

group not as individuals who have suffered injustice but as members of that particular group. Taylor disagrees with Cowan's argument that in the moral context there is no group based on race. He traces back the creation of such a group to the initial instance of unjust treatment. Taylor rightly argues that Cowan's view that compensation is owed to individuals is misplaced because the wrongs that are being sought to be corrected were 'committed as an integral part of an organised social practice whose very essence was discrimination' against the group as such. It was a class of individuals as a group that was identified as 'a collective target' of institutionalised unjust practices and therefore the right has been created in the group. Taylor sums it up best when he states that 'institutionalised injustice demands institutionalised compensation'.

II-B: Further Challenges for Compensatory Justice

In this sub-section, two further levels of challenges to a system of compensatory justice are analysed. The first concern is about the incidence of cost while compensating for past discrimination. Since compensating for past discrimination will necessarily involve costs, crucial questions arise about who should bear this cost and the precise nature of these costs. The second challenge relates to the mode of delivery of compensation and maps the concerns regarding the use of education and employment for such delivery.

II-B(i):Compensatory Justice: Who Pays the Costs, if any?

One of the initial hurdles faced by the compensatory justice model in particular and affirmative action policies in general is the issue of who should legitimately bear the disadvantages/costs of providing preferential treatment to certain groups. Professor Fredman sets out the terms of the debate when she recognizes that on the one hand, the merit principles proceed on the assumption that each individual must be evaluated in terms of her own personal achievements and qualities where factors like race, case and gender are irrelevant and on the other hand is the fault principle which advocates the position that 'individuals are responsible for their own actions, not for others'[55]. As a result, we end up having to face the argument that no individual can be required to pay the costs for compensating or remedying injustices for which she is not responsible. In terms of the incidence of costs, for affirmative action in the pursuit of compensatory justice, the argument is that when compensation is provided on grounds like caste, the only individuals bearing the cost of providing compensation are upper castes seeking admissions or particular jobs. Nobody else in society bears the 'burden of compensation (which) falls unequally'[56] upon only few upper caste individuals. Is it indeed the case that it is only the few upper caste individuals seeking admissions and jobs that bear the cost of providing such compensation?

[55]Sandra Fredman, 'Reversing Discrimination' (1997) 13 Law Quarterly Review 575, 577.

[56] Robert Hoffman, 'Justice, Merit and the Good' in Barry Gross (ed), *Reverse Discrimination* (Prometheus Books 1977) 358, 367-368.

However, the prior question that needs to be asked is what the precise meaning of terms like 'burden of compensation', 'cost of providing compensation' etc means in this context.[57] It is very likely that these terms refer to individuals (other than those belonging to beneficiary groups) who might have otherwise gained that admission or job, on the basis of merit, if not for the policy favouring members of certain wronged groups. The 'cost' to the individual who loses out in such a situation is obvious and the excluded applicant might well argue that she is being made to bear the burden of compensating a wrong she did not commit.[58] This argument presents a rather inaccurate picture of the process of compensatory justice. The true nature of the effect on excluded applicants is not in terms of the cost they pay despite not having perpetrated any injustice. The impact on such individuals is better understood within the framework of the benefit they would receive, if it were not for compensatory justice.[59] Without compensatory justice, the individuals who claim to be paying a cost would benefit the most. It is this disproportionate benefit that is being offset. It is not that they are responsible or more responsible than others in the dominant group that requires them to be excluded, it is the fact that they stand to benefit most from the impact of first-order discrimination that justifies giving the opportunity to a victim of discrimination even if such victim is not the most qualified.

[57] Robert Amdur, 'Compensatory Justice: The Question of Costs', (1979) 7(2) Political Theory229.

[58]Kent Greenwalt, *Discrimination and Reverse Discrimination* (Alfred A. Knopff 1983) 62.

[59] George Sher, 'Justifying Reverse Discrimination in Employment' (1975) 4(2) Philosophy and Public Affairs 159, 164.

However, the critical question is whether the 'cost' is only to the individual concerned or is it to the society at large as well, for example in terms of efficiency losses? The issue of 'cost' to society is complex and must be responded to at different levels. By 'cost' in this context, I refer to some sort of a loss that society suffers. The cost to society does not operate in the same way as it operates for the individual. The individual who loses out inevitably bears a cost. It would be difficult to argue that society suffers a 'cost' for every instance where merit is not the sole determinant for admissions and employment. It is difficult to imagine the loss that society suffers when a Dalit is hired as a peon in a municipal office over a more 'meritorious' candidate. Undoubtedly there also exist positions that certainly require the best possible person, in terms of qualifications and skills, to be hired. A failure to hire such individuals will certainly result in a cost that is paid in terms of efficiency and output to society. As discussed earlier in Section I on 'Understanding Merit Principles' in the context of the second merit principle, the efficiency argument cannot be applied homogenously across the entire area of public employment and that must be factored into the discussion on the 'cost' to society. Even though those are two extreme ends of the spectrum, it delineates the issues involved. Also, it is important to state that this issue cannot be framed merely in negative terms of whether society suffers a loss. There is a significant positive element to providing compensation to wronged groups. It is important that the contribution made by compensatory justice measures to social cohesion be acknowledged. It enables marginalised sections of society to participate in and benefit from the various opportunities that are available. The benefit is not merely to members of the group being compensated but for society as a whole.

II-B(ii):Suitability of Educational and Employment Opportunities to Deliver Compensatory Justice

While the above discussion clarifies that it is indeed just to compensate certain groups, it still leaves a very important question unanswered: is differential favourable treatment a just way to compensate a group? Crucial to answering that question is the relationship between compensating a group and the terms of the distribution of compensation within that group. A difficulty faced in this context is arguing that differential favourable treatment in admissions and employment is a valid form of compensation for each member of the group qua a member of the group. Differential favourable treatment ends up benefitting only a few members of the groups[60] and mainly those who have the ability to gain admissions and jobs. Since positions in these spheres (higher education and public employment) are limited, not all members of the group can benefit from it. By virtue of positions being limitied, a further distributive principle is required to allocate the benefits of differential favourable treatment within the group. And invariably it is the principle of 'merit' that is used for such internal distribution.This runs into the similar objections that formal equality encounters. Though compensation seems to be available for everyone in the group, in reality it is possible only for members, with certain qualifications and abilities, to avail of this compensation. Due to this nature of differential favourable treatment, it is very often the case that individuals,for example Dalits with similar backgrounds, end up receiving very different compensation. While one of them could find a place in the highest rung

[60] Robert Simon, 'Preferential Hiring: A Reply to Judith Jarvis Thomson' (Spring 1974) 3(3) Philosophy and Public Affairs 312.

of the bureaucracy, it is very often the case that many others receive compensation that is far less desired.

This draws our attention to a critical concern around compensatory justice. The above scenario arises because the basis on which compensation is owed is not the basis for distribution of the compensation. Compensatory justice that is distributed on the basis of educational qualifications, performance in examinations etc becomes suspect on the ground that it cannot really distribute compensation to all members of the group and that it ensures that only the relatively privileged few within the group are compensated. Using the 'merit' framework when compensating groups results in unfair distribution of the compensation at best and is also likely to marginalise the most marginalised.

Having engaged with the concerns surrounding educational and employment opportunities as appropriate means of compensation, 'cash payments' in lieu of educational and employment opportunities seem to possess certain attractive advantages.[61] By opting to distribute compensatory justice through educational and employment opportunities, it is ensured that it is only some individuals who receive the compensation. With its 'all-or-nothing' approach, many deserving individuals do not receive their share of compensatory justice and monetary compensation presents the opportunity to spread the benefit amongst all intended beneficiaries.[62] Perhaps the most significant reason

[61] Robert Ambdur, 'Compensatory Justice: The Question of Costs' (1979) 7(2) Political Theory 229.

[62] It is one of the options explored by Boris Bittker, *The Case for Black Reparations* (Random House 1973) 89.

for considering monetary compensation is that it does not depend in any way on merit in terms of the necessity to demonstrate any prior educational qualifications, skills etc. Education and employment opportunities present difficult problems in terms of the need to displace another individual in order to compensate a member of the disadvantaged group. In addition to that particular issue of fairness (even though one might conclude it is not unfair), to succeed and progress within the sphere of employment or to benefit appropriately from educational opportunities, the beneficiary needs to have acquired the capability of performing the job well or making relevant use of educational opportunities.

II-B(iii):Advantages of Education and Employment Opportunities over Monetary Compensation

The monetary compensation argument misses an important aspect of education and employment opportunities in the context of compensatory justice. They cannot be seen as ends in themselves. Preferential treatment in education and employment seeks to provide equality of opportunities and cannot be merely seen as distribution of goods. Neither is the effect of preferential treatment in education and employment limited to the individual beneficiaries themselves. For marginalised and exploited groups, the effect of seeing members of their group in coveted educational programmes and jobs has an effect that goes far beyond the individual. The message it sends out is that these positions are no longer the sole privilege of dominant groups and the value of such a message cannot be under-estimated. Employment and educational opportunities are not one-time benefits and 'would seem to contribute more to self-development and self-realization than

would cash payments.'[63] Education and employment provide long term sustainable opportunities as opposed to the largely one-time consumption use that cash can be put to. Also cash compensation proceeds on the flawed assumption that money holds the same value for everyone in terms of pursuing her life goals. Undoubtedly, the same argument could be used against education and employment that they do not present the same value to everyone. However, especially education by its very nature presents a far wider range of opportunities to determine how best to pursue life-goals. However, education and employment do present certain difficulties in the distribution of compensatory justice.

II-C: Making Intra-Group Distribution Fairer

The discussion so far on group-based affirmative action policies in higher education and public employment has raised two concerns that must be addressed to further the legitimacy of such measures. Firstly, it must be acknowledged that not all individuals within the beneficiary group are similarly situated in terms of being affected by consequences of marginalising experiences (both historically and in the present). However, this does not take away from the fact that, viewed from outside the group, there are certain characteristics and consequences that unify them as a group. Recognition of internal differences for the purposes of distribution of affirmative action measures does not adversely impact recognizing the collection of such individuals as a group. Additionally, it must also be acknowledged that disparities exist amongst individuals in the group

[63] Mary Lyndon Shanley and Mary C. Segers, 'On Amdur's "Compensatory Justice: The Question of Costs"' (1979) 7(3) Political Theory 414.

in terms of abilities to take advantage of the measures designed for the empowerment of the group. Secondly, the concerns highlighted in the first point have an exaggerated impact in the context of educational and employment opportunities that need to be addressed for the benefits to flow to those who need it the most. This calls for fine-tuning compensatory justice as the basis for differential favourable treatment.

A system of compensation that is based on competition within the beneficiary group has unfair consequences and it requires a mediating principle to offset some of these consequences. It would only be fair that those members of the group who are in a worse-off position receive more of the compensation than others. While it is impossible that all members of a group receive the same compensation in terms of admissions, employment and representation in legislative bodies, such a 'relative principle' for distribution of compensation, it is necessary that the extent of unfairness resulting from the distribution of these limited opportunities be reduced within the group. It may call for the differential application of the merit principle within different sites of differential favourable treatment. To reduce the unfairness of the distribution of compensation, it is necessary that we develop a framework for the differential application of 'merit' amongst beneficiary groups within education and employment. And even within education and employment, there is a need to recognise that 'merit' need not apply with the same intensity across all sites of favourable treatment for the group being compensated. If differential favourable treatment for a group is based on compensation, justice demands that the internal difference of positions within that group be taken into account while distributing the compensation.

The crucial question concerns the criteria that must be adopted while admitting students or appointing people. The argument based on efficiency is often cited as an argument in favour of adopting the second merit principle as discussed in Part-I of this chapter on 'Understanding Merit Principles'. Yet, as we have seen the purpose behind compensatory justice is defeated to a large extent by adopting merit as the basis for distributing compensation among the members of the group. Undoubtedly, certain jobs require a minimum level of skill or knowledge for them to be performed well and the same argument can be extended to admissions into certain courses. It would however be a mistake to argue that either merit or the 'relative principle' should trump in all situations.

Drawing upon Robert Alexy's distinction between rules and principles is a way forward in resolving the conflict between these two interests. Rules, for Alexy, are norms that are either to be followed or not with no other option available. Principles are norms that require to be achieved to the greatest extent possible and are what Alexy calls 'optimisation requirements'. They are norms which need not be satisfied to the same degree at all points of time and the extent to which they can be followed depends on the factual and legal possibilities.[64] While it is necessary to read in an exception or do away with one of the rules in the case of conflicting rules, such an approach is not required while dealing with conflicting principles. When two principles are in play and they compete, resolving the conflict only requires one principle to be given more significance.

[64] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 47-48.

However, giving one of the principles more significance or letting it outweigh in the concrete situation being considered, does not mean that the principle that had to give way will always have to do so. It only means that in that particular situation and considering all the relevant factors in that scenario, one principle gives way to the other. In another situation with similar of different factors, it could very well be that the principle that gave way earlier could be the one that decides the outcome. As Alexy argues, '…principles have different weights in different cases and that the more important principle on the facts of the case takes precedence.'[65] Alexy understands principles as reasons that can be trumped by other reasons. However, there is nothing contained in the principles themselves that indicate the relationship between reason and counter-reason. Principles do not contain anything that would help determine the exact extent of their application in different factual situations.

Using the framework provided by Alexy, I would argue that while distributing compensation amongst members of the beneficiary group the balance between merit and efficiency on one hand and the need to compensate the worst-off on the other cannot be the same in all instances. The current framework, as far as distribution of compensation is concerned, lets the principle of merit trump in all situations. Only the most qualified and eligible individuals benefit from favourable treatment in employment and education. However, for compensatory justice to find a strong normative basis it is essential that it be grounded in compensating the worst-off just as much. As recognized earlier, in some cases

[65]ibid 50-51.

efficiency through merit must be allowed to trump but the current dominant practice of applying the merit framework to compensate members of the group opens up compensatory justice to some very serious criticism.

There also remains the criticism that differential favourable treatment does not actually amount to compensating the whole group since the compensation flows only to very few members of the group. This criticism would remain despite adopting a 'relative principle' of compensation because it would still mean that only few members of the group receive the compensation through differential favourable treatment. However, this argument assumes that the compensation to the group is only through favourable treatment in admissions, employment and representative bodies. States must adopt other measures for the benefit of such groups beyond the abovementioned sites of favourable treatment. For if the group is to be truly compensated it cannot be purely through favourable treatment in the above sites alone. If States are serious about compensating groups, they need to envisage a far wider and transformative programme. It is, however, not necessary that every benefit for the group must be equally available to every member of the group. That particular position would be feasible only if members of the group also had access, if not to favourable treatment in education, employment and representative bodies, to different benefits of similarly equal value. Therefore, if only 5% of Dalits (of those that could be possibly eligible) had access to very good colleges and jobs in the higher bureaucracy and the only compensation available to 60% of the Dalits consisted of admissions in low quality colleges and jobs in the lowest level of government, then compensatory justice as the basis for differential favourable treatment becomes hard to defend.

Therefore, it is essential that for compensatory justice to be a strong normative justification for differential favourable treatment, the 'relative principle' for distribution of compensation within the group must be adopted along with providing a wide range of transformative benefits that looks far beyond admissions, employment and representative bodies.

Part III: Redistributive Justifications for Affirmative Action

In this part, I provide a distributive framework as the justification for affirmative action measures. I start with exploring the fairest means that could be adopted to distribute educational and employment opportunities. I start by agreeing with Alan Goldman that a lottery system is not appropriate and identify appropriate principles for distribution for places in educational institutions and job opportunities. In III-B, I highlight the assumptions that underlie the principle of distribution that has been identified. I argue that it is engagement with the assumption of means-regarding equality that provides the basis for affirmative action within the distributive justice paradigm. In III-C, I examine Goldman's argument that those who are 'chronically poor' are the only legitimate group that can benefit from affirmative action as a group. Groups whose defining characteristics are either race or sex, Goldman argues, are under-inclusive and over-inclusive at the same time and defining characteristic must be 'chronic poverty'.

III-A: Identifying Principles for Distribution of Educational and Employment Opportunities

An interesting question to start with, concerning distribution of educational and employment opportunities, is whether a lottery system would be acceptable. Alan Goldman in his exhaustive analysis of affirmative action from the viewpoint of distributive justice seeks to provide the principles on which such distribution should happen. Goldman's analysis operates within a slightly altered Rawlsian framework. While Rawls' original contractors agreed upon the principles of justice behind a full veil, Goldman's contractors are subject only to a partial veil. The original contractors envisaged by Goldman have information about their physical abilities and intelligence and the structure of society. However, their own position within that social structure is hidden from them.[66] Given this context, Goldman explores the principles on which society would choose to distribute educational and employment opportunities.

A lottery does not seem to be an acceptable way of allocating employment opportunities because it would be in the interest of the least talented as well that jobs be given, as a starting principle, to the most qualified. The assumption here is that jobs with most qualified people would ensure maximum efficiency and a larger pool of valuable goods for the use of society.[67] That is a reasonable position to take because if the least talented person lost out in the lottery she would be in a worse off position than losing out when the jobs are allocated to the most

[66]Alan H Goldman, *Justice and Reverse Discrimination* (Princeton University Press 1979) 12.

[67]ibid 153.

talented.[68] This would ensure that society has a larger share of goods to distribute and the least talented would get more goods in a system where she loses out on the basis of talent rather than in a system where she loses out on the basis of a lottery. While this might be the general rule by which society decides to allocate jobs, it leaves the question of whether the most qualified individuals have a 'right' to a position on offer. The belief in such a right forms an integral part of the rhetoric around the position against affirmative action and it is important that we unpack its basis. Goldman provides a convincing answer when he states that the basis for such a 'right' is the value we place in the 'stability of expectations', which can also be understood as the 'great value of security'.[69] It is a basic belief that 'satisfying certain general social rules through their own efforts entitles them to expect certain returns as their rights.'[70] The value of this argument lies in the fact that expectations no longer turn on the benevolence of others in society and claims are asserted on the basis of autonomy and personhood.

III-B: Means-Regarding Equality and the Basis for Affirmative Action

It is important to recognise that the above principle would prohibit discrimination in the first instance and any sort of affirmative action at the same time. The above distributive principle is in play only when those who are best qualified for the job

[68]Michel Rosenfeld, *Affirmative Action and Justice* (Yale University Press 1991) 73.

[69]Goldman (n 66) 155.

[70]ibid 156.

have not been prevented from taking up those jobs.[71] This notion of equality of opportunity, in the first instance, is predicated on the assumption that those competing for scarce positions have the same means to achieving the scarce position. Having the same means to achieve the scarce position is what Rae, Yates et.al[72] call 'means-regarding equality'. 'Means-regarding equality' is defined as 'two persons, j and k, have equal opportunities for X if each has the same instruments for attaining X'.[73] 'Means-regarding equality' can be compared with 'prospect-regarding equality'. 'Prospect-regarding equality' in the above example would mean that 'j' and 'k' have the same chance of attaining X.[74]

Under Goldman's framework of distributive justice, means-regarding equality already exists as a feature of society under consideration. It is the existence of means-regarding equality that allows Goldman to mount a justification for affirmative action under the framework of distributive justice. Therefore, Goldman's justification for affirmative action is that compensation for any violation of the above distributive rule should take precedence over distributive considerations. When discrimination occurs, the operation of the distributive principle will cease until the appropriate compensation is provided. In such cases it is legitimate under the distributive justice framework not to hire the most qualified candidate and hire a candidate who has been previously discriminated against. As is evident from the above discussion, affirmative action

[71] One would also assume that it also means that individuals have not been prevented from achieving those qualifications.

[72]Douglas Rae and Douglas Yates, *Equalities* (Harvard University Press 1981).

[73]ibid 66.

[74]ibid 65.

is justified within such a distributive framework only when there is first-order discrimination.

It must be clarified here that Goldman's argument does not advocate a position that seeks to mask equality of results as equality of opportunity. That was precisely the concern raised by Advocate General Tesauro in *Kalanke v Freie Hansestadt Bremen*[75]. In *Kalanke,* the law in question stipulated that, where applicants were equally qualified, women would receive a preference in promotions over men in sectors where women were under-represented (defined as those sectors where women were less than half the employees). The law essentially served as a tiebreaker in favour of women where the applicants could not be distinguished in terms of qualifications. Advocate General Tesauro in his submission to the European Court of Justice argued that the law in question violated the prohibition on sex discrimination contained in Article 2(1) of the Equal Treatment Directive. However the question was whether the law was covered under the exception in Article 2(4) that permitted measures to promote equal opportunity by removing inequalities that affected women's opportunities. Advocate General Tesauro took the view (which was reflected in the judgment of the ECJ) that the Bremen law is not protected by the exception because the law in reality was trying to establish equality of results whereas the protection under Article 2(4) was only for equality of opportunity measures.[76]

[75]Case 450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

[76]Case 450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, Opinion of AG Tesauro, para 13-24.

The situation with Goldman's model is slightly different and cannot be seen as an 'equality of results' model because it seeks to compensate specific cases of individual injustice by giving such an individual preferential treatment in hiring decisions. Though the individual was denied the job initially despite being the best person available, at the point of compensation the individual need not be the best person available. Not being the person available at the time of compensation does not come in the way of remedying the injustice. Such an affirmative action policy is not contrary to the Goldman's initial concern of efficiency either. Unjust practices that routinely exclude individuals from the jobs they would have had alsoproduces serious inefficiencies for society and the market. Compensating individuals who have been unjustly denied jobs by hiring them at a time when they might not be the best qualified person cannot be seen as a case of committing another wrong (in terms of efficiency) to remedy an earlier wrong. It must be seen as a mechanism to correct the distortion in hiring whereby future decisions to unjustly exclude individuals from jobs is disincentivised.

III-C: Relevant Groups for Affirmative Action Based on Future-Looking Considerations

Goldman also presents a justification for affirmative action in terms of a future-looking perspective[77]. He believes that such a justification will apply only to the 'class of social and economically deprived individuals'[78]. Beyond the need to

[77] Here the consideration has moved beyond the experience of past injustice and exclusion and is concerned with larger issues of social justice like housing, nutrition, employment, health etc.

[78]Goldman (n 66) 197.

demonstrate first order discrimination that would entitle individuals to affirmative action (compensation) under the distributive paradigm, as a class it is only the chronically poor that are entitled to affirmative action in a future-looking perspective. Goldman has to take this position because of his commitment to 'means-regarding equality of opportunity'[79]. Such a commitment would mean that for the distributive principle to apply in an unfettered fashion disparity of means must be countered. However, Goldman is clear that the existence of disparities of means cannot alone justify affirmative action.[80] While other measures like providing free public schooling with a common curriculum and special measures to train and motivate may be taken, Goldman is of the view that for the chronically poor, who are caught in the vicious cycle of lack of opportunities and lack of motivation, affirmative action is essential. Goldman recognises that

> there is a crucial distinction here between those who are temporarily low on the economic ladder and the chronically disadvantaged, who are likely to remain so without special treatment. This distinction relates precisely to chronic lack of motivation, the factor that justifies this form of reverse discrimination. Programs designed to correct for this factor need not employ purely economic criteria for qualification but can be aimed at those from chronically deprived communities and backgrounds. Since blacks and members of other communities are disproportionately represented in this unfortunate group, preferential policies to achieve this purpose will mainly help them in any case. But it will help them in a way that accords with rather than violates the principle of equal opportunity.[81]

Under this construction of affirmative action within a forward-looking distributive framework, blacks and women are not legitimate beneficiary

[79]Rosenfeld (n 68) 78.

[80] Goldman (n 66) 171-175.

[81]ibid 191-192.

categories. Since fair mean-regarding equality of opportunity is the stated aim, Goldman believes it is only the chronically poor that may not be able to achieve that without affirmative action. Using race and gender would be both under-inclusive and over-inclusive at the same time because Goldman is of the view that all blacks and all women are neither chronically poor nor lack motivation (which is not an empirical claim). Goldman is of the view that certain members of these groups have escaped the marginalising impact and therefore cannot be legitimate beneficiaries while excluding many in the chronically poor category who require such beneficial measures. Goldman's view is that the group to be treated as a beneficiary must be defined more narrowly than by race or gender.[82]

III-C(i):Can Chronic Poverty be Homogenised?

The response to Goldman can be at many levels. His argument about the experience of poverty compared to the experience of race and gender presents many issues. The chronic lack of motivation need not be a sole product of poverty. But Goldman's significant contribution is that he brings into sharp focus the point that preferential treatment in employment and education tends to benefit the most competent victims. The critical assumption he makes here is that the most qualified individual in the beneficiary group is least likely to have been a victim of discrimination. While we could question that assumption, we cannot deny the fact that Goldman has his finger on a fundamental question concerning affirmative action. The manner in which we define beneficiary groups has ensured that the

[82]ibid 195.

best off end up being the beneficiaries. By applying a meritocratic evaluation within the beneficiary group, affirmative action policies face the very real problem of benefitting those who need it the least. The solution could well be Goldman's suggestion of defining the beneficiary group more narrowly. However, I am unwilling to take the next step with Goldman and assert that the consequence of narrowing the beneficiary group must be to identify the beneficiary group as only those who are chronically poor. Chronic poverty cannot be seen a homogenous experience blind to other factors of gender, race, caste etc.

Part IV: Diversity as a Justification for Affirmative Action

Diversity as a justification for affirmative action has achieved tremendous significance in the U.S. and with it has attracted a lot of criticism as well. The aim of this section is two-fold: a) analyse the strength of the diversity argument and its potential in the context of affirmative action; b) test the relevance of the diversity argument in India in the context of Dalits. In response to the first issue, I agree with the argument that diversity as a justification does not capture the crux of the problem for racial minorities and in effect imposes an unfair burden on the worst-off within that group. As far as the relevance of the diversity argument for India is concerned, I analyse it primarily in the context of Dalits. I have limited it to Dalits because a sufficiently serious claim based on diversity has been made only by certain Dalit groups. I am not concerned with the proposals for the proposed Diversity Index because my project here is to analyse arguments surrounding cultural diversity and not racial/ethnic diversity simpliciter. Diversity as a ground for affirmative action for Dalits is counterproductive because it ignores the

context in which this 'culture' is produced and leaves the feminist project within the anti-casteism movement susceptible.

IV-A: Legal Development of Diversity as a Justification

The use of diversity as a justification for affirmative action achieved prominence with the decision of the U.S. Supreme Court in *Regents of the University of California v Bakke*[83] (hereinafter '*Bakke')*. In *Bakke,* the U.S. Supreme Court was of the view that the University of California at Davis could not earmark sixteen seats in its medical school for minority groups. Of the six opinions in *Bakke*, Justice Powell's was the most crucial as it formed the basis of the plurality. While Justices Blackmun, White, Brennan and Marshall held that colour-blind policies were not required in all circumstances and that Title VI of the 1964 Civil Rights Act 'does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment'[84], Justices Stevens, Burger (Chief Justice), Stewart and Rehnquist were of the view that the case did not call upon the Court to decide whether race can ever be used as a factor in admission decisions[85] and held in favour of Alan Bakke under limited statutory grounds. Justice Powell, however, disagreed with Justices Blackmun, White, Brennan and Marshall to the extent of his finding that racial classification to remedy past societal discrimination was not a compelling state interest under the Fourteenth Amendment.[86] The fact that the

[83]*Bakke Case* (n 26).

[84]ibid 328.

[85]ibid 411.

[86]ibid 307-10.

Davis program excluded non-minority groups from a certain percentage of seats on a purely racial basis made it fall foul of the Fourteenth Amendment[87] and therefore formed a majority with Justices Stevens, Burger, Stewart and Rehnquist to strike down the Davis policy and find in favour of Alan Bakke. However, Justice Powell agreed with the Blackmun quartet to the extent of his approval of using race as one of the factors.[88] Justice Powell's most significant contribution in his opinion in *Bakke*, which changed the landscape of affirmative action policies in the United States, is his approval of the aim of achieving a diverse student body as a compelling state interest.[89] Justice Powell was clear that the diversity in play was not 'simple ethnic diversity' but rather a more genuine diversity. Genuine diversity, according to Justice Powell, was an exercise where each individual applicant was evaluated for her potential to contribute to diversity without race being a decisive factor. The thrust within this understanding of diversity is to select individuals who are most likely to promote 'educational pluralism'. Justice Powell included qualities like 'exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important'.[90]

Given that no other judge in *Bakke* had supported the diversity rationale, a lot of confusion existed post-*Bakke* about whether Justice Powell's diversity

[87]ibid 319-320.

[88]ibid 315.

[89]ibid 311-316.

[90]ibid 315-317.

rationale was indeed binding law.[91] Justice O'Connor's judgment in *Grutter v Bollinger*[92](hereinafter '*Grutter*') joined by Stevens, Souter, Ginsburg and Breyer, JJ., upheld the above diversity rationale and held that the University of Michigan's Law School 'adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race.' An essential outcome of such a process is that a candidate admitted through the diversity route is required to demonstrate how she will contribute to cultural diversity. Undoubtedly what is expected constitutionally is not racial or ethnic diversity simpliciter, but cultural diversity. The move here is to abandon the argument that preferential admissions/hiring is aimed at redressing marginalisation and instead, the diversity approach seeks to value and celebrate difference.

However, in *Parents Involved in Community Schools v Seattle School District No.1*[93], the U.S. Supreme Court rejected the applicability of *Grutter* in the context of elementary and secondary schools.[94]

[91] As stated in *Grutter Case* (n 15) 325 (O' Connor J) 'Compare, *e.g.*, *Johnson* v *Board of Regents of Univ. of Ga*., 263 F.3d 1234 (CA11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood* v*Texas*, 236 F.3d 256, 274-275 (CA5 2000) (*Hopwood II*) (same); *Hopwood I*, 78 F.3d 932 (same), with *Smith* v *University of Wash. Law School,* 233 F.3d 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*)'.

[92]*Grutter Case* (n 15).

[93]*Seattle School* (n 16).

[94]ibid (Roberts CJ, Part III-A).

IV-B: Evaluating Diversity

The strongest case for diversity can be articulated in terms of the belief that bringing together people of different backgrounds will lead to a change in attitudes, more tolerance and contribute to a far more meaningful education for the entire pool. Such interaction would lead to the development of significant skills required in a diverse society that would enable individuals to work with diverse groups in an environment of respect and tolerance. Such social interaction between members of society would ultimately lead to more sustainable economic growth in society. Michal Kurlaender and Gary Orfield[95] cite Patricia Gurin's work as providing the most convincing case for diversity. Gurin concludes from her empirical study that individuals who experienced diversity in the classroom exhibited the most engagement in various forms of citizenship and also had the most engagements with different races and cultures in their college life and after.[96] William Bowen and Derek Bok provide evidence for the position that the concern around stigma experienced by students admitted on the basis of diversity in top universities in the U.S. is exaggerated. They provide evidence for the position that minority group students in such extremely selective institutions are

[95] Michal Kurlaender and Gary Orfield, 'In Defense of Diversity: New Research and Evidence from the University of Michigan' (1999) 32(2) Equity and Excellence in Education 31-35.

[96] ibid 32-33 'Gurin's research relies on three very different data sets: (1) data collected at the University of Michigan on the undergraduate class of 1994 (the entire class was surveyed at entry in 1990, and all students of color and a large number of White students were surveyed at the end of their first year, second year, and senior year); (2) data collected from students who participated in a specific classroom program at the University of Michigan, The Intergroup Relations, Community, and Conflict Program, before they were enrolled in the first-year course, at the end of the course, and at graduation; (3) a very extensive multi-institutional data base of students who entered college in 1985 and were surveyed upon entry to college, and follow-up surveys both four years after college entry and nine years after college entry. Her specific research relied on information from 9,316 students at 184 colleges and universities'.

much more likely to receive their degrees and progress on to advanced degrees than the minority students admitted in less selective institutions.[97]

This move towards cultural diversity and away from hierarchical practices has been the central basis for criticising the diversity approach. The main criticism has been that the diversity masks exclusion by invoking the paradigm of tolerance and promotion of different 'cultures'.[98]*Bakke* played a crucial role in changing the terms of the race debate in the U.S. Even though significant parts of Justice Powell's judgment closed many doors for the Black movement, he left a window of opportunity with the diversity discourse. It led to the blooming of a certain variety of race-conscious thought that worked successfully towards establishing that Blacks have distinctive practices and perspectives. The argument is certainly not that the decision in *Bakke* gave rise to this stream of intellectual thought, but what *Bakke* certainly did was to hurl the discourse of racial difference as cultural difference from relative non-prominence into a central tenet of Black empowerment.[99]

The most significant concern with proceeding along the cultural diversity path for race was that it imputed a certain level of innocence to the fact of discrimination and sought to push the discourse on institutionally imposed

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[97] William Bowen and Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (Princeton University Press 1998).

[98] Kimberle Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43 Connecticut Law Review 1253, 1341-1342.

[99] For a detailed and thorough analysis of why diversity was not the dominant theme for affirmative action in the U.S. until *Bakke,* see Peter Wood, *Diversity: The Invention of a Concept* (Encounter Books 2003) 143-162.

wrongs of status hierarchy to the background.[100] Justice Powell's judgment in *Bakke* held that quotas were unconstitutional and that remedying past discrimination amounted to a compelling state interest only if the educational institutions were aiming to remedy specific instances of discrimination inflicted by the institution. The ruling in *Bakke* held explicitly that remedying general discrimination could not amount to a compelling state interest. With diversity providing a way out, it ensured that diversity went from being one of the many reasons for implementing affirmative action programmes to being the sole reason for it. Diversity's role as one of the justifications is very different from its impact as the sole reason for affirmative action. *Bakke* had the effect of forcing both institutions and marginalised groups to place an undue emphasis on cultural differences alone. Not only did universities and applicants need to make the general claim that racial minorities would bring different perspectives into the classroom, they also needed to give a working account of the different perspectives that would come with preferring individuals from such minority groups. All this contributed towards the extremely undesirable end that students from racial minorities needed to necessarily demonstrate their ability to bring distinct viewpoints into the classroom to justify their selection under preferential treatment schemes.

An enduring concern with the diversity rationale has also been the 'racial proxy' argument. The basis that racial diversity will lead to interaction and exchange of ideas is thought to be problematic because it essentially relies on

[100] Richard Thompson Ford, *Racial Culture: A Critique* (Princeton University Press 2005) 52-57.

stereotypes of races. The response to that line of attack has been that race can be used as proxy when it stands as an accurate proxy for certain life experiences, perspectives and contributions'but not when it is an inaccurate proxy for others.'[101] The crux of the problem with diversity seems to be that it reduces the individual to preconceived notions of the group she belongs to. The problem of 'race as proxy' is evident when it is irrational and discriminatory but the same set of concerns must also arise when individuals are reduced to their racial identity in terms of the contribution they can make. Volokh notes that much of the civil rights movement in the United States was about moving away from the 'race as proxy' framework and upholding the ideal that individuals deserved to be treated on the basis of their individual traits.[102]

A response to the 'racial proxy' criticism has been that the use of race is not to argue that members of the beneficiary group will be the only ones to think about and articulate matters concerning the group with sufficient depth. Neither is the claim that members of such a group will always have views that are in anyway representative of the group experience. The claim is far more limited. The reason for race-based diversity programmes is that the likelihood of members of such groups having reflected on certain issues is much higher, as an empirical claim, than individuals outside such a group.[103]

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[101]Eugene Volokh, 'Diversity, Race as Proxy, and Religion as Proxy' (1996) 43 UCLA Law Review 2059, 2065.

[102]ibid 2076.

[103] Sanford Levinson, 'Diversity' (2000) 2 University of Pennsylvania Journal of Constitutional Law 573, 596-597.

However, the important move by Justice Powell that seeks to address the above concerns is that race is only one of the factors to be used. For Justice Powell a constitutionally valid diversity policy must include 'race plus' other qualities.

> Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.[104]

However, this move by Justice Powell gives rise to another set of concerns, which operate within the identified groups. The introduction of the additional set of factors has a significant impact on the nature of beneficiaries from within the group. The next section evaluates the manner in which Justice Powell's 'race plus' requirement has a marginalising impact within the group.

IV-C: Diversity and Internal Group Differences

Grutter further entrenches the diversity rationale through Justice O'Connor's opinion and held that Justice Powell's opinion is abundantly clear that the race can be used as a factor only to achieve a diverse student body. *Grutter* like *Bakke* also rejects that there exists a compelling state interest in addressing general discrimination of racial minorities through affirmative action and neither does such an interest exist in 'reducing the historic deficit of traditionally disfavoured minorities'. The greatest drawback of the diversity justification is that it requires

[104] *Bakke Case* (n 26) 317.

individuals from racial minorities to exhibit and articulate their difference in certain recognisable forms to benefit from affirmative action. However, that fact ignores the position that groups like Blacks, especially the worst-off within the group, are subject to systemic discrimination that prevents them from gaining the requisite inputs that are required to gain admission on these grounds. In this process, what the U.S. Supreme Court has ended up rejecting are arguments that were the most important justifications, especially in professional courses, before *Bakke.* One such justification, which is no longer valid, is that members of such racial minorities are more likely to serve in their marginalised communities than professionals belonging to the majority group. The diversity rationale, as developed in the U.S., ignores the present day experience of invidious discrimination and systemic exclusion and its relation to racial identity. By couching status hierarchy in terms of inherent differences and advocating for tolerance, accommodation and encouragement for cultural diversity, diversity as the singular rationale for affirmative action ignores all the structural elements in the experience of discrimination.

IV-D: Cultural Diversity in the Indian Context

In the Indian social and constitutional context, the distinction explored above between status hierarchies and cultural diversity plays out in an interesting fashion.

Sociologists writing on the caste system have always been careful not to reduce the caste system to a system of cultural differences. It has always been

recognised that hierarchical aspects of caste are integral to understanding the operation of the caste system and that the temptation to prioritise difference over inequality must be resisted.[105] On the surface, it might seem that each jati (sub-caste groups within each of the four main castes) has

> its own cultural traditions with its own food habits, rituals, dress code and even art forms and may thus 'appear' to be merely functioning along an axis of difference, evidence of the enormous variation in Hindu society. Nevertheless, the relationship to the occupation and specific cultural traditions of each caste functions within a broader framework in which the localized hierarchy is based on ritual status, control or lack of control over productive resources and power. This is the basis for the internal differences within the caste system, making for the division between upper or higher castes and lower castes.[106]

IV-D(i):Diversity and the 21st Century Dalit Agenda

There have been interesting attempts from within the Dalit community to develop the diversity discourse. At a nationwide meeting in Bhopal in January 2002, a wide range of intellectuals, politician and policy makers discussed and evolved a Dalit agenda for the 21st century. In what came to known as the Bhopal Document, for the first time a case was made out to address discrimination against Dalits using the diversity paradigm. The Bhopal Document calls for workplace diversity in place of reservations in recognition of the fact that reservations lacked non-Dalit approval. Four of the twenty-one points in the Bhopal Declaration specifically call for diversity. Point 15 uses the term 'diversity' to mean the diversification of economic gains across caste divisions that act as hurdles to an inclusive society. Thus, the demand is to include Dalit businesses in state

[105] Mary Searle-Chatterjee and Ursula Sharma, *Contextualising Caste: Post-Dumontian Approaches* (Blackwell Publishers 1994).

[106] Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree 2003) 55.

government contracts and hence is termed 'supplier and dealership diversity'. The Bhopal Document explicitly states that it is borrowing from the U.S. model and it will be argued in this section that the diversity agenda for Dalit is an inappropriate one.

However, there seems to be significant confusion in the manner in which 'diversity' is understood within the Bhopal Document. While on the one hand it says it is borrowing from the U.S. model, it is clear from the introductory paragraphs thatwhat is being aimed for is more along the lines of racial/ethnic diversity simpliciter and not 'cultural diversity' as in the U.S. However, in light of the ambiguity, the argument concerning cultural diversity in the context of Dalits must be addressed. The policy recommendations do not state, for example in demanding share of Government contracts, that there is a particular Dalit way of doing business that is in some way different from how 'others' do business. In fact, the actual demand is that Dalit businesses must get 'normal' treatment and be treated like everyone else as far as awarding contracts is concerned. However, though there is frequent invocation of the U.S. system, there is very little in the document that connects or differentiates the U.S. understanding of diversity as explained in *Bakke* to the demands for a diversity paradigm in India. Even if the cultural diversity argument were pursued, it would come up against the same arguments used in the critique of *Bakke* and *Grutter*.

The constitutional perspective on this issue of cultural diversity is critical. The drafters of the Constitution in fulfilling the commitment to protect cultural

diversity differentiated between four communities: religion, language, tribe and caste. The treatment of castes in the Constitution is very different from any of the other communities. Religion, language and tribe were included in provisions that were intended to protect, preserve and further their culture but no such cultural protection has been afforded to castes in the Indian Constitution. It throws significant light on the nature of the discrimination suffered by lower castes as understood by the Constituent Assembly Debates. It is clear through the CADs that cultural differences were never considered as the basis for caste discrimination and hence no such protection was afforded.

Further evidence of the lack of force behind understanding the caste system purely in terms of cultural diversity can be seen from decisions of the courts. Courts have been called upon to adjudicate the claims to the status of Scheduled Tribe/Scheduled Caste in numerous cases. While cultural practices are invoked very frequently where the status of Scheduled Tribes is in question, there is no such invocation for cases involving Scheduled Castes and OBCs. In cases involving Scheduled Castes and OBCs, the Courts favour using birth as the ground to arrive at a decision.[107]

[107]For the discussion on Diversity, 21st Century Dalit Agenda and the Bhopal Document, see Balmurli Natrajan, *The Culturalization of Caste in India: Identity and Inequality in a Multicultural Age* (Routledge, 2011)*;* Laura Dudley-Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (Routledge 2003); Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (2nd edn, Oxford University Press 1991).

IV-D(ii):Diversity and the Dalit Feminist Project

A diversity-based approach relying on cultural differences in the context of caste discrimination has significance for gender issues within caste. A rich body of academic literature has established the close connection between patriarchy and caste and that patriarchy operates differently amongst Dalits. However, despite operating differently it has been argued that brahmanical patriarchy was a single framework, which linked caste, gender and land control. Even though it operated differently across the caste hierarchy, the whole system is nonetheless informed by it. A misplaced cultural differences approach to caste has the potential to jeopardize the feminist movement to combat the impact of patriarchy within the caste system.[108] This is important in the context of the discourse around 'cultural defence'. While cultural defence has been thoroughly engaged within the context of religion in India, the same has not been the case with caste due to the resistance to view them as ethnic groups. Caste-based discrimination has so far not been considered to be cultural discrimination and has therefore been denied the protection of cultural rights and the 'cultural defence'. A diversity rationale for caste-based affirmative action takes us in the direction of cultural rights for caste and given the entrenched role of patriarchy in the caste system, it would not be an exaggeration to suggest that the feminist project would be the first to be adversely affected.

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[108] V. Geetha, *Patriarchy: Theorising Feminism* (Stree 2007); Gail Omvedt, 'Review: "Towards a Theory of Brahmanic Patriarchy"' (2000) XXXV(4) Economic and Political Weekly 187; Anupama Rao, *Gender and Caste: Contemporary Issues in Indian Feminism* (Anupama Rao ed, Zed Books 2005); Sharmila Rege, *Writing Caste/Writing Gender: Narrating Testimonies of Dalit Women*' (Zubaan 2006).

CHAPTER TWO: CONSTITUTIONAL ADJUDICATION OF RESERVATIONS AND THE DRAFTING HISTORY OF THE INDIAN CONSTITUTION

The primary aim in this chapter is to identify the appropriate role for the Constituent Assembly Debates in the adjudication of reservation cases in India, particularly in the context of the different normative concerns that informed the debate on reservations for Scheduled Castes and Muslims. The Constituent Assembly Debates and other documents that contributed to the drafting of the Constitution of India are analysed in this chapter to support the argument that constitutional intent cannot be determinative of any contemporary constitutional dispute regarding reservations. However, that position is not inconsistent with the argument that the higher judiciary, to gain crucial contextual perspectives, must necessarily use the proceedings of drafting the Constitution to inform contemporary constitutional adjudication. In Part I of this chapter, different theories on constitutional adjudication are explored with the aim of creating a context within which constitutional intent might be relevant. Having established that context, Part II demonstrates the difficulty with establishing a coherent constitutional intent concerning reservations from the various drafting proceedings and the Constituent Assembly Debates. In light of the discussion on the different aspects of constitutional adjudication and the indeterminacy of constitutional intent in the context of reservations, a feasible framework for using such constitutional intent is suggested. The indeterminacy of constitutional intent concerning some debates on reservation and the absolute certainty in certain others aspects cannot be, in either case, conclusive of the constitutional position in contemporary times and yet it is important for the higher judiciary to

acknowledge and engage with this indeterminacy or certainty as the case might be.

Part I: Approaches to Constitutional Adjudication

It would be difficult to make the claim that the higher judiciary in India has developed a coherent approach to adjudicating reservation cases and it would perhaps be fair to argue that it has been an unpredictable mix of textual interpretation, constitutional intent, legislative history, empirical evidence (or the lack of it) and facets of contemporary society. Constitutional adjudication has always grappled with concerns about the power of judges to strike down legislations without reducing it to a mere exercise of discretion by individual judges. While acknowledging the importance of judges having the power to declare legislative actions as violating constitutional protections, the tyranny of judges is a major concern in theories of constitutional adjudication just as the tyranny of majorities articulated through legislatures is. In order to curb the power of the judges, theorists argue that certain provisions of the Constitution are so clear that judges need not interpret it and have to merely 'apply' it were the legislature to violate those provisions. In I-A, textualism as a limitation on the power of judges is analysed. After coming to the conclusion that inevitably gaps exist in the text and that interpretation cannot be exercised, in I-B, the theory of original intent as a means of filling the gaps is analysed. Highlighting the shortcomings of originalism leads to an examination, in I-C, of whether the 'living tree' theory has all the necessary answers. The concerns that each of these theories raise for the constitutional adjudication of reservations in India are

brought together in the discussion on the Constituent Assembly Debates in Part III of this chapter.

I-A: The Challenge of Textualism

Though much of this section engages with textualism in the context of legislative interpretation, there are important lessons from the discussions on textualism for constitutional interpretation. Some of the concerns that a textualist approach face in the context of legislative interpretation cannot be avoidedwhen it comes to constitutional interpretation either. One such concern is whether discussions and statements in the legislature must be completely ignored or whether an appropriate role can be found for them without sacrificing the primacy of the text. A nuanced approach to textualism, while still rejecting the search for the specific 'intent' of the legislature, would not reject a broader consideration of 'goals, purposes and concerns' of the legislature in an attempt to better understand the ordinary meaning of the text. While such a broader consideration would not control the meaning of the text, it would certainly contribute to a contextual understanding of textual meaning. Justice Scalia in his dissenting opinion in *Smith v United States* argues that while giving statutes their meaning, non-technical words must be given their ordinary meaning. In giving such meaning, Justice Scalia argues, what is important is not how a word 'can' be used but how it is 'ordinarily' used.[109] Proponents of textualism are clear that it is not merely a revival of the plain meaning rule but that it is a nuanced understanding of the

[109]*Smith v United States* 508 U.S. 223, 242 (1993).

meaning of words in their context that is relevant. This context is provided by the other provisions of the law in which these words appear and also other laws that exist in the statute books. While applying this theory to interpreting ordinary legislation, textualism requires that judges ask how a 'reasonable person, conversant with the social and linguistic conventions, would read the text in context. This approach recognises that literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.'[110] Textualism does not permit legislative intent to take precedence and control the meaning of words that appear in a statute.[111] Textualism for many, like Justice Scalia, is essentially a theory of judicial restraint. By requiring the judge to attribute meanings that are 'ordinarily' implied, the interpretational choices before the judges are reduced.[112] In the context of legislative interpretation, the search for 'legislative intent' is problematic for textualists because it opens up a wide range of options for judges to choose from without any guiding principle. The underlying concern is that there are multiple 'intentions'/interests to be found in the making of a legislation and it would run the risk of a judge choosing an intention that suits her ideological disposition. It is in this attempt to reduce judicial discretion that the textualists argue for courts not to consider legislative intent. [113] Resorting to the ordinary meaning of the words is seen as an attempt to

[110]John F. Manning, 'The Absurdity Doctrine' (2003) 116Harvard Law Review 2387, 2393.

[111]Thomas Merrill, 'Textualism and the Future of the *Chevron* Doctrine' (1994) 72 Washington University Law Quarterly 351.

[112]Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) Duke Law Journal 511, 521.

[113] John F. Manning, 'Textualism and the Equity of the Statute' (2001) 101 Columbia Law Review 1, 69-70.

reduce this unguided judicial discretion and limiting it to the ordinary meaning of words. However, much of the criticism directed at textualism of this sort raises the concern that the search for ordinary meaning is just as uncertain and multiple outcomes could still be possible.

Proponents of textualism like Frank Easterbrook have a subtly different justification. Easterbrook is of the view that it is not feasible to reduce textualism to mere plain meaning and rely on dictionary meaning of words.[114] In interpreting a law, judges have various choices of meanings and the theory of meaning that courts adopt must be jurisprudential and must go beyond that of plain meaning. Textualists recognise that language is a social construct[115]and have acknowledged Wittgenstein's work[116] in establishing that sets of words do not possess intrinsic meaning and neither can such meaning be attributed to them. Despite that, there seems to difference of opinion about the role for legislative history in infusing meaning and influencing the meaning of the text. Easterbrook draws attention to the two different ways in which legislative history can be used to highlight the precise nature of textualism. The first method, taking off from the position that words have no 'natural meanings', looks to understand the meaning of the words in a legislation in its various contexts like the structure of the legislation, the place of the provision in the legislation, previous laws on the issues etc. The 'goals, purposes and concerns' of the drafters of the legislation represent

[114]Frank Easterbrook, 'Text, History and Structure in Statutory Interpretation' (1994) 17 Harvard Journal of Law and Public Policy 61, 67.

[115]Manning, 'The Absurdity Doctrine' (n 110) 2392.

[116]Frank Easterbrook, 'Statutes Domain' (1983) 50 University of Chicago Law Review 533, 536.

one such context, i.e. to determine the domain of the statute[117], and while they can certainly contribute some clarity to the meaning of the words, they certainly cannot control its meaning.[118] The second method treats the legislature as the dominant institution. The meanings that are attributed to the words in the legislation depend on what those who made the law had in mind. The purpose of adjudication is then reduced to finding that intention. Textualists argue that it is this latter search for meaning that gives unacceptable powers to a judge because the search is no longer for 'rules' but rather for 'intention' that can be attributed to lawmakers. It would be an impossible task to ascertain the legislature's intention because they comprise numerous members. Each member may or may not have a consistent policy on various issues. A legislature as a whole only has an outcome and it would be impossible to discern the intention or the set of intentions that went into creating the outcome.[119] Textualists proceed with the assumption that there is one correct meaning to be found and in the pursuit of finding this meaning they 'assemble various pieces of linguistic data, dictionary definitions, and canons into the best account of the meaning of the statute.'[120]

A textualist approach to interpretation has been heavily criticised. Even when ostensibly mechanical provisions whose text seems to provide no room for ambiguity whatsoever are involved, judges like Frank Easterbrook have admitted

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[117] Frank Easterbrook, 'What Does Legislative History Tell Us?' (1990) 66 Chicago-Kent Law Review 441, 448.

[118]Easterbrook, 'Text, History and Structure in Statutory Interpretation' (n 114) 64.

[119] Easterbrook, 'What Does Legislative History Tell Us?' (n 117) 443.

[120]Thomas Merrill, 'Textualism and the Future of the *Chevron* Doctrine' (1994) 72 Washington University Law Quarterly 351, 372.

that 'the invocation of the "plain meaning" rule just sweeps under the rug the process by which meaning is divined.' He rightly identifies the concern that 'often the meaning of a statute is smuggled into the rules that determine when, and why, to cut off the debate'.[121] However, theorists like John Manning consider textualism's move from 'plain meaning' to 'ordinary meaning' significant for its legitimacy since it contributes to rebutting the charge that the use of 'plain meaning' could lead to absurd results.[122]

Mark Tushnet mounts a strong critique of what he calls 'unsophisticated textualism' based on the evolution of classical liberalism. Associating textualism with the 'contemporary political conservatism' branch of classical liberalism in the United States, he believes textualism has been a response to the need of liberalism to restrict both political majoritarianism and the attitude of the courts at the same time. Political conservatives have been traditionally wary of political majoritarianism and saw courts as the institution through which a check on political majoritarianism was to be achieved. And courts were, in turn, meant to be checked by theories of constitutional law. However, the political conservatives see courts in the constitutional history of the United States to have escaped these restrictions. Political conservatives underline courts championing causes of political liberals as one of the main consequences of their having escaped such restrictions. Being caught in this situation, Tushnet believes, the political conservatives are forced (ironically) to defend populism in order to check the judiciary and yet their connection to classical liberalism would not permit

[121]Easterbrook, 'Statutes Domain' (n 116) 536.

[122]Manning, 'The Absurdity Doctrine' (n 110) 2393.

resorting to populism in an unrestricted manner. The political conservatives are then forced to profess 'unsophisticated textualism' as a check on populism to maintain their connection with classical liberalism.[123]

I-A(i): Constitutional Textualism and the Role for 'Intent' in Interpreting Constitutions

The role of legislative intent in statutory interpretation has close resonance to the issues surrounding the use of 'original intent' in the interpretation of constitutions. Integral to this discussion is the difference drawn between 'original intent' and 'original meaning'. Just as 'legislative intent' is seen as posing serious concerns in statutory interpretation, 'original intent' faces far more significant objections than 'original meaning'. However, certain proponents of originalism believe that it is the original intent of the Framers that is relevant rather than the original meaning.[124] By virtue of judicial review being implicit in the notion of the (U.S.) Constitution,[125] Justice Scalia argues that the Constitution also has an ascertainable meaning that can be reached by applying the usual devices in interpretation.[126] Scalia rejects the relevance of the intention of the Framers of the Constitution for determining the meaning of constitutional provisions (as he does

[123]Mark Tushnet, 'A Note on the Revival of Textualism in Constitutional Theory' (1985) 58 Southern California Law Review 683, 689-670.

[124] Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (2nd edn, Indianapolis: Liberty Fund 1997); Raoul Berger, 'Originalist Theories of Interpretation' (1988) 73 Cornell Law Review 351.

[125]*Marbury v Madison* 5 U.S. (1 Cranch) 137, 177 (1803).

[126] Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849, 854.

of the intention of the drafters for ordinary legislations). His reference to materials like the *Federalist Papers*, Scalia argues, is to understand how people originally understood the Constitution then. It is not the intention of the Drafters that is relevant but rather it is the original meaning of the text.[127] While the debate in legislative interpretation is between the intention of framers and objective meaning, in constitutional interpretation it is cast in terms of original meaning and current meaning.[128] Scalia acknowledges that there can be differences about what the original meaning is or the manner in which original meaning should be applied to new and unforeseen circumstances and in such situations the 'trajectory' of the concerned provision must be allowed to determine what is required.[129] This position has obvious connections to textualism and is articulated by one of its strongest proponents as a defence of a 'spacious but not unbounded version of constitutional textualism. On this view, textual analysis dovetails with the study of enactment history and constitutional structure. The joint aim of these related approaches is to understand what the American People meant and did when We ratified and amended the document….What counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.'[130]

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[127] Antonin Scalia, 'Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Antonin Scalia, *A Matter of Interpretation* (Amy Gutman ed, Princeton University Press 1997) 39.

[128] ibid 38; For a more detailed discussion of the terminology, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A. Knopf Inc 1996) 8-10.

[129]Scalia, *A Matter of Interpretation* (n 127) 45.

[130] Akhil Reed Amar, 'The Supreme Court: 1999 Term, Foreword: The Document and the Doctrine' (2000) 114 Harvard Law Review 26, 28-29.

Paul Brest in his influential article[131] raises concerns about the difficulty in deciphering the original intention of the ratifiers compared to the drafters. He identifies the problem that as the text of the Constitution moved from the drafters to the ratifiers in both Houses and various States, it was inescapable that the thought that went into finalising the provisions diminished.[132] Brest identifies the complex nature of an adjudicator who is an originalist by saying that 'first, she must immerse herself in the word of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopters' interpretive intent and the intended scope of the provision in question. Third, she must often 'translate' the ratifiers' concepts and intentions into our time and apply them to situations that the ratifiers did not foresee.'[133] While the first two tasks present a complex task of trying to understand the past and come up with a coherent answer, the last stage necessarily requires speculation on the part of an originalist judge to predict how the adopters' of the Constitution would have ruled on a situation they could have never imagined.[134]

[131] Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204.

[132]ibid 214.

[133]ibid 218.

[134]ibid 221.

I-B: The Potential and Dangers of 'Original Meaning' in Constitutional Adjudication

As indicated in the preceding section, the 'original meaning' strand of originalism in constitutional interpretation seems to be more acceptable. Even within the discourse on 'original meaning', Dworkin has pointed out two further choices that are possible. Defending what he calls 'semantic originalism', Dworkin draws a distinction between what different clauses in the Constitution can be read to say depending on what those who enacted it intended to *say* and 'what they intended –or expected or hoped-would be the *consequence* of their saying it'.[135] It is using this distinction that Dworkin defends the decision in *Brown v Board of Education*[136]under the originalism model. There is widespread agreement with Dworkin that the Supreme Court's decision that school segregation violated equal protection was the correct interpretation of what the Fourteenth Amendment said and it must be taken to have always meant that, irrespective of the fact that the drafters and adopters would certainly not have intended it to *do* such a thing. Dworkin is of the view that Scalia is defending the second version, called 'expectation originalism'. However, Scalia has declared that he is in agreement with Dworkin and that it is indeed 'semantic originalism' that he supports.[137] Dworkin also makes the claim that some parts of the Constitution were obviously intended (in terms of provisions like free speech, due process etc) to be broad statements of principle rather than narrowly stated rules and it is a point Justice

[135] Ronald Dworkin, 'Comment' in Scalia, *A Matter of Interpretation* (n 127) 116-119.

[136] *Brown v Board of Education* 347 U.S. 483 (1954).

[137] Antonin Scalia, 'Comment' in Scalia, *A Matter of Interpretation* (n 127) 144.

Scalia also accepts when he concedes that the 'trajectory' of certain provisions must be taken into account when deciding situations that could not have been foreseen at the time of drafting the Constitution.

The seemingly defensible model of 'original meaning' put forward by Dworkin runs into strong opposition on three grounds. Firstly, Laurence Tribe argues that the distinction that Dworkin draws and Scalia buys into, between two types of constitutional clauses is untenable. He is of the view that it would not be possible to decipher whether a particular clause was a broad statement of principle or a narrow rule by analysing the text or by reference to historical facts and views to determine what certain historical individuals were saying. Even textualists like Frank Easterbrook acknowledge the fact that provisions like age restrictions to be the President or terms of Congress were also value decisions made as a product of the time the drafters and adopters found themselves in.[138] Secondly, the nature of the decisions reflected in the Constitution leads Mark Tushnet to argue that originalists set up a very difficult task for themselves. He believes that attitudes, opinions, beliefs etc. concerning the law at any given point in history cannot be divorced from the larger political, economic and social conditions of the day. Trying to separate the meaning given to the words from the larger socio-political context of the day is an attempt to 'grasp historical parts without embracing the historical whole'.[139] Finally, apart from the difficulties that come with deriving meaning removed from the socio-political context, originalism

[138]Easterbrook, 'Statutes Domain' (n 116) 536.

[139] Mark Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 Harvard Law Review 781, 798.

has also come under attack from perspectives on language per se. Originalism relies on the ability of language to freeze and control meanings and does not take into account the propensity of language to evolve and meanings to change.[140]

I-B(i): The Role for Original Meaning in Various Apex Courts

The debate in the United States Supreme Court over the use of 'original meaning' is not ideal to analyse the discussion on the use of constitutional drafting debates because of the time that has passed since the drafting debates. It is very often influenced by the fact that the Supreme Court is looking to understand a period of history far removed from the times in which the Court finds itself. In that context it is relevant to look at jurisdictions where apex courts were required to consider the issue soon after their respective constitutions were created. They provide the strongest case for analysing the role of constitutional drafting debates because the courts were hearing the cases in the same political, social and economic circumstances in which the drafting debates occurred. That would provide courts with the strongest justification for relying on the drafting debates since they were so proximate in time and permit the debates to inform the content of the rights. Yet, the South African Constitutional Court and the Canadian Supreme Court chose not to let the drafting debates and discussions control the meaning of constitutional provisions and instead determined a limited role for them. The South African Constitutional Court was called upon in its very early days to determine the role for constitutional drafting debates while deciding the

[140] Sanford Levinson, 'Law as Literature' (1982) 60 Texas Law Review 373, 376.

constitutionality of the death penalty.[141] Justice Chaskalson in his opinion is clear that it is legitimate to consider the circumstances that prevailed during the adoption of the Constitution, including the various debates and writings that contributed to the process. However, Justice Chaskalson limits the role of such background materials to provide the context in which interpretation must take place and insights into the reasons for adopting or omitting certain provisions. He certainly does not envisage a dominant role for such materials or the meanings that these materials indicate. Citing the multiplicity of persons who contributed to the adoption of the Constitution through the Multi-Party Negotiating Process and others who enacted the final draft as members of Parliament, Justice Chaskalson is unequivocal about such materials not being determinative.[142]

Justice Chaskalson also refers to practices in other courts of the world and it would be worthwhile to refer to them briefly to discern the global currents on the use of constitutional debates and background materials. In *Reference re Section 94(2) of the Motor Vehicle Act 1979*[143], the Canadian Supreme Court considered the admissibility and weight to be given to the minutes of the proceedings and evidence of the Special Joint Committee that discussed the drafting of the Canadian Charter of Rights and Freedoms. Just like the South African Constitutional Court in *Makwanyane,* the Canadian Supreme Court was determining this issue barely a few years after the Charter had come into force. Justice Lamer held that extrinsic aids like the proceeding of the Special Joint

[141]*S v Makwanyane* [1995] ZACC 3.

[142]ibid para 12-19.

[143]*Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

Committee are admissible in constitutional interpretation even though their role in interpreting ordinary legislations is not on strong footing. However, Justice Lamer is also clear that such materials have very minimal value. The reluctance on the part of Canadian courts to use speeches from Parliament while deciding cases, in the opinion of Justice Lamer, is equally justified when it comes to the minutes of the Special Joint Committee. While the various records and drafts may represent the views of individuals concerned, they certainly cannot be used to discern the intent of the institution/body concerned. For Justice Lamer the unreliability that informs Parliamentary speeches as indicators of Parliament's intentions must also affect the minutes of the Special Joint Committee even though they are in the context of the Canadian Charter. Justice Lamer declares in no uncertain terms that it is impossible to attain certainty of the intention of the legislative bodies that adopted the Charter by referring to statements/drafts of public servants that were involved the process. Given the inescapable uncertainty and impossibility of determining such intention of the body concerned, Justice Lamer attributes only minimal weight to testimonies from the Special Joint Committee.[144] Justice Lamer also highlights the danger of freezing the nature of constitutional protections if the minutes of the Special Joint Committee are given a dominant role. In order to give the Canadian Charter the space to grow and evolve to meet 'changing societal needs', the minutes of the Special Joint Committee must be given only minimal weight to ensure that such materials do not stunt the growth of the 'living tree'.[145]

[144]ibid para 38-52.

[145]ibid para 53.

Therefore, we find a different experience in the South African and Canadian apex courts where there is certainty about the minimal role that constitution drafting debates and materials can play. Despite being much newer constitutions than that of the United States with much more organized access to definitive material that went into the drafting of the Constitutions, it is interesting to study the choices made by these courts. It is also important to note that the South African and Canadian apex courts made these decisions in the early days of working their respective constitutions. Despite the debates having taken place barely a few years before the cases were decided, these courts are mindful of the dangers that a dominant role for original meaning could have.

Perhaps the attractiveness of the 'original meaning' doctrine lies in its attempt to limit the discretion that judges possess. To the objection that originalism tries to impose the will of a generation that is long gone on current generations is met with the response that the very idea of a Constitution is to prevent majoritarianism. In this important task, originalists believe it is far better to root the nature and extent of these limitations in the intentions/meanings that were ratified by a democratic process rather than leave it to be decided by a few unelected judges.[146] However, originalism leaves itself open to the challenge that the search for original meaning does not solve the issue of judicial discretion in a significant way either.

[146]William Rehnquist, 'The Notion of a Living Constitution' (1976) 54 Texas Law Review693.

I-C: The 'Living-Tree' Doctrine – In Search of a Definite Meaning

At the heart of the living-tree doctrine lies the claim that when judges are engaged in constitutional interpretation they have the power to build and alter the content of protections afforded by the Constitution.[147] In deciding the content of right, Dworkin rightly identifies that judges are called upon to 'answer intractable, controversial, and profound questions of political morality that philosophers, statesmen and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices, whose insight into these issues is not spectacularly special'.[148] Dworkin seems to be suggesting that judges exercise a great deal of discretion in deciding these questions without any real guiding principles. However, Justice Breyer is of the view that all judges use the same set of basic devices – text along with language of other parts of the document, history, traditions surrounding use of the relevant language, precedents, purposes and values of the provisions, and consequences of other interpretational alternatives. The difference, according Justice Breyer, creeps in with the emphasis that is given to each device by different judges.[149] Judges under the living-tree doctrine cannot do as they please. In order for the interpretation to be constitutionally legitimate, judges have to give reasons that are constitutive of their decision and these reasons must bear a

[147]Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law and Jurisprudence 55, 57.

[148] Ronald Dworkin, 'Unenumerated Rights: Whether and How *Roe* Should Be Overruled' in Geoffrey R Stone, Richard A Epstein and Cass R Sunstein (eds), *The Bill of Rights in the Modern State* (University of Chicago Press 1992) 381, 383.

[149] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf Inc 2005) 7-8.

close connection to the wording of the Constitution.[150] The text of the Constitution limits the range of choices available to the judge and she has to make a decision within that spectrum.

The term living-tree was first used in *Edwards v Attorney-General for Canada*[151], a decision in 1929 by the Privy Council involving a question that arose under the 1867 Canadian Constitution (then in the form of a statute as the British North America Act, 1867) on whether women could serve as members of the Canadian Senate. Though the Act contained no equality clause, the provision on eligibility was framed in masculine terms and formed the basis for the Supreme Court of Canada to conclude that women were excluded. However, in the Privy Council, Lord Sankey argued that statutes that were constitutions were to be treated differently from ordinary statutes and observed 'the British North America Act planted in Canada is a *living tree* capable of growth and expansion within its natural limits…….Like all written constitutions it has been subject to development through usage and convention'[152]. Lord Sankey was of the view that the practice and convention of excluding women could not control the meaning of the provision and that the title of the section 'Eligibility of Persons' has to be read widely with special reference to the word 'persons'. [153]

[150]Kavanagh (n 147) 60.

[151]*Edwards v Attorney General for Canada* [1930] AC 124 (PC 1929).

[152]ibid 136.

[153] Vicki C. Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 Fordham Law Review 921, 945-947.

It is then perhaps only appropriate that the Canadian Supreme Court has been at the forefront of the commitment to the living-tree doctrine and the negation of originalism. Emphasis on purposive interpretation has been one of the specific commitments that has emerged from the Canadian Supreme Court's adoption of the living-tree doctrine.[154] It means that the Court will interpret rights within the Canadian Charter by ascertaining the purpose of such a guarantee within the Charter and adopting an interpretation that moves towards fulfilling that purpose. The Canadian Supreme Court makes an important move by taking the position that such purpose is not the purpose given by the legislative bodies, drafters, courts or any group. By virtue of being a living-tree, the Charter is ascribed a purpose of its own which the Courts then seek to draw out.[155] Reflecting on the manner in which such purpose may be discerned, Dickson, C.J. in *R v Big M Drug Mart Ltd.* held that the 'the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.'[156] Justice Breyer of the U.S. Supreme Court also follows the purposive method of interpretation and is of the view that attention needs to be paid to 'consequences'. In this context, 'consequences' clearly does not refer to a simplistic determination of the desirability of an

[154] Bradley W. Miller, 'Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada' (2009) 22 Canadian Journal of Law and Jurisprudence 331, 339.

[155]ibid 340.

[156]*R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 345.

outcome, rather the focus is on 'consequences related to the particular textual provision at issue'. The consequences have to be weighed up against the relevant values of the Constitution and this requirement to match it against the values of the Constitution serves to 'limit interpretive possibilities.'[157] In response to the criticism that a living-constitution approach in the United States serves to further judicial subjectivity, Justice Breyer argues that 'language, precedent, constitutional values, and factual circumstances all constrain judicial subjectivity'.[158] Justice Barak further explores the relationship between the text and purposive interpretation when he argues that, for purposive interpretation that drives the living-constitution doctrine to be legitimate, it must achieve a balance between the subjective purpose and the objective purpose.[159] For Justice Barak the original intent is important and the text for immediate purposesmust be used keeping in mind its historical context. However, the Constitution for Justice Barak exists to solve contemporary problems and the historical context must exist 'alongside the fundamental views and values of modern society at the time of interpretation.'[160]

Interestingly the Canadian Supreme Court seems to have developed a distinction between provisions of the Constitution that reflect political

[157] Stephen Breyer, *Active Liberty: Interpreting A Democratic Constitution* (Oxford University Press 2008) 115.

[158]ibid119.

[159] For Justice Barak, 'subjective purpose' refers to the real intent of the authors/drafters and 'objective purpose' refers to the 'hypothetical intent that a reasonable author would want to realise through the given legal text' and at a higher level of abstraction it refers to the 'fundamental values of the legal system'.

[160] Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 Harvard Law Review 19, 66-69.

compromises and those that are more in the nature of principles. The Canadian Supreme Court appears to have been more concerned with original intention when dealing with minority language and religious education protections in the Constitution.[161] Justice Beetz's pronouncement in *Societes des Acadiens v Association of Parents* is very instructive: 'Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s.7 of the *Charter*[162], are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each.'[163]

Justice Scalia has been amongst the vocal opponents of the living-constitution doctrine. The single greatest drawback, for Scalia, of viewing the Constitution as something that evolves is that there is no guiding principle for such evolution. There are no principles that the doctrine offers to assist a judge in discerning in what direction the evolution has occurred. Scalia is of the opinion that beyond the discussion on whether a constitution should be static, the living-constitution camp is deeply fractured along multiple lines of 'the good, the true,

[161] Bradley W. Miller, 'Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada', 22 Canadian Journal of Law and Jurisprudence 331 (2009), 345

[162] s. 7, Canadian Charter of Rights and Freedoms, Part I, The Constitution Act, 1982: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[163]Miller (n 51) citing *Societes des Acadiens v Association of Parents* [1986] 1 SCR 549, 578.

and the beautiful.'[164] Therefore, Scalia's main point of attack is that judges, in the name of living-constitutionalism, exercise discretion with highly insufficient checks not bound by any principle of constitutional interpretation.

The foregoing discussion on textualism, originalism and the living-tree doctrine demonstrates the appropriate role for debates that led to the drafting of constitutions. It is evident that discerning the intentions and motivations of a body like the Constituent Assembly is an inherently complex and impossible task. Given the nature of creating a document like the Constitution, there are multiple concerns and interests at play and it would be inaccurate to attribute any dominant meaning to such proceedings. However, such debates do provide the context within which contemporary constitutional questions may be viewed and it would only contribute to the legitimacy of constitutional adjudication to engage with that context.

Part-II: Reservations for Scheduled Castes and Muslims in India: A Complex Constitutional History

The evolution of provisions concerning reservations in the Indian Constitution has a fascinating history. On display, through various stages of the development of these provisions, are the numerous concerns that played on the minds of the drafters. This Part seeks to map the various positions that were taken in the relevant Sub-Committees, Advisory Committees and finally in the debates in the

[164]Scalia (n 127) 45.

Constituent Assembly on four main themes: a) reservations as a tool of empowerment; b) the criteria for and circumstances in which the State could provide reservations; c) reservations in legislatures for Scheduled Castes and Muslims; d) reservations in public employment for Scheduled Castes and Muslims. The four themes are mapped in order to establish the difference in opinion as far as wisdom of reservations per se is concerned and that despite different opinions regarding the divisive nature of reservations, there was general agreement that special measures were required for the upliftment of Scheduled Castes in light of the centuries of oppression and their marginalised position when the Constitution was being drafted. Reservations for Muslims were specifically considered, accepted and then rejected in the context of violence surrounding the partition of India and the creation of Pakistan. The indeterminacy around the use of reservations as a tool for empowerment of Scheduled Castes and the clear rejection of reservations for Muslims cannot be determinative of constitutional questions surrounding reservations. The passage of time since independence must require the Supreme Court to justify invoking or rejecting the debates while engaging in constitutional adjudication of reservations in contemporary India.

Women in the Constituent Assembly had decided not to push for reservations of any sort and therefore there is hardly any discussion around it. Discussions on reservations in higher education are largely absent from the drafting of the Constitution and as a consequence there is no specific provision in the Constitution that came into effect on 26th January 1950. However, this forms the basis for the tussle between the Supreme Court and Parliament very early on

and led to the First Amendment of the Constitution. The First Amendment will be discussed along with the judicial decisions that led to it.

This part will attempt to demonstrate the difficulty of relying on the CADs in the context of reservations and how this difficulty must inform their role in constitutional adjudication.

II-A: The Constituent Assembly and Its Democratic Deficit

The process adopted to form the Constituent Assembly raises concerns about its true representative character. There was no universal adult franchise to elect the Constituent Assembly because it was thought to be too time consuming. Instead the electorate for the Constituent Assembly comprised those elected to the provincial assemblies as part of the 1945-46 elections. The total membership of the Constituent Assembly was 389 of which 292 members were elected from the Provincial Legislative Assemblies; the Indian Princely States sent 93 representatives; and the Chief Commissioners' Provinces had 4 representatives. Following the 1935 Government of India Act, a vast number of people, including small peasants, most of the small shopkeepers and many through qualification criteria revolving around taxation and educational qualifications, were excluded from voting in these elections and it is estimated that only 28.5% of the adult population in the provinces voted in these provincial elections.[165] Before partition, the Congress had 202 of the 206 'general' seats and Mohammad Ali Jinnah's

[165] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 10.

Muslim League won 73 of the 78 seats reserved for Muslims. While the Congress had a majority of 69% before partition, it rose to 82% after partition when the Muslim League was left only with 28 members.[166] In the Constituent Assembly after partition, 30% of the total members represented minority groups (which were then understood to include, among others, Muslims, Anglo-Indians, Scheduled Castes, Christians, Sikhs etc) and this percentage was close to India's population of non-Hindus (37% including Scheduled Castes) as determined by the 1951 Census.[167]Granville Austin argues that any concern about the democratic deficit is perhaps overstated because the candidates of the Congress Party came from all parts of the ideological spectrum which covered the interests of those denied suffrage as well.[168] However, not everyone is as charitable as Austin. Despite the Congress' strategy to have influential leaders outside the Congress (like B.R Ambedkar representing Scheduled Castes and Frank Anthony representing Anglo-Indians) elected from the Provincial Assemblies, the Constituent Assembly is seen as a one-party body.[169] The representative credentials of the Constituent Assembly, it is claimed, are dented by many factors. The Assembly had a large number of upper castes, very few women (15), and 'in a country where more than 80% of the population still lived on the land, people with a professional background formed over three-fifths of its first legislature –

[166]ibid 9-10.

[167] James Chiriyankandath, '"Creating a Secular State in a Religious Country": The Debate in the Indian Constituent Assembly' (2000) 38(2) Commonwealth and Comparative Politics 1, 4-5.

[168]Austin (n 165).

[169] Stuart Corbridge and John Harriss, *Reinventing India: Liberalization, Hindu Nationalism and Popular Democracy* 23 (Polity Press 2000).

lawyers alone contributing a third'.[170] It is essential that this background to the Constituent Assembly must temper any discussion on the value that can be attached to the Constituent Assembly Debates in constitutional adjudication.

II-B: Process of Making the Constitution

Discussions in the Constituent Assembly can be generally divided into two phases. The first phase from 9th December 1946 to 30th August 1947 is when the Constituent Assembly considered various reports drafted by the different Committees and Sub-Committees whose members were drawn from the Constituent Assembly. Of particular significance to this chapter are the discussions in the Sub-Committee on Fundamental Rights headed by Jivatram Bhagwandas Kriplani (a Gandhian Socialist), the Sub-Committee on Minority Rights headed by Harendra Coomar Mookerji (representative of Indian Christians) and the Advisory Committees above each of those Sub-Committees. The reports of the Advisory Committees were then placed before the Constituent Assembly and the discussions on these reports frequently saw amendments to the decisions reflected in the reports before finally being adopted. After being adjourned on 30th August 1947, members of the Drafting Committee worked on a Draft Constitution and submitted it to the President of the Constituent Assembly on 21st February 1948. Subsequently there were widespread consultations and deliberations of the Draft Constitution all over the country and especially in the Provincial Assemblies. The Constituent Assembly reconvened next on

[170]Chiriyankandath (n 167) 5.

4thNovember 1948 (though it met for a day on 27th January 1948) to consider the draft of the Constitution submitted by the Drafting Committee[171]. The phase of debates in the Constituent Assembly from November 1948 saw a major reversal of the decisions that were earlier made and in particular decisions that related to reservations for Muslims and other religious minorities in legislatures and public employment. However, those decisions continued to be in place for Scheduled Castes and Scheduled Tribes.

II-C: The Vision for Equality and the Desirability of Reservations

Equality as a right is first dealt with in the Sub-Committee on Fundamental Rights set up by the Constituent Assembly. Before recommendations were made to the Committee on Fundamental Rights, various drafts put forth by members of the Sub-Committee were debated. One of the very first drafts debated in the Sub-Committee was the one presented by K.M. Munshi and the equality provisions contained in Article III of his draft reflect a symmetric view of the equality principle.[172] In this draft there are no provisions that permit special measures for women or Scheduled Castes/Scheduled Tribes. The right to religious freedom in Article VI and the right to education in Article VII are symmetric in nature and seek to provide the right in equal measure to all citizens of the country.[173] Members of the Constituent Assembly like Rajkumari Amrit Kaur were strongly

[171] Rochana Bajpai refers to the two stages as 'report stage' and 'draft stage' in Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford University Press 2011) 49.

[172] B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, vol II (Universal Law Publishing Co Pvt Ltd, 1967) 74-75.

[173]ibid 76-77.

opposed to the idea of any special measures for religious minorities or Scheduled Castes. She believed that such measures would hinder the project of uniting India as a nation. Referring to the stand taken by the 'majority of educated women', she was of the view that the refusal by women to ask for any special privileges in any sphere indicated the path forward for nation building in India. Despite being a group that was and continued to be systematically exploited and marginalised in Indian society, she believed that Indian women viewed themselves as an 'integral part of the whole' and had, therefore, not put forward a claim for special treatment.[174] Rajkumari Amrit Kaur, in addition to being opposed to separate electorates, was also opposed to the idea of reservations in legislatures and services. She questioned 'the legal existence of the depressed classes the moment the new Constitution' came in and that the category of Scheduled Castes would be an anomaly once the Constitution abolished untouchability. Seeking to situate Dalits within the fold of Hinduism, Rajkumari Amrit Kaur argued that Dalits would become one with the 'backward and ignorant poor Hindus' and hence did not require any special treatment. Advocating a break from the policies of colonial India, she strongly believed that the old preferential policies had only served to accentuate communal problems and that it was critical for independent India to abandon those policies.[175] Thakurdas Bhargava also backed Rajkumari Amrit Kaur's opposition, in principle, to reservations for any group[176]. Harnam Singh's draft on Fundamental Rights presented on 18th March 1947 contains the first reference to special measures for Backward Classes. The provision imposes an

[174]ibid 309-312.

[175]ibid 402.

[176]ibid 408.

obligation on the State (and in that sense is different from the language of permissibility that is reflected in the final draft of the Constitution) to 'provide special educational facilities to enter public services for Backward Classes such as Scheduled Castes, the Aboriginal Tribes…) etc. Displaying tremendous foresight, this provision clarifies that these facilities would be provided to any member of the listed castes/tribes, irrespective of religious denomination.[177] Also, in Harnam Singh's draft we see the genesis of the political protection that was afforded to minorities in terms of establishing autonomous institutions. The strongest attempt in the Fundamental Rights Sub-Committee at providing special measures is unsurprisingly in B.R Ambedkar's draft. The concept of 'adequate representation' first finds mention in Ambedkar's draft, which enables the State to take special measures to ensure adequate representation in civil and military employment along with educational institutions.[178] Ambedkar's draft is also unique in its protection against discrimination by private employers on the grounds of 'race or creed or social status'.[179] Unanimity seems to have existed amongst Dalit leaders, unlike on the issue of separate electorates discussed later in this Part, when it came to the initial suggestions on education. Ambedkar's draft envisaged special responsibilities for the State and Central Governments to bear the costs of secondary and higher education of Scheduled Castes in addition to

[177] In the post-independence years, the issue of religion in the context of reservations for Scheduled Castes and Scheduled Tribes is one that is incorrectly and inadequately addressed by Parliament (See paragraph 3 (as amended in 1956 and 1990), Constitution (Scheduled Castes) Order, 1950) the Supreme Court (*Soosai v. Union of India*, AIR 1986 SC 733). As a result, the law specifically excludes Muslims and Christians from being designated as Scheduled Castes while the social reality has been that many Scheduled Castes have converted to Islam and Christianity in the hope of escaping their caste status under Hindu society. However, such converts continue to be discriminated against both within their new religion and the larger society.

[178]Rao (n 172) vol II 88.

[179]ibid 89.

finding the money for foreign education of Scheduled Castes.[180] There are similar demands in the documents submitted by the Working Committee of the All-India Adi-Hindu Depressed Classes Association, H.J Khandekar and Jagjivan Ram.

Even in the debates of the Constituent Assembly there was no unanimity about the use of reservations. To the current text of Article 15(2), which provides that 'Nothing in this article shall prevent the State from making any special provision for women and children', K.T Shah wanted to add the words 'or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment'. He was of the view that the Scheduled Castes and backward tribes suffered from 'disabilities or handicaps' due to the historical discrimination they had faced. He felt such a long and structural experience of discrimination would take away their ability to meaningfully enjoy the rightsthat would be guaranteed equally. He wanted an amendment in the Constitution so that any measures in favour of these groups would not be seen as violating equality. He took the position that backwardness of certain communities would hinder the progress of society as a whole. Advocating a fair degree of uniformity in progress, K.T Shah believed it was only right that measures be taken to bring the Scheduled Castes and backward tribes to a comparable stage with other groups in society.[181] Interestingly Ambedkar did not support K.T Shah's amendment. Ambedkar believed it would grant constitutional validity to the State's attempt to segregate

[180]ibid 94-95.

[181] Constituent Assembly Debates: Official Report, Book 2, vol VII (Third Reprint, Lok Sabha Secretariat, New Delhi 1999) 655.

Scheduled Castes by building separate institutions for them in the guise of fulfilling the mandate of the provision. K.T Shah's amendment was defeated.[182]

Taking a position against reservations in public employment (under Article 16 in the final draft of the Constitution), Lokanath Misra argued that that having an equal right to employment, food, clothing and shelter for all citizens was the requirement and this could not translate into a right for certain citizens to be entitled to a specific share of public employment. He saw reservations as a system that rewarded backwardness and extracted a heavy toll in terms of efficiency. Strongly advocating the case for purely merit based recruitments, he argued that reservations for certain groups would amount to a degrading experience for those groups inflicted in the name of generosity.[183] Similarly, Damodar Swarup Seth also believed that reservations demanded an unacceptable cost in terms of efficiency even though they did appear to contribute to justice on the face of it. Given the difficulty in identifying the criteria for backwardness and the strong possibility of favouritism and casteism in administering such a system, Damodar Swarup Seth was of the view that while extra facilities and concession may be given to backward classes to improve their educational qualifications, no such measures should be taken in public employment.[184] His position that a completely meritocratic system must be adopted in public employment but indicating acceptability of special measures in education points us in the direction of considering whether different normative justifications must be adopted for

[182]ibid 662.

[183]ibid 673.

[184]ibid 679.

education and employment opportunities. This will be explored further in Chapter 3.

II-D: 'Adequacy of Representation' and Backwardness as Criteria

The principle of 'adequacy of representation' is one that finds increasing reference and relevance in the judicial discussions on reservations in India as will be seen in Chapter 4. As indicated in II-C, the phrase 'adequate representation' first finds mention in Article II Section II Clause 2 of Ambedkar's draft discussed in the Sub-Committee on Fundamental Rights.[185] That clause enabled the State to take special measures to ensure adequate representation in civil and military employment along with educational institutions. In the Proceedings of the Advisory Committee on Fundamental Rights, Ambedkar was of the view that the qualifying clause 'not adequately represented' should be removed. The provision, he said, could now be understood as suggesting that the State could provide reservation only if the condition of 'adequacy of representation' was not satisfied. Ambedkar was concerned that it would become a matter of litigation and the courts could substitute their judgment on adequacy of representation by holding that a reservation was being made despite being adequately represented.[186] The responses were based on the apprehension that if the phrase 'not adequately represented' was omitted it could lead to a situation where reservations were used to favour classes/groups that did not require it. C. Rajagopalachari was of the view that the absence of such a clause would make the non-discrimination clause

[185]Rao (n 172) 88.

[186]ibid 258.

redundant.[187] K.M Munshi first introduced the language that is reflected in the final draft of the Constitution that the relevant parts of the provision should read as 'classes which in the opinion of the State are not adequately represented'.[188] In response to Ujjal Singh's argument that all references to 'adequate representation' must be removed, the Chairperson, Sardar Vallabhai Patel, said that would enable the State to provide inadequate representation in attempting to fulfil the constitutional mandate.[189]

While the 'adequacy of representation' issue did not attract much attention in the Constituent Assembly Debates, the criterion that the classes for whom the State could provide reservation had to be 'backward' was a matter of significant debate. Pandit H.N. Kunzru first discussed the issue in the context of the need for a sunset clause in the provision dealing with reservation in public employment. Further indicating that the reasons and importance of reservations need not be the same across legislatures, public employment and education, Pandit H.N. Kunzru argued for a sunset clause of ten years, subject to review, for reservations in public employment. He argued that if reservations for legislatures, which were far more important since they gave marginalised groups the power to influence decision making, could have a sunset clause (ten year period) there was no reason to not apply it with greater intensity in the context of public employment. This statement by Pandit H.N. Kunzru and that of Damodar Swarup Seth in the preceding section that concessions must be made for backward classes in

[187]ibid 259.

[188]ibid 259.

[189]ibid 261.

education rather than public employment give a clear indication that members of the Constituent Assembly were open to the idea that reservations need not apply in the same manner across different sites like legislatures, employment and education. Pandit H.N. Kunzru was of the view that a sunset clause would prevent the temptation of communities to claim 'backward' status. Further a constitutionally mandated review process after ten years would prevent the State from believing it has met its obligation by merely providing reservations and would force the State to evaluate the manner and extent to which reservations were contributing to the overall upliftment of the backward classes.[190] This concern has played out in contemporary India where groups continuously clamour for inclusion in the OBC list and there has not been a single instance of a group being removed from the list.

However, many in the Constituent Assembly believed it was not wise to allow the State to provide reservations to classes, despite not being adequately represented, only if they were 'backward'. Aziz Ahmed Khan moved an amendment to suggest that backwardness as a criterion should be removed. He argued that it was entirely possible that individuals from minority communities who were qualified might not be recruited and that the State should have the freedom to remedy it. He felt the criteria of 'backwardness' in such a situation would restrict the flexibility of the State to remedy such a situation.[191] Mohammad Ismail Sahib also raised the issue of minorities in the context of reservations in

[190] Constituent Assembly Debates: Official Report (Third Reprint, Lok Sabha Secretariat, New Delhi 1999) Book 2, vol VII, 679-681.

[191] ibid 681.

public employment. He wanted backward classes of minorities included within the definition of backward classes and argued that the bogey of communalism in post-partition India could not be raised to deny the rights of people who deserve them. The non-representation in services would lead the minorities to demand their due share and cause discontent.[192]K.M. Munshi, speaking for the drafting committee, assured the Constituent Assembly that the term 'backward classes' included Scheduled Castes/Scheduled Tribes. Also, he implicitly acknowledged that efficiency was one of the concerns that had to be set off against the need to achieve inclusivity.[193] Ambedkar sought to justify the need to include the qualifying word 'backward'. He said there was a need to reconcile the following views – a) equality of opportunity for all citizens; b) to implement equality of opportunity, reservations of any sort for any class or community would not be permissible; c) despite the desirability of the foregoing aims, it was generally accepted that certain special measures must be provided to ensure the participation of marginalised groups in the administration of the country. Draft Article 9(3)[194] (Article 16(4) in the final draft), Ambedkar said represented a balancing act between these considerations by allowing reservations in order to end the virtual monopoly of certain groups over public employment. Ambedkar felt that if the two views – equality of opportunity and the legitimate demand of certain groups for presence in government services – were to be reconciled, then a qualifying word like 'backward' was necessary. The equality of opportunity was the guiding principle for Ambedkar and he was of the view that the demand for

[192]ibid 692.

[193]ibid 696-697.

[194]Rao (n 172) vol III 521.

inclusion of groups could not swallow (overwhelm) that principle in its entirety. He categorically stated that the reserved seats could not exceed 50% because only then would the principle of equality of opportunity be operational in practice. On the question of who would comprise a 'backward community' and whether such a determination would be justiciable, Ambedkar said a dogmatic answer would not be possible and felt it would be appropriate to approach the Supreme Court if the State had reserved a disproportionate percentage of seats without sufficient basis for it.[195]

II-E: Reservations for 'Minorities' Before December 1949

(The term 'minorities' in the drafting process of the Constitution included both Scheduled Castes and Muslims and no distinction was made in the protection afforded to them as far as reservations were concerned until December 1949)

The contentious issues that the Sub-Committee on Minority Rights, the Advisory Committee on Minority Rights and finally the Constituent Assembly considered in the initial stages revolved around the special measures in legislatures and public employment for minorities. While there was widespread agreement that the demand for separate electorates for Scheduled Castes and Muslims would not be appropriate for a newly independent country, the decisions on reservations in legislatures and appropriate measures in public employment were far more contentious. We see contrasting positions taken on reservations in the context of

[195] Constituent Assembly Debates (n 190) 700-702.

legislatures and recruitment to the services. Concerns of efficiency are at the forefront of the discomfort with reservations in public services whereas reservations in legislatures on the basis of population ratios for Scheduled Castes and Muslims are marked by concerns of political participation and legitimacy.

While II-F analyses the significant change in the meaning of 'minorities' post-December 1949 and the subsequent change in the special measures adopted, it is useful to place the protections that were agreed upon before December 1949 within a larger theoretical framework. Rochana Bajpai in her work on analysing the Constituent Assembly Debates for minorities, from a political science perspective, classifies the protections demanded and granted into three categories: a) The 'assimilationist/integrationist' position where the emphasis was on not providing any special measures for minorities in the attempt to move away from practices of colonial India and forge a new unified national identity; b) The extreme group rights position as support for the 'multinational' position; c) The middle position, which was seen as 'limited multiculturalism'.[196] In the pre-December 1949 phase even though there was a complete rejection of separate electorates, reservations in legislature for Scheduled Castes and Muslims meant that the measures fell into the third category along with the position on special measures in public employment. However, in the post-December 1949 phase, the protections for Scheduled Castes remained in the third category whereas all special measures for Muslims in legislatures and public employment were revoked invoking the rationale in the first category.

[196]Bajpai (n 171) 48.

II-E(i): Reservations in the Sub-Committees on Fundamental Rights and Minority Rights

The term 'minorities' in the initial discussions on the Constitution included Scheduled Castes along with religious minorities. This was a complicated political decision because of B.R Ambedkar's stand that Dalits were not part of Hinduism and hence were a minority. Ambedkar strongly believed that the basis for minority protection was not whether a group practiced a religion different from Hinduism but whether the group suffered social discrimination at the hands of the majority group (Hindus). Ambedkar believed that it was this fact of social discrimination that justified protections and special measures for Muslims and Scheduled Castes rather than a difference in religion. However, many leaders in the Congress, reflecting Gandhi's position, argued that Dalits should be considered as part of Hindus and need not be accorded 'minority' status. It was finally decided that rights and protections for Scheduled Castes would be considered in the discussions pertaining to minorities.

Ambedkar's draft in the Sub-Committee on Fundamental Rights contains the first in-depth treatment of safeguards for Scheduled Castes. The safeguards deal with representation of Scheduled Castes in the legislature, executive and the services. Ambedkar advocated for the principle of proportionate representation for Scheduled Castes in these three areas but was against using proportional representation as the sole basis for providing reservations. Additionally, he

proposed that the arrangements of the Poona Pact[197] be reversed and a separate electorate for Scheduled Castes be provided for elections to the legislature.[198] Ambedkar also argued that it was incorrect for the majority to insist on reservations for minorities only on the basis of population ratios and was of the view that what mattered was 'not more representation but effective representation'. He recognised that acceptance of his proposals would not change the minority characteristic of the group and that they would still remain minorities. Ambedkar's emphasis, however, was on the effectiveness of their political voice and felt that his suggestions were the only way to ensure that minorities were not condemned to political irrelevance. Ambedkar was of the firm opinion that merely granting some form of representation did not amount to safeguarding the legitimate claims of minorities and a rule purely based on population ratios would be making a mockery of those claims.[199] The argument that Scheduled Castes cannot be considered minorities reflected on the complex relationship between Dalits and Hinduism. Rebutting the argument that Scheduled Castes are Hindus and therefore cannot be a minority group, Ambedkar took the position that religious affiliation cannot be the sole test of determining a minority. Social discrimination was the relevant factor for Ambedkar and he said

[197] The Poona Pact was an agreement between Gandhi and Ambedkar in September 1932 that separate electorates would not be established for Dalits in the administration of British India. Prior to the Second Round Table Conference between September-December 1931 in London, Ambedkar had raised the demand for separate electorates for Dalits similar to those that existed for minorities like Sikhs, Muslims, Anglo-Indians and Christians. Despite Ambedkar not being present at the Second Round Table Conference, British Prime Minister Ramsay McDonald accepted the demand for a separate electorate. Gandhi subsequently went on a fast in Yerawada Jail in Pune against separate electorates it and Ambedkar was forced to give up the separate electorate for Dalits in return for Gandhi ending his fast.

[198] Rao (n 172) vol II 93.

[199] ibid 107.

that using religious affiliation as the sole factor would mask the 'intense degree of social separation and discrimination' within the religion. Using the example of separate electorates for Muslims, Ambedkar clarified that the reason for granting separate electorates for Muslims (as was the case then) was not that they belonged to a separate religion but was based on the 'fundamental fact (that) the social relations between Hindus and Musalmans are marked by social discrimination.'[200] Ambedkar's response to the concern that separate electorates for Scheduled Castes would perpetuate untouchability rather than do away with it was based on the understanding that a day of voting together as a joint electorate once in five years was not going to promote solidarity when Hindus and Dalits lead 'severely separate lives' otherwise.[201] For Ambedkar the real battle for integration was on questions of intermarriage and interdining and he felt that separate electorates in no way hindered the introduction of measures to achieve those aims.[202] Ambedkar's demand for a separate electorate also found support in the memorandum by the Working Committee of the All-India Adi-Hindu Depressed Classes Association, dated 15th April 1947, submitted to the Sub-Committee on Minorities which called for separate electorates in addition to the requirement that a candidate must secure at least 40% of the Scheduled Caste votes to be elected.[203]

[200]ibid 109.

[201]ibid 110.

[202]ibid 110.

[203]ibid 382.

However, there was no unanimity concerning separate electorates even amongst Dalit representatives. H.J Khandekar, a Dalit leader from Maharashtra, called for proportionate representation for Scheduled Castes in legislatures, executive governments, judiciary and government services but advocated joint electorates instead of separate electorates for Scheduled Castes.[204] Jagjivan Ram, a Dalit leader from Bihar (who went on to become the Deputy Prime Minister of India in 1977), was also in favour of proportional representation but argued in favour of joint electorates.[205]

In the deliberations of the Sub-Committee on Minorities it was decided, by a majority of 28 to 3 votes, that there would be no separate electorates whatsoever for election to legislatures.[206] However, by a majority of 26 to 3, the Sub-Committee decided that there should be reservations of seats in legislatures for different recognised minorities.[207] Three categories of minorities were identified and Muslims and Scheduled Castes were in Category C that comprised groups with populations exceeding 1.5%. The Report of the Sub-Committee on the Minorities decided by a very narrow margin (8 votes to 7) that there would be no provision in the text of the Constitution reserving seats for minorities in Cabinets.[208] H.J. Khandekar attached a dissenting note on this point and was of the view that while the interests of Dalits were being protected by the then leaders,

[204]ibid 325-327.

[205]ibid 332-333.

[206]ibid 397.

[207]ibid 397.

[208]ibid 398.

there was no guarantee that future generations would be willing to share power in the Cabinet with Dalits.[209] While it was agreed as a general principle that there would be reservations in services for Scheduled Castes and Muslims, the Sub-Committee decided by a majority of 8 votes to 7 that there would be no reservations for Muslims in services where recruitment was on the basis of competitive exams.[210] The proposal to provide reservations on the basis of population was rejected by the Sub-Committee by a majority of 9 to 8 votes.[211]

When the Advisory Committee on Minorities on 28th July 1947 considered the Report of the Sub-Committee, the issue of a sunset clause was discussed. The proposal that K.M. Munshi put forward was that reservations in legislatures would be reconsidered after ten years (which is the position finally reflected in the Constitution). However, R.K. Sidhwa's proposal that the provision should not give the option for reservations in legislatures to be reconsidered and should instead mandate that it be ended after ten years was defeated by a huge majority in the Advisory Committee.[212] The proposal not to provide any reservations for minorities (which then included Scheduled Castes) in Cabinets was carried by a huge majority and H.J. Khandekar's plea that an exception be made for Scheduled Castes was not accepted.[213] The issue concerning the basis for providing reservations in services arose immediately in the Advisory Committee. Chaudhuri

[209]ibid 401.

[210]ibid 399.

[211]ibid 400.

[212]ibid 404.

[213]ibid 408.

Khaliquzzaman proposed an amendment that sought to reserve positions in the services for minorities based on their population. Ambedkar, however, made a similar demand only for the Scheduled Castes and not for all minorities. Both proposals were defeated. Population as the basis for determining the quantum of reservation was rejected only as far as the services were concerned but it continued to be the basis for reservations in legislatures.

However, in the discussions on 30th and 31stJuly 1947, we see the first references to concerns of efficiency in public employment being raised in the context of reservations. Ali Zaheer moved a resolution which read:

> This committee recommends that in the Provincial as well as Central services, the claims of all the minorities should be kept in view in making appointments to such services ***consistently with the consideration of efficiency of administration*** (emphasis supplied). The committee further recommends that suitable provision to this effect may be embodied in some form in the Constitution or in some other way.[214]

The language of efficiency was sure to raise objections and Muniswami Pillai moved an amendment to delete the words 'consistently with the consideration of efficiency of administration' from the draft. Though the records do not reflect the substantive debates on this issue, it does record the fact that Muniswami Pillai's proposed amendment was defeated.[215]

The foregoing discussion of the proceedings in the Sub-Committee on Minorities highlight the initial steps in deciding the terms of protections and special measures for minorities (which included both Scheduled Castes and

[214]ibid 409.

[215]ibid 409.

Muslims). It is seen that the strongest form of protection in terms of separate electorates is clearly rejected. On the issue of reservations, the Sub-Committee treated the issues of legislatures and public employment differently. Having rejected separate electorates as the basis for elections, the Sub-Committee voted in favour of having a provision in the Constitution that mandated reservations for different minorities in the legislature. However, no such guarantee was agreed upon in the context of public employment and it was recommended that the Constitution should only contain a provision that urged the State to consider the claims of minorities while making appointments consistent with concerns of efficiency.

II-E(ii): Reservations in the Report of the Advisory Committee on Minority Rights

The Advisory Committee then considered the decisions taken in the Sub-Committee on Minority Rights. While no decisions taken in the Sub-Committee were reversed, the contents of the Report of the Advisory Committee on Minority Rights throw further light on some of the discussions. In the report submitted to the President of the Constituent Assembly of India on 8th August 1947 there is a clear rejection of separate electorates. There is an acknowledgement that separate electorates would be communally divisive in a manner that was unacceptable to a newly independent country. However, the Report of the Advisory Committee conceded to the demand for reservations in legislatures for minorities, which included Scheduled Castes and Muslims as part of Group-C minorities. While the Advisory Committee did not adopt population ratios as determining the extent of

reservations in legislatures for all minorities (Anglo-Indians for example), it did adopt this criterion as the basis for Scheduled Caste and Muslim reservations in legislatures.[216] Just like with the demand for a constitutional guarantee of representation in Cabinets, the Advisory Committee did not accept the demand for such a guarantee in public services. The Report of the Advisory Committee stated that such a constitutional guarantee for representation in services would be a 'dangerous innovation'. Citing reasons for rejecting such a demand, the Report of the Advisory Committee argued that a rigid constitutional provision ensuring representation in services (just like representation in Cabinets) would render parliamentary democracy unworkable. The Advisory Committee felt that it would be unworkable partly because it was essential to balance the claims of minorities with the larger mandate of building a 'healthy national life'.[217] Clearly, a majority of members of the Advisory Committee viewed providing reservations in public services as being antithetical to the project of India as a unified nation and that it stood in the way of parliamentary democracy working effectively. It is evident that the foundations for the discourse on reservations as an undesirable tool to achieve representation of minorities were laid in these discussions. This is not to say that members in this Advisory Committee (also members of the Constituent Assembly) did not recognise the importance of protecting the rights of minorities in nation building and addressing their sense of alienation and oppression. However, there is a distinct discomfort with providing reservations and a simultaneous acknowledgment of the importance to take other measures to integrate minorities into national life. Nevertheless, in lieu of reservations, the

[216]ibid 412-415.

[217]ibid 416.

Advisory Committee recommended inserting a provision that exhorts the Central and Provincial governments to pay due regard to the claims of minorities, consistent with concerns of efficiency, while making appointments to public services.[218]

Sardar Patel in his speech moving the Report of the Advisory Committee for the consideration of the Constituent Assembly stated in no uncertain terms that differences existed on various positions amongst the groups that comprised the minorities. He said that it was impossible for all minorities to unanimously agree on many provisions because there existed 'minorities within minorities'.[219]He was abundantly clear that the efficiency of administration would suffer if posts in public services were allocated by reservations rather than by merit in competitive exams.[220] He expressed the view of the Advisory Committee that a constitutional guarantee for reservations in services could not be provided and that the Advisory Committee recommended a provision that read as follows: 'Recruitment in Services: *Due share to all minorities guaranteed:* In the all-India and Provincial Services, the claims of all minorities shall be kept in view in making appointments to these services consistently with the consideration of efficiency of administration'[221]

[218]ibid 416.

[219]ibid 423.

[220]ibid 426.

[221]ibid 428-429.

II-F: Reservations in Legislatures and Public Employment post-December 1949 – Different Provisions for Scheduled Castes and Muslims

After December 1949, the decisions of the Constituent Assembly on reservations in legislatures and public employment did not use the term 'minorities' as understood up until then. There were concerted and successful attempts to exclude all religious minorities from reservations in legislatures and public employment in furtherance of the integrationist position. Nevertheless, the decisions made in relation to reservations in legislatures and public employment continued to stand for the Scheduled Castes and Scheduled Tribes. At the heart of this change in approach was the impact of the communal violence surrounding the partition of India and the creation of Pakistan. The discussions in the Constituent Assembly make this very evident and the feeling of intense mistrust and suspicion is palpable even through the text of the debates as the Constituent Assembly goes about reversing the protections for religious minorities, especially Muslims.

II-F(i): Yes to Scheduled Castes, No to Muslims: The Decision Making Process

When Sardar Patel introduced the Report on Minority Rights in the Constituent Assembly on 27th August 1947, the decisions (a) constitutionally guaranteeing reservations in legislatures for minorities (which then included both Scheduled Castes and Muslims) and, (b) requiring the State to consider claims of all minorities (consistent with considerations of efficiency) while making appointments in public employment were adopted by the Constituent Assembly.

These decisions were further reflected in the Draft Constitution of February 1948that was submitted to the President of the Constituent Assembly. Article 292 in the Draft Constitution explicitly provided for reservations in the House of the People (to subsequently become the Lok Sabha) for Muslims and Scheduled Castes.[222] As far as special measures for minorities in public employment were concerned, Draft Article 296 stipulated that 'the claims of all ***minority*** communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts…'[223]

When the Constituent Assembly reconvened in November 1948, the Advisory Committee on Minority Rights resumed its meetings a month later. Earnest efforts to do away with reservation for minorities in legislatures began during these meetings in December 1948. On 30th December 1948, the Vice-President of the Constituent Assembly, H.C. Mookerjee (also the leader of Indian Christians), moved a resolution to abolish reservations for minorities in legislatures and was backed by Tajamul Husain from Bihar. The Advisory Committee reconvened on 11th May 1949 in the background of various meetings that took place involving the minorities since December 1948. It considered H.C Mookerjee's resolution to do away with reservations for minorities in legislatures with an amendment that sought to exempt Scheduled Castes moved by V.I. Muniswamy Pillai. Despite opposition from many quarters of the minorities, the

[222]Rao (n 172) vol III 630.

[223]ibid 631.

differences amongst the Muslims and Sikhs in the Advisory Committee ensured that the resolution was adopted.[224]

Sardar Patel (a leading figure of the Indian National Congress and chairperson of Advisory Committee on Minority Rights) then moved this report of the Advisory Committee for adoption in the Constituent Assembly on 25th May 1949. Referring to the Advisory Committee's Report of 8th August 1947, which was considered and adopted on 27th August 1947, Sardar Patel informed the Constituent Assembly that the recommendation for reservations in legislatures for minorities had been made without comprehending the 'full effect of Partition' and that the issue had to be reopened in light of changed circumstances. He indicated that some Muslim members had reflected long and hard before coming to the conclusion that it was best to do away with reservations in legislatures. In the view of the events that unfolded after August 1947, Sardar Patel said that some Muslim members felt it was in the interests of minorities themselves to give up such a demand. Referring to the process behind this decision of the Advisory Committee, he informed the Constituent Assembly that the representatives of the minorities had sufficient time to consult their constituencies, communities and other minorities on this issue. He believed it was 'in the interest of all to lay down real and genuine foundations of a secular State' and that nothing was 'better for the minorities than to trust the good sense and sense of fairness of the majority, and to place confidence in them.'[225] Making a case for the patriotism of Muslims in

[224] Ralph H Retzlaff, 'The Problem of Communal Minorities in the Drafting of the Indian Constitution' in R.N Spann (ed), *Constitutionalism in Asia* (Asia Publishing House 1963) 63, 70.

[225] Constitutional Assembly Debates (n 190) Book 3, vol VIII, 272.

India, Mohamed Ismail Sahib (a member of the Muslim League) sought to clarify the exact nature of the changed circumstances. He argued that the violence and its resolution had shown that the Muslims were at the forefront of defending the country's honour and this, in turn, demonstrated the need for real and substantial protections. Thelesson learnt could not be that even the few safeguard provided for the minorities need to be done away with, he said. The basis on which Sardar Patel came to the conclusion that the Muslims themselves wanted to do away with reservations was questioned. Mohammad Ismail Sahib and Z.H. Lari argued that views of some members in the Advisory Committee could not be taken as the position of the community and cited the continued demand by the Muslim League in India for reservations in legislatures. Mohammad Ismail Sahib was of the view that it would be one thing for the majority of the party in power to do away with reservations for minorities in legislatures and quite another to give the impression that the minorities were themselves giving up the claim. Both Mohammad Ismail Sahib and Z.H. Lari were of the opinion that there was no justification to retain reservations in legislatures only for Scheduled Castes and not other minorities. Believing the recommendation for reservations for Scheduled Castes to be the right decision, Mohammad Ismail Sahib said:

> ….this Committee has done the right thing in recommending the retention of the reservation of seats for the Scheduled Castes. But when they, according to the majority community, form part of that latter community, they follow the same culture and same religion and when they are of the same race according to them, yet it was thought fit, Sir, that they should be given separate safeguard of the reservation of seats. When it is justified for them, Sir, is it not all the more justified in the case of other communities which are admittedly different from the majority community? Sir, this action may look like something like vindictiveness, but any arrangement based upon ill will or vindictiveness cannot be a lasting one. I want the House to consider this aspect. The Muslims as well as the other communities want to contribute effectively and efficiently towards

> the harmony, prosperity and happiness of the country which is their motherland and for that purpose, they want to have equal opportunities with other people. They want to be an honourable section of the people of the land, as honourable as any other section;…….[226]

Z.H. Lari took the position that arguments around an integrated, unified nation and reservations for minorities were not being applied to reservations for Scheduled Castes in legislatures. Probing the reasons for providing reservations for Scheduled Castes in legislatures, Z.H. Lari said it might well be because people are not confident that the electorate will return sufficient number of Scheduled Castes to legislatures without reservations. He said reservations were not necessary 'if the electorate is wide awake, if the electorate is conscious, if the electorate is aware of the necessity of having representation of every portion of that community…' The fact that reservations were being provided for Scheduled Castes, Z.H. Lari argued, was indicative of the fact that the Constituent Assembly was not confident that the electorate would indeed conduct itself in that manner. If such confidence did not exist in the case of Scheduled Castes, Z.H. Lari felt there existed a stronger case for reservations for Muslims who have been treated with deep-seated suspicion (unlike Scheduled Castes) and were therefore likely to be elected in fewer numbers. He also stated that there was no justification to apply the argument that reservations were against national interest only to the Muslims.[227] Aware of the existing sentiments around the partition, the Muslims speakers repeatedly emphasised their patriotism and loyalty. It was indeed a tragedy of the times that such statesmen had to combat such deep-seated hatred

[226]ibid 280.

[227]ibid 288-289.

and suspicion and were forced to prove their loyalty to the nation by sacrificing concerns of equality and justice for the groups they represented. And perhaps nothing captured the level of distrust and suspicion better than when Z.H. Lari was interrupted during his speech and asked by H.V. Kamath, 'Why did you demand Pakistan?'

After the Advisory Committee's Report on Minority Right was adopted on 25th May 1949, the amendment of Draft Article 292 (to formally provide reservations in legislatures only to Scheduled Castes/Scheduled Tribes) came up before the Constituent Assembly on 24th August 1949. It is clear from Jaspat Roy Kapoor's speech that the discourse that the Muslims had themselves given up on the demand for reservation in legislatures is well entrenched. Congratulating this decision, Jaspat Roy Kapoor also called for the Scheduled Castes to give up their demand in the interest of nation building.[228]He congratulated the Muslims, Sikhs and Christian for giving up the demand for reservations in legislatures and felt that the Scheduled Castes, who he argued belonged to the fold of Hinduism, should have given up their demand for reservations in legislatures and that they would realise their folly in due course. He believed that an independent India must no longer be divided along the lines of majorities and minorities and must instead learn to live as a single whole community.[229] Sardar Hukam Singh took a far more realistic approach to the issue and argued that despite all the rhetoric about a new nation and a unified community, India could not ignore the existence of minorities. Minorities, he declared, would truly cease to exist only if the

[228] ibid, Book 4, vol IX 640.

[229]ibid 640-643.

majority fulfilled their responsibilities and none more important than the duty not to discriminate.[230]

The last remaining provision that acknowledged the claims of minorities was also amended on 14th October 1949. Article 296, in the Draft Constitution that was submitted in February 1948, provided that 'the claims of all ***minority*** communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts'. Draft Article 296 was amended by the Constituent Assembly to provide that it would only be the claims of Scheduled Castes and Scheduled Tribes that would be taken into consideration while making appointments in public employment and the earlier provision to take into account claims of 'minorities' was deleted. On 26th August 1949, Naziruddin Ahmad and Sardar Hukam Singh raised concerns about the provision being changed and demanded an explanation from the Drafting Committee as to why the reference to 'minorities' was being removed. The responses indicated a clear misunderstanding of the extent of the concession that the minorities had made in relation to reservations in legislative assemblies. B.R. Ambedkar and T.T. Krishnamachari argued that the Advisory Committee had come to the conclusion, on the basis of the consent from Muslims and Christians, that the two groups were no longer to be considered as minorities as far as reservations were concerned. The only minorities that remained in the context of reservations were Scheduled Castes and Scheduled Tribes and that the amendment was being proposed in light of that. Naziruddin Ahmad and Sardar

[230]ibid 644-646.

Hukam Singh were quick to point out that the decision of the Advisory Committee was only in the context of reservations in legislatures.[231] In the discussion leading up to the amendment on 14th October 1949, members like H.V. Kamath, R.K. Sidhva, and Sardar Patel once again invoked notions of a common Indian nationhood and the need to move beyond divisive measures as justifications for this amendment. However, there was a very definite sense that the Constituent Assembly was taking away the last remaining political protection for the minorities. Sardar Hukam Singh highlighted the importance of Draft Article 296 as it appeared in the original Draft Constitution of February 1948 by saying that

> it was only a solemn affirmation of bona fides, on behalf of the majority, and a mental satisfaction to the minority. Otherwise it had not very much value. That right was not justiciable in any court, of law and it could not be enforced anywhere else as well. It had no binding force. But in spite of that, it is being taken away now. I must, at the same time, make myself clear that so far as I can think, it was no blot on our secularism and it did not soil our nationalism as well. The minorities have always been advised to repose full confidence in the majority. Article 296 as originally framed, in my opinion, was that complete reposal of confidence by the minorities in the majority and nothing beyond that. The only thing that the members of the minority could do at any time, in cases of violation was that the attention of the majority' could be drawn to the fact, that there was some pledge or an undertaking; and that is also being removed.[232]

The discussion in this Part has demonstrated the various opinions that influenced decisions on different aspects of reservations in the Constitution. From the democratic deficit of the Constituent Assembly to the complicated decisions to revoke political safeguards for Muslims, the process of making the Constitution reflects a multitude of interests, concerns and ideological positions. The

[231] ibid 702-703.

[232] ibid, Book 5, vol X 232.

complexity of the debates and lack of a uniform position in the Constituent Assembly on various issues does not mean that they are irrelevant in constitutional adjudication. In fact, they are a rich source for courts to understand the various viewpoints that existed on crucial issues like the effects of reservations, use of 'backwardness' as a criterion, the meaning of 'adequacy of representations', significance of efficiency etc. While they do provide context and a source for multiple perspectives, it is also important to reflect on the extent to which they must be allowed to influence constitutional adjudication of reservations.

Part-III: The Role of Constituent Assembly Debates in Constitutional Adjudication of Reservations in India

The discussion of the drafting process in Part-II reveals the complicated constitutional history of reservations for Scheduled Castes and Muslims in India. It is clear that it would be impossible to discern any consistent constitutional intent on providing reservations for Scheduled Castes in legislatures and denying the same to Muslims. And yet, it is crucial for the Supreme Court to engage with that complexity in a coherent manner. In the search for coherent constitutional adjudication on reservations, it would not be advisable for the Court to exclusively adopt a textualist or an originalist approach. A textualist approach would force the Court to ignore the complicated history of the provisions on reservations in India, especially when the politics of the times were integral to determining the language and content of those constitutional provisions The text of the Constitution on reservations has left such a large scope for ambiguity, as will be

evident in Chapter Four, that a purely textualist approach would necessarily mean that the judges would be making constitutional choices of huge proportions without any democratic basis.

The drafting history of the reservation provisions makes evident the impossibility of determining the 'original meaning' of the provisions concerned. From the very fundamental question of whether reservations were viewed as a legitimate tool for social upliftment to more complex questions of composition of 'backward classes', there is no definite agreement to be found on the meaning. There was agreement to provide reservations for Scheduled Castes for different reasons. While some believed reservations were the most effective method to ensure representation and participation in the decision making process, even those who were opposed to reservations in principle agreed to such measures for Scheduled Castes in light of the compensation that was owed to them due to centuries of oppression. Any attempt to identify the 'original meaning' on the issue of reservations for Muslims is infinitely more complex. Decisions were made in an extremely charged atmosphere and the deep-seated suspicion and distrust in the context of India's partition render it an extremely dangerous proposition to discern 'original meaning'.

Then question then is what method of constitutional interpretation should the Supreme Court adopt when it comes to the use of the Constituent Assembly Debates. It would not be appropriate for the Court to decide questions on reservations purely on the basis of contemporary circumstances. The argument in this chapter is that the Supreme Court must adopt a 'living-tree' approach that is

capable of giving importance to history, text and contemporary circumstances. The Court must adopt a method that requires it to justify both the use and non-use of the relevant Constituent Assembly Debates. In deciding questions surrounding reservations for Scheduled Castes, the invocation of Constituent Assembly Debates to justify State measures must require the Court to engage in a justificatory exercise as to why the Debates continue to be relevant. The change (or the lack of it) in circumstances of Scheduled Castes as a group must determine the relevance of the Constituent Assembly Debates. It is important that this change in circumstances be rigorously determined rather than be stated as mere opinions of the judges on contemporary Indian society. Similarly, if the Constituent Assembly Debates are invoked to strengthen a decision that separate quotas for Muslim Other Backward Classes (OBCs) are unconstitutional, the Supreme Court must engage in a justificatory exercise as to why the Debates of 1947 continue to be relevant in contemporary India. The Debates cannot be used only to a limited extent to establish that the specific question of reservations for Muslims was considered and rejected by the Constituent Assembly. The Supreme Court will necessarily have to go a step further and justify why the reasons that led to that decision continue to be valid and why, the text permitting, a separate quota for Muslims OBCs cannot be constitutional.

Ignoring the politics that went into drafting the Constitution will limit the transformative capacity of the Indian Constitution and the ability of judges to aid that process. In enforcing constitutional safeguards and provisions in contemporary times, judges must engage with India's complicated constitutional history either to demonstrate the similar nature of challenges since 1947 or that

the nature of challenges have changed since and that we cannot be prisoners of history.

CHAPTER THREE: BENEFICIARY GROUPS AND SPHERES OF RESERVATION – MAPPING RATIONALES FOR A FRAMEWORK OF ANALYSIS

Having considered the normative justifications for reservations and the debates on reservations and beneficiary groups in Chapters 1 and 2, this chapter looks to provide a framework for analysing reservations for Scheduled Castes, Muslim OBCs and OBCs in the context of higher education and public employment in contemporary India. The theme of this chapter is to analyse the interaction between the basis for reservations for certain groups and justifications for choosing higher education and public employment as spheres for providing reservations. This mapping of justifications between beneficiary groups and spheres of reservations will demonstrate the need to adopt a different approach amongst beneficiary groups in the same sphere of reservation and also distinguish between different spheres of reservation while examining special measures of any particular beneficiary group. This framework of analysis along with the arguments explored in Chapters 1 and 2 will be used to analyse the judicial discourse on important aspects of reservations in Chapter 4.

The central question that this chapter seeks to answer is whether the nature of the claims of Scheduled Castes, Muslim OBCs and OBCs for reservations in higher education and public employment is similar. In answering this question, I aim to discern the basis on which reservations for Scheduled Castes, OBCs and Muslim OBCs can be justified in contemporary India and present the strongest normative basis for reservations in higher education and public employment. By

mapping the justifications presented for the beneficiary groups on to the arguments for reservations in particular spheres, it becomes clear that it is untenable to argue that the nature of entitlement is similar for all groups across all spheres. The nature of claim of the Scheduled Castes and Muslim OBCs have a lot in common that sets them apart from the remaining OBCs and the claim for reservations in higher education is stronger than in public employment. Therefore, this chapter will establish the position that Scheduled Castes and Muslim OBCs in the context of higher education have the strongest entitlement while non-Muslim OBCs in public employment have the weakest entitlements.

Part-I of this chapter attempts to understand the basis for reservations for Scheduled Castes, Muslim OBCs and OBCs in contemporary India by analysing the methods of identification of these groups, secondary material on the experience of these groups in contemporary India, relevant empirical data and contours of special measures applicable to each of the groups. Part-I comes to the conclusion that, by virtue of the nature of social exclusion suffered, the claims of Scheduled Castes and Muslim OBCs to reservations are qualitatively different from that of the non-Muslim OBCs. Part-II of the chapter looks at higher education and public employment as spheres of reservation and analyses the roles they perform in the context of substantive equality. While there is some overlap between the roles they play, Part-II establishes the important differences between these spheres of reservation. Part-III brings together the arguments concerning the beneficiary groups and spheres of reservation to establish the case that the claims of different groups in different spheres do not have the same normative basis. It is important to match the justifications for each group on to the reasons for reservations in a

particular sphere to understand the strength of particular claims. Scheduled Castes and Muslim OBCs in higher education have the strongest entitlement while non-Muslim OBCs in public employment have the weakest entitlement. As beneficiary groups, Scheduled Castes and Muslim OBCs have a stronger claim and the justifications for reservations in higher education are stronger than those for public employment.

Part-I: Scheduled Castes, OBCs and Muslim OBCs as Beneficiary Groups in Contemporary India

In this part, the focus will be the basis of identification of Scheduled Castes, OBCs and Muslim OBCs, which will then be related to the position of Scheduled Castes and Muslims in contemporary India. Scheduled Castes and Muslims face social exclusion in addition to economic deprivation to an extent that is qualitatively different from non-Muslim OBCs. While for the Scheduled Castes this is evident from the criteria for identification, their lack of presence and studies showing social exclusion, the approach to establishing the case for Muslim OBCs is slightly different. Parts I-A, I-B and I-C lay out the information required to build the argument that the position and experience of Scheduled Castes and Muslim OBCs are different compared to the non-Muslim OBCs. In Part I-D, details of the special measures in place for the above groups are provided. In Part I-E, the framework of social exclusion is applied to the discussion in Parts I-A, I-B and I-C to establish the argument that the experience of marginalisation of Scheduled Castes and Muslim OBCs in contemporary India is markedly different from that of non-Muslim OBCs. While social exclusion still informs the experience of OBCs in India,

the intensity and nature of social exclusion suffered by Scheduled Castes and Muslim OBCs cannot be treated in the same manner as that for OBCs.

I-A: Scheduled Castes as Beneficiaries of Reservations

Dalits are the most marginalised and exploited section of Indian society and have occupied that place for many centuries. The ancient texts of Hindu culture and religion quite literally excluded them from the structure of society and they were considered not to have a caste whatsoever. Hindu society is divided into four 'varnas' or broad groups and Dalits are not one amongst them. They are considered 'outcastes' and therefore outside this four-fold division of Hindu society which comprises Brahmins (priestly class), Kshatriyas (warrior class), Vaishyas (trading class) and Shudras (manual labourers and servants). However, it is not these four broad groups that play the most important role in the everyday life of the caste system and it is 'jati' instead that performs that role. Jatis are endogamous groups with different cultural and religious practices and very often individuals identify more with their 'jati' rather than 'varna'. Though Dalits were not part of any varna, different jatis exist amongst the Dalits as well.

Notions of purity and pollution are integral to the caste system just as membership in a jati or varna was by birth. While there are states of temporary impurity for Hindus in the four varnas like menstruation and childbirth for women, Dalits are considered to be permanently impure.[233] The traditional caste

[233] Louis Dumont, *Homo Hierarchicus: The Caste System and Its Implications* (University of Chicago Press 1970) 53.

system demarcated occupations for different varnas and the permanent impurity attached to Dalits was attributed to the 'unclean' work they had to do, which according to the jati that a Dalit belonged to could include manual scavenging, work at burial grounds, leatherwork, removing dead animals etc. Dalits have for centuries suffered social and physical marginalisation and were forced to live on the outskirts of villages. As a group, they are socially and economically marginalised and also subject to degrading physical violence. A list of the criteria used in the 1931 Census to identify Scheduled Castes gives us an indication of the discrimination and marginalisation that Dalits suffer. J.H Hutton, the 1931 Census Commissioner used a list of nine (9) criteria:

a. Whether the caste or class in question can be served by Brahmans or not.
b. Whether barbers, water carriers, tailor etc., who provide services to caste-Hindus, also provide services to the caste or class in question.
c. Whether the caste in question pollutes a high-caste Hindu by contact or proximity.
d. Whether the caste or class in question is one from whose hands a caste Hindu can take water.
e. Whether the caste or class in question is debarred from using public conveniences such as roads, ferries, wells or schools.
f. Whether the caste or class in question is debarred from the use of Hindu temples.
g. Whether in ordinary social intercourse a well-educated member of the caste or class in question will be treated as an equal by the high caste men of the same educational qualifications.

h. Whether the caste or class in question is merely depressed on account of its own ignorance, illiteracy or poverty and but for that, would be subject to no social disability.

i. Whether it is depressed on account of the occupation followed, and whether but for that occupation it would be subject to no social disability.[234]

The marginalisation suffered due to untouchability can be understood to have three dimensions. Firstly, there is the obvious facet of economic exploitation that results from forced and unpaid labour along with the prohibition from owning property. Secondly, there is the aspect of humiliation[235] that often requires Dalits to be very careful about their dress, bowing in deference to the upper castes, carrying their footwear in the vicinity of upper castes. Lastly, there is the pervasive practice of social exclusion that prevents Dalits from participating in the community freely by prohibiting access to certain spaces, both public and private.

The social, political and psychological transformation from being 'untouchables' to Dalits is one of great significance for India's democratic order and it was not easily achieved. A wide range of factors, including activism by Dalits and various caste reform movements like that of Jyotirao Phule's, contributed to the politicisation of the suffering of Dalits and redefining of many

[234] Galanter (n 107) 127-128.

[235] V. Geetha, 'Bereft of Being: The Humiliations of Untouchability' in Gopal Guru (ed), *Humiliation: Claims and Context* (Oxford University Press 2009)95.

social, cultural and religious practices in the language of social, political and economic exclusion.[236] The definition of Scheduled Castes, starting in colonial India and continued in independent India, 'merged the qualities of social exclusion suffered by the Dalit communities with their ritual status as degraded Hindus, such that the Scheduled Castes were seen to suffer a unique combination of socio-economic deprivation, occupational segregation, and educational backwardness combined with ritual stigma.'[237] The change in position of Dalits was negotiated through a mix of anti-discrimination laws and preferential policies even in colonial India. The first major anti-discrimination measure was passed before independence in the state of Madras in 1938, which outlawed discrimination against Dalits in public places that were funded by the State and other non-religious establishments to which the general public had access.[238]

The Constitution of India signalled, in some ways a culmination and in certain others a beginning, of the renegotiation of Dalits as political subjects of a new country. The Constitution contained significant provisions that fundamentally altered the manner in which Dalits would interact with the State and society. Article 17 abolished untouchability, Article 15 outlawed discrimination on the basis of caste, Article 16(4) permitted reservations for backward classes which included Scheduled Castes, Articles 330 guaranteed reservations in legislatures for Scheduled Castes and Article 335 required the

[236] For an incisive account of this transformation from the 19th century to the middle of the 20th century, see Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009).

[237]ibid 171.

[238] Oliver Mendelsohn and Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge University Press 1998) 120.

State to take into consideration claims of Scheduled Castes while making appointments to government posts. The Parliament also enacted the Untouchability Offences Act, 1955, the Protection of Civil Rights Act, 1976 and the SC/ST Prevention of Atrocities Act, 1986. The Government also used the enabling provisions in the Constitution, Articles 15(4) and 16(4), to provide special measures in primary education and reservations in higher education and public employment.

I-A(i): Dalits in Contemporary India

Undoubtedly, through the abovementioned anti-discrimination laws and reservation policies, the position of Dalits has undergone significant change in almost 65 years since Independence. The 2001 Census concluded that the population of Scheduled Castes was 166 million, which was 16.2 per cent of India's total population. According to the National Sample Survey Office (hereinafter 'NSSO')[239], Scheduled Castes comprised a little over 14 per cent of India's urban population and 20.5 per cent of the rural population.[240] There has been a significant increase in the number of Scheduled Castes in public employment which matches the proportion of Scheduled Castes in the overall population of the country. 16.5 per cent of Central Government employees were Scheduled Castes in 2003 compared to 12.2 per cent in 1960.[241] Similarly in public sector enterprises, while Scheduled Castes held only 7.4 per cent of the jobs in

[239] NSSO is part of the Ministry of Statistics and Programme Implementation, Government of India.

[240] Estimated Population Shares of Social Groups by Sector, NSSO 55th Round, 1999-2000.

[241] Sukhadeo Thorat, *Dalits in India: Search for a Common Destiny* (Sage Publications 2009) 71.

1971, it was 16% in 2004.[242] There has been a tremendous improvement in literacy rates of Scheduled Castes as well. In 1961 only 10.2 per cent of Scheduled Castes were literate and the figure, according to the census, was 54.7 per cent in 2001.

However, the marginalisation and discrimination suffered by Dalits continues to be significant. One of the evident indicators of exploitation and economic marginalisation are the poverty figures for Scheduled Castes in contemporary India. Almost 36 per cent of the Scheduled Caste population in rural India is below the poverty line, while the figure is a little over 38 per cent in urban India. The equivalent figures for upper castes Hindus are at 11.7 and 9.9 per cent respectively.[243] In addition to the issue of poverty, even education remains a significant area of concern. Almost 70 percent of Scheduled Caste women and 50 per cent of Scheduled Caste men (45.6 and 25.8 per cent for forward castes) are illiterate in rural India while these figures for Scheduled Castes in urban India are at 49.7 per cent and 33.3 percent respectively (20.5 and 12 per cent for forward castes).[244] There is evidence that demonstrates that Scheduled Castes are at the very bottom of the economic heap and continue to suffer not just the consequences of past discrimination but face discrimination in employment and wages in contemporary India.[245]

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[242]ibid 77.

[243] Percentage of Population below Poverty Line by Social Group and Sector, NSSO 55th Round, 1999-2000.

[244] Percentage of Illiterates among Social Groups by Gender and Sector, NSSO 55th Round, 1999-2000.

[245] Ashwini Deshpande, *The Grammar of Caste: Economic Discrimination in Contemporary India* (Oxford University Press 2011).

Even the progress in literacy rates and presence in public employment cited earlier mask serious concerns in these fields as well. Data for primary school children in the age-group of 5-14 years demonstrates that while the enrolment figures for Scheduled Caste children are roughly at the same level as other groups, the drop-out rate for Scheduled Caste students is far higher than that of students from other groups and it is seen that for every 100 Scheduled Caste students that join Standard I only four reach Standard XII. A further analysis reveals that the drop-out rate for Scheduled Castes is higher in rural schools and amongst boys. Amongst the reasons cited for this are the need to contribute to family income due to poverty, distance to schools from their homes, discrimination and negligence on the part of the teachers.[246] The situation is grimmer in the context of higher education where only 0.5 and 1.2 per cent of Scheduled Caste women and men respectively (1.7 and 4.8 per cent for forward castes) are graduates in rural India while it is 1.8 and 3.5 per cent in urban India (13.3 and 19.1 per cent for forward castes).[247] Even in public employment figures it is seen that Scheduled Castes are employed in larger numbers in Group C and Group D services rather than Group A and Group B.[248]Detailed public employment data reveals that out of over 100 Scheduled Castes, only 6.7 per cent were

[246] Ghanshyam Shah, et.al, *Untouchability in Rural India* (Sage Publications 2010) 46-47.

[247] Percentage of Graduates among Social Groups by Gender and Sector, NSSO 55th Round, 1999-2000.

[248] Group A comprise the most prestigious and highest paid services like the Indian Administrative Service, Indian Police Service, Indian Foreign Service, Central Health Service, Indian Revenue Service etc. Below Group A, Group B comprises the Section Officers Grade, Deputy Superintendent of Police etc. Group A and B officers are gazetted officers while those in Group C and D are not. Group C comprises services like the Post and Telegraph Accounts Service, Central Secretariat Service etc. Group D comprises peons, watchmen, sweepers, messengers etc.

employed in Group A and B services while 93.3 per cent were employed in Group C and D services.

I-A(ii): Continuing Social Exclusion of Dalits in Contemporary India

Irrespective of the conditions of poverty, illiteracy and details of public employment data, it is also important to understand the nature and extent of social exclusion that Dalits suffer in contemporary India by virtue of their ritual status. The thesis relies upon a survey conducted by Action Aid India[249]between 2001-02 in 565 villages[250] across 11 States to illustrate this problem. The survey studied the prevalence of various facets of untouchability in the daily life of these villages and used criteria that have long been considered strong indicators of social exclusion based on untouchability.

Of the 565 villages surveyed, it was found that:

i) In more than 50 per cent of the villages, there was prevalence of-

- Denial of entry into non-Dalit houses
- Prohibitions against food sharing
- Denial of entry into places of worship
- Ill-treatment of Dalit women by non-Dalit women

ii) In 45-50 per cent of the villages, there was prevalence of –

- Denial of cremation and burial grounds

[249] The findings of this survey are published in the book, Shah (n 246).

[250] According to the 2001 Census, India has almost 600,000 villages (5.94 lakh).

- Denial of access to water facilities
- Ban on marriage processions
- Ban on selling milk to cooperatives
- Denial of barber services
- Denial of laundry services
- Ill-treatment of Dalit women by non-Dalit men

iii) In 30-40 per cent of the villages, there was prevalence of:

- Separate eating provisions in schools
- Denial of visits by health workers
- Separate utensils in hotels
- Discriminatory treatment in police stations
- Separate seating in Self-Help Groups

iv) In 25-30 per centof the villages, there was prevalence of:

- Denial of entry into police stations
- Denial of entry into the Public Distribution System shops
- Denial of access to restaurants/hotels
- Dalits being forced to stand before upper caste men

These instances of social exclusion need to be placed in the context of the national statistics on offences against Dalits under the Untouchability Offences Act, 1955, Protection of Civil Rights Act, 1976 and the SC/ST Prevention of Atrocities Act, 1989. 285, 871 cases were registered under these legislations between 1990-2000 and these included cases of murder, rapes and caste atrocities. It is important to view this statistic in the context of difficulties faced by

Dalits in registering cases in police stations and therefore a large number of incidents remain unreported. There has been significant judicial delay in cases under these legislations and 100,981 cases of atrocities against Dalits were pending in the courts at the end of 2000.[251] Therefore, it can be seen in this sub-section that the marginalisation faced by Dalits in contemporary India, is not just about the lack of presence of economic deprivation. Social exclusion continues to be a central concern.

I-B: Who are the Other Backward Classes (OBCs)?

The Constitution does not provide any mechanism for determining backward classes and neither is any particular body/office identified for the notification of backward classes for their inclusion or exclusion for purposes of Articles 15 and 16. In case of the Scheduled Castes, under Article 341, it is the President who is empowered to issue the initial list of Scheduled Castes and Parliament has to authorise every subsequent inclusion or exclusion. However, Article 340 of the Constitution empowers the President to appoint a Commission to 'investigate the conditions of backward classes'. The term 'backward classes' as it appears in Articles 15(4) and 16(4) is certainly not the easiest to understand in terms of its underlying motivations. Special measures for 'backward classes' were in vogue much before India's independence but there was no uniform meaning attached to the term in different parts of colonial India.[252]The identification of 'backward

[251] Shah (n 246) 134-135.

[252] Marc Galanter has identified ten such meanings that existed in colonial India in Galanter (n 107) 155.

classes' in colonial India was only at the state level and there was never any attempt to determine the list of 'backward classes' at the level of the Central Government. Once the President of India had issued the list of Scheduled Castes in 1950, the term OBCs was used to refer to all 'backward classes' other than Scheduled Castes and Scheduled Tribes and thereby covered by Articles 15(4) and 16(4).

Post-independence, the attempt to determine a Central list of OBCs did not materialise till the early 90s. Until then, there were only separate lists for different States and there were three different approaches that the States adopted. The southern states included a large proportion of their population in the OBC category and gave them a very wide range of benefits. In certain states like Madhya Pradesh, Assam, Orissa, and Rajasthan there has been no real use of the OBC category. In states in northern India, though OBCs comprise a significant proportion of the population, the benefits extended to them have not been anywhere as wide as in the southern states.[253] The first attempt to determine a central list of OBCs was made by the first Backward Classes Commission in 1955 with Kaka Kalelkar as its Chairperson. The mandate of the Commission to identify the criteria for social and economic backwardness and also determine sections of the population that fell within that category ran into serious problems due to a severe lack of data. The next attempt was the Mandal Commission Report of the Backward Classes Commission, 1980. The recommendations of this Report settled the question of the composition of OBCs at the central level.

[253]ibid 180-181.

An examination of the indicators used by the Mandal Commission will reveal the difference in character between the OBCs and the Scheduled Castes, as they are currently constituted. The Commission used eleven indicators that were a combination of social, educational and economic.[254] The social indicators were social backwardness, manual labour, marital age, female work participation; the educational indicators were school attendance, drop-out rates, proportion of matriculates; and the economic indicators were based on the value of assets, type of housing, distance to drinking water and indebtedness. All factors were not assigned equal value because every social indicator had three points attached, while each of the educational and economic indicators had two points each. This point system was then applied to every caste that was part of the Commission's

[254] B P Mandal, Commission Report of the Backward Classes Commission (Akalank Publications, Delhi 1980) Chapter XI, 57 (Mandal Commission Report):

Social Indicators:

1 Castes/classes considered as socially backward by others.
2 Castes/classes that mainly depend on manual labour for their livelihood.
3 Castes/classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
4 Castes/classes where participation of females in work is at least 25% above the State average.

Educational Indicators

5 Castes/classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the state average.
6 Castes/classes where the rate of student dropout in the age group of 5-15 years is at least 25% above the state average.
7 Castes/classes amongst whom the proportion of matriculates is at least 25% below the State average.

Economic Indicators

8 Castes/classes where the average value of family assets is at least 25%below the State average.
9 Castes/classes where the number of families living in 'kuccha' (temporary) houses is at least 25% above the state average.
10 Castes/classes where the source of drinking water is beyond half a kilometre for more than 50% of the households.
11 Castes/classes where the number of households having taken consumption loan is at least 25% above the state average.

survey and all castes that had more than at least 11 points were declared to be socially and educationally backward.

As a consequence of the judgment of the Supreme Court in *Indra Sawhney v Union of India*[255], the Government of India appointed the Justice R.N. Prasad Committee in February 1993 to draw up factors to identify the 'creamy layer'. The factors used to exclude individuals from amongst the OBCs broadly fell into the following categories:[256]

a. Certain constitutional posts
b. Certain classes of officers in the central and state services and the defence forces
c. Professionals like doctors, lawyers engineers, architects etc with a prescribed minimum income
d. Land-holdings, income and wealth

These factors were to be applicable not just to the applicants themselves but were to be used to analyse the position of the applicant's parents and in case of women, to their husbands. Irrespective of whether the 'creamy layer' factors applied to the applicant herself or to the relevant members of her family, the applicant would be excluded from the OBCs.[257] It is clear with the adoption of the

[255] The Supreme Court in *Indra Sawhney v Union of India* AIR 1993 SC 477 decided the constitutionality of the Office Memorandums issued by the Government of India in August 1990 and September 1991 that provided for 27 per cent reservation for OBCs in public employment. While upholding the constitutionality of the quota, the Supreme Court made it mandatory to identify and exclude the 'creamy layer' amongst the OBCs.

[256] RBS Verma, 'Creamy Layer Among the OBCs: Genesis, Operationalization and Current Status' in HS Verma (ed), *The OBCs and the Ruling Classes in India* (Rawat Publications 2005) 134, 143-144.

[257] Laura Dudley Jenkins, *Identity and Identification in India* (Routledge 2003) 148-149.

'creamy layer' rules that while group-based criteria are used for identification of OBCs, there is a move towards individual criteria in questions of exclusion.[258]

As is evident from the identification criteria for OBCs and the exclusion criteria for the 'creamy layer', while social exclusion does play a part, it does not play a central or the most dominant role in understanding the nature of marginalisation suffered by the OBCs. Undoubtedly, OBCs suffer from a lack of presence but it would be a difficult case to make that their marginalisation is as intrinsically connected to issues of social exclusion as it is for Dalits or Muslims in contemporary India.

I-C: Muslims and Muslim OBCs in India

Muslims constitute nearly 14 per cent of India's total population and apart from being left behind on most socio-economic indicators, Muslims in India are doubly disadvantaged because they have their citizenship constantly questioned with accusations of being 'anti-nationalist'. Additionally, Muslims are viewed unfavourably because they are perceived as being beneficiaries of the politics of 'appeasement'. However, as the following paragraphs demonstrate, the politics of 'appeasement' have hardly translated into any sort of meaningful benefits for Muslims in India.[259] Muslim OBCs constitute nearly 41 per cent of the total Muslim

[258]ibid 154.

[259] Rakesh Basant and Abusaleh Shariff, 'The State of Muslims in India: An Overview' in Rakesh Basant and Abusaleh Shariff (eds), *Oxford Handbook of Muslims in India* (Oxford University Press 2010) 3-4.

population in India[260] and constitute 15.7 per cent of the total OBC population[261]. As the discussion below will demonstrate, Muslims per se as a group live on the margins of contemporary Indian society and despite 40 per cent of the Muslim population being eligible for reservations, marginalisation of Muslims in India is intense.

Concerns of marginalisation and exclusion do not operate only when Muslims as a group are compared with other groups in India. Even within Muslims in India there are significant concerns of marginalisation. The prevalence of caste amongst Muslims in India has been a matter of intense debate and sociological evidence does point to caste-like groupings, even though all characteristics of the caste system are not present. As observed by anthropologist Ghaus Ansari[262] and then sociologist Imtiaz Ahmad,[263] social stratification amongst Muslims in India comprises three broad categories: *ashraf* (noble ancestry), *ajlaf* (meaning 'lowly') and *arzal* (excluded). The *ashrafs* are believed to have a foreign ancestry and a superior status is ascribed and claimed. A large proportion of India's Muslims fall into the '*ajlaf*' category which comprise the 'ritually clean' but lower Hindu caste converts and the '*arzals*' comprise Dalits who have converted to Islam in India. These categories, just like the caste system,

[260] Justice Rajendar Sachar, Social, Economic and Educational Status of the Muslim Community in India: A Report (2006) 203 (Sachar Committee Report).

[261] ibid 213.

[262] Zoya Hasan, *Politics of Inclusion: Castes, Minorities and Affirmative Action* (Oxford University Press 2009) 176.

[263] Imtiaz Ahmad, 'Introduction' in Imtiaz Ahmad (ed), *Caste and Social Stratification among Muslims in India* (Manohar Publishers, 1978).

are primarily based on occupations and most of the groups that are in the 'ajlaf' and 'arzal' categories comprise the Muslim OBCs in India.

I-C(i): Evidence of Marginalisation

Starting from representation of Muslims in the Parliament to the education figures for Muslims and other socio-economic indicators, it is evident that Muslims are victims of intense marginalisation in contemporary India. Muslims constituted 4.3% of the first Lok Sabha (lower house of Parliament) and by the 14th Lok Sabha in 2004, they still constituted only 6.4%. The position of Muslim women in the Lok Sabha has been much worse. Of the 406 Muslims that were elected to the Lok Sabha between the second and the 14th Lok Sabha, only twelve were women.[264]

As stated earlier, 40 per cent of Muslims in India are OBCs and Muslim OBCs constitute 15.7 percent of the total OBC population. Despite a significant proportion of the Muslims being part of the OBCs, the benefits of reservations have hardly accrued to Muslims in India. The literacy rate amongst Muslims is higher only than the figure for SC/STs and the rates of growth in literacy rates have been the lowest for Muslims in recent years.[265] Though there has been growth in enrolment rates[266], 25 per cent of Muslim children in the age group of 6-14 years have either never been to school or are drop-outs and this figure is

[264] Hasan (n 262) 143-145.

[265] *Sachar Committee Report* 52-54.

[266] ibid 56.

higher than that for SC/STs.[267] In higher education, the gap in Graduation Attainment Rates for Muslims compared to other groups has been widening. Also, there is an acute lack of presence of Muslims in India's elite higher educational institutions and the proportion of Muslim students in under-graduate and graduate programmes is far less than the proportion of Muslims in the total population.[268]

As members of the workforce, Muslims tend to be more vulnerable because of the very high concentration (greater than other groups) in the informal sector characterised by poor employment security in terms of lacking employment contracts, benefits etc. The proportion of Muslims in regular salaried jobs is far lower than any other group and a large proportion of Muslim are either self-employed or engaged in trading activities.[269] The number of Muslims employed in government services is abysmal with a large concentrationin lower grade services. An illustration of this is the proportion of Muslims in India's highest bureaucratic services, the Indian Administrative Service (IAS) and the Indian Police Service (IPS). Statistics reveal that in 1960, 4.5 and 4.04 per cent of the IAS and IPS officers respectively were Muslims. Forty-six years later in 2006, the corresponding figures were 3 and 4 per cent respectively.[270] Access to credit for carrying on business activities is made particularly difficult for Muslims because many banks have deemed areas with concentration of Muslim populations as 'red

[267]ibid 58.

[268]ibid 64-71.

[269]Ibid91-110.

[270]Ibid164-175.

zones' - areas to which they cannot lend due to apprehension of non-recovery.[271] Muslims in India also suffer deprivation in the context of access to potable water, electricity, and sewage and drainage facilities.[272]

The Sachar Committee Report and the Report of the National Commission for Religious and Linguistic Minorities (May 2007) have exhaustively documented the nature and extent of marginalisation suffered by Muslims in India. However, the exclusion seen in legislative bodies, education and employment along with deprivation of infrastructural facilities has to be seen in the context of social attitudes towards Muslims in India. It would be incorrect to view the data on employment, education, poverty etc outside the context of the societal attitudes towards Muslims in India. In the context of the rise of right wing Hindu politics, communalisation of politics and the increased threat of extremist Islamic terrorism in India, Muslims are victims of significant social discrimination. While there is no exhaustive empirical work to demonstrate this[273], writers have argued that the data of the Sachar Committee Report must be viewed in this context.[274] The Sachar Committee Report does refer to the identity and security related concerns of Muslims in India. The Report states Muslims face discrimination in buying/renting of property, accessing schools for Muslim children and accessing jobs while wearing markers of their religious identity like the *burqa* or the *topi* (a

[271]Ibid123-138.

[272]ibid 145-148.

[273] Making a case for the need for such empirical data, see Steven Wilkinson, 'A Comment on the Analysis in the Sachar Report' (2007) XLII(10) Economic and Political Weekly 832.

[274]Ghanshyam Shah, 'The Condition of Muslims' (2007) XLII(10) Economic and Political Weekly 836; MA Kalam, 'Conditioned Lives?'(2007) XLII(10) Economic and Political Weekly 843.

general word for cap but used to indicated the specific Muslim cap in this case). Along with social discrimination, there is the ill treatment from law enforcement agencies where many respondents told the Sachar Committee that the police were extremely suspicious of Muslim men, thereby causing a culture of fear. The Sachar Committee also highlights the fact that security concerns have led to the ghettoization of Muslims in communally sensitive towns and cities. The Committee notes that 'water, sanitation, electricity, schools, public health facilities, banking facilities, ration shops, roads and transport facilities – are all short in supply in such areas.'[275]

I-D: Special Measures for Scheduled Castes, OBCs and Muslim OBCs

I-D(i): Scheduled Castes

The special measures for Scheduled Castes are largely seen in the areas of public employment, education and representation in legislatures. Though many of the measures take the form of quotas, they are not the only special measures that Scheduled Castes benefit from.

I-D(i)(a): Public Employment

Articles 16(4), 16(4-A) of the Constitution permit reservations while making appointments in public employment and also in promotions. 15 per cent of all

[275]*Sachar Committee Report* 11-14; Also see Justice Ranganath Misra, Report of the National Commission for Religious and Linguistic Minorities (2007) 28-29.

direct recruitment through open competition conducted by the Union Public Service Commission or other authorities to Group A or Group B services are reserved for Scheduled Castes that qualify through a rigorous examination and selection process. Reservations in direct recruitment to Group C and Group D posts are provided in proportion to the Scheduled Caste population in the concerned State. There is reservation for Scheduled Castes up to 15 per cent in posts filled by promotion as well. In case sufficient qualified Scheduled Caste candidates are not available to fill the posts reserved, candidates from the general category can be appointed and the reservation can be carried forward to the next three years of recruitment. There are other concessions that Scheduled Castes benefit from as well like relaxation of the maximum age criteria, qualifications required, experience etc.[276]

I-D(i)(b): Education

Special measures for Scheduled Caste students exist at all levels of the educational system. There are various schemes that the Central Government funds which facilitate and financially support the entry of Scheduled Caste students into primary and secondary schools, scholarships for secondary education, remedial classes, training for competitive entrance exams to universities, coaching for exams conducted by the Union Public Service Commission, special scholarships for children of manual scavengers, post-matriculation scholarships, book banks for Scheduled Caste students, hostels for Scheduled Caste students in middle to

[276] Thorat (n 244) 14-15.

secondary schools and also in universities and overseas scholarship for Scheduled Caste students. In addition to these schemes there is a 15 per cent reservation of seats even in elite central education institutions like the Indian Institutes of Technology, All India Institute of Medical Sciences (AIIMS), Indian Institutes of Management, National Institutes of Technology, all 43 Central Universities, Kendriya Vidyalayas and Navodaya Vidyalayas (the last two set of institutions are schools offering education up to the secondary level).[277]

In terms of reservations in legislatures, it must be noted that the Constitution specifically mandates reservations for Scheduled Castes. Reservations or special measures in education and employment under Articles 15 and 16 are not mandatorily required but are only enabling provisions. Reservations are required to be provided in the lower house of the legislatures (both central and state) and the proportion of the Scheduled Caste population decides the number of reserved seats.[278]

I-D(ii): Other Backward Classes

This chapter of the thesis is concerned only with reservations for OBCs as implemented by the Central Government. It must be noted that every State has its own list of OBCs and the Central list is not a mere amalgamation of the State lists. The manner in which States provide for OBC reservations in general varies and

[277]ibid 17-22.

[278] Galanter (n 107) 44-45.

some prominent examples will be discussed along with relevant case law in Chapter Four.

The Mandal Commission submitted its report in 1980 and it was discussed in Parliament in 1982 and 1983. The Government of India, however, introduced reservations for OBCs only in August 1990 through an Office Memorandum that provided 27 per cent reservation in civil posts and services under the Government of India for socially and educationally backward classes. It also provided that if candidates belonging to the socially and educationally backward classes were selected through the open category, then such candidates would not be counted towards the 27 per cent reservations for socially and educationally backward classes. After widespread protests in North India and a change in government at the Centre, another Office Memorandum was issued in September 1991 amending the earlier one. It was provided that within the 27 per cent for OBCs, preference would be given to candidates belonging to the poorer sections of the OBCs and if such candidates could not be found in sufficient numbers, the remaining vacancies would be filled by the other OBCs. This memorandum also provided for 10 per cent reservation for economically backward section not covered by any scheme of reservations. It was at this stage that the Supreme Court handed down its decision in *Indra Sawhney v Union of India*[279] Subsequent to the judgment, the Government of India issued another Office Memorandum in September 1993 that further modified the conditions for OBC reservations. The provision that required the poorer sections OBCs to be given first preference was removed and so was the 10

[279]AIR 1993 SC 477.

per cent reservation for purely economically disadvantaged sections. This memorandum also notified the 'creamy layer' criteria discussed earlier.

Reservations for OBCs in higher education were brought into force only in January 2007 despite the Mandal Commission Report having recommended it way back in 1980. The 93rd Constitution Amendment Act (2005), which inserted Article 15(5), enabled the State to provide reservations for socially and educationally backward classes and SC/STs cleared the path for OBC reservations in admissions to educational institutions, including private educational institutions. The Parliament then enacted the Central Educational Institutions (Reservation in Admission) Act, 2006 that implemented 27 per cent reservation for OBCs in all central educational institutions.

I-D(iii): Muslims OBCs

Muslims included in the central list of OBCs come exclusively from the '*ajlaf*' and '*arzal*' sections of the Muslim population in India. The list does not include any of the '*ashrafs*'. The Presidential Order of 1950 declared that non-Hindus could not be considered as Scheduled Castes and as a result those Dalits that converted to Islam are included amongst the list of OBCs. Despite the conversion to Islam, their professions continue to be seen as 'polluting' and they continue to face similar social exclusion. Also amongst the Muslim OBCs are the '*ajlafs*' who are converts from lower castes but seen as practicing 'clean' occupations such as weavers, tailors etc. The Mandal Commission recognised that socially and educationally backward classes existed amongst non-Hindus as well and acknowledged the

existence of 'caste-like' structures amongst Muslims. However, caste was not used as the basis of identification for non-Hindus and neither was a purely poverty based criterion adopted. The Mandal Commission included 82 Muslim groups in the list of OBCs based on two conditions – a) All Dalits who had converted to another religion were included in the OBC list b) Occupational communities, though known by a different name in any other religion, whose Hindu equivalents were included in the OBC list. Muslim OBCs were included in the central list of OBCs on the same terms as all other OBCs and no special provision was made for them. They now access the 27 per cent reservations in public employment and certain central educational institutions on the same terms as all other OBCs.[280]

At the state level, however, the treatment of Muslims OBCs is varied. There are three models that can be discerned from the practice amongst the states. In the Kerala/Karnataka model, Muslims, as a whole, are included as a separate category in the state OBC list. The 'creamy layer' criteria are applied to Muslims as well but all Muslims are entitled to reservations. While Karnataka reserves 4 per cent (Category II-B: Muslims) of the seats and vacancies for Muslims not excluded by the 'creamy layer' test, Kerala reserves 12 per cent. Tamil Nadu has implemented a different model where Muslims are not provided reservations as a separate group but 95 per cent of the Muslim population in the State has been included in the backward or most backward lists. Finally, states like Bihar carve out the category of Most Backward Classes (MBCs) from the OBCs and provide a separate quota for MBCs. Depending on a largely economic criterion, nine Muslim

[280] *Sachar Committee Report* 192-195.

groups in Bihar are in the OBC list while 27 Muslims groups are present in the MBC list.[281]

I-E: The Role of 'Social Exclusion' and Scheduled Castes, OBCs and Muslim OBCs as Beneficiary Groups

The above sections on the criteria adopted for identification of beneficiary groups, their experience of marginalisation in contemporary India and the design of reservations reveal that an important difference has to be drawn between the groups. In this section, I argue that there is a principled difference, based on social exclusion, between the contemporary experience of Scheduled Castes and Muslim OBCs on the one hand and the experience of non-Muslim OBCs on the other. As has been demonstrated in the above discussion on Scheduled Castes and Muslim OBCs, it is clear that they face significant concerns of social exclusion compared to non-Muslim OBCs. The argument, however, is not that social exclusion is irrelevant for non-Muslim OBCs. As can be seen in the criteria adopted for identifying OBCs, social exclusion does play a part but my position is that the intensity and nature of social exclusion faced by the Scheduled Castes and OBC Muslims is very different from that of the other OBCs. Scheduled Castes and Muslim OBCs by virtue of their caste and religion respectively face social exclusion and this aspect of their marginalisation should ideally be reflected in the remedial measures adopted.

[281]ibid 196-198.

Social exclusion has a specific meaning in this context. As Amartya Sen has argued, there is intrinsic value to 'not being excluded from social relations' and in this sense it is part of 'capability poverty'.[282] Drawing on Adam Smith, Sen argues that 'the inability to interact freely with others is an important deprivation in itself (like being undernourished or homeless), and has the implication that some types of social exclusion must be seen as constitutive components of the idea of poverty – indeed must be counted amongst its core components.'[283] While this understanding reflects on how social exclusion can be a 'constitutive' part of capability deprivation,[284] Sen also recognises that social exclusion can'instrumentally' be a cause of capability deprivation. Referring to them as 'relational deprivations', Sen is of the view that these deprivations might not be impoverishing by themselves, but could lead to other deprivations like economic deprivation, homelessness, lack of access to healthcare etc. Illustrating this point,Sen gives the example of exclusion from access to credit markets. While lack of access to credit markets need not in all circumstances impoverish in and of itself, it could lead to 'income poverty, or the inability to take up interesting opportunities that might have been both fulfilling and enriching but which may require an initial investment and use of credit.'[285]

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[282] Amartya Sen, *Social Exclusion: Concept, Application, and Scrutiny* (Office of Environment and Social Development, Asian Development Bank 2000) 4.

[283]ibid 4-5.

[284] On 'capability deprivation' generally, see Amartya Sen, 'Equality of What?' in Sterling McMurrin (ed), *The Tanner Lectures on Human Values* (Cambridge University Press 1980); Amartya Sen, *Inequality Reexamined* (Oxford University Press 1992); Amartya Sen, 'Capability and Well-Being' in Martha Nussbaum and Amartya Sen (eds), *Quality of Life* (Oxford University Press 1993) 30; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

[285] Amartya Sen, *Social Exclusion: Concept, Application, and Scrutiny* (n 282) 13.

The difference in the nature of social exclusion must inform the character of reservations. As seen in Part I-B, Muslim OBCs at the level of the Central Government are grouped along with all other OBCs. The extent of marginalisation of Muslims in public employment and higher education cannot be explained without reference to social exclusion. The intensity and nature of the social exclusion suffered by Muslims in contemporary India cannot be equated to the experience of Hindu OBCs. Muslims included in the OBC category suffer from the additional (and different) burden of marginalisation based on religion. By according similar preferential treatment to Muslim OBCs as the other OBCs, Muslim OBCs have not been able to enjoy the benefits earmarked for the OBC category. As a result, they are marginalised within the OBC category in terms of accessing the benefits of reservations as has been shown by their lack of presence in higher education and public employment. The marginalisation of Muslim OBCs is closer to that of SCs, where socio-economic factors and recognition harms are inextricably linked.

However, the question that does arise is whether all Muslims should qualify for reservations on the basis of this social exclusion or whether the benefit of reservations should extend only to Muslim OBCs. While the reasons for not addressing this issue in detail are stated in Chapter Five, for our current purposes it would suffice to say that the social stratification amongst Muslims in India should not be ignored while designing the distribution of quotas. While it would be fair to argue that social exclusion is a serious concern for Muslims as a group per se, the *ashrafs* are currently not included amongst the Muslim OBCs by virtue

of their advanced socio-economic status which is far above that of *ajlafs* and *arzals*. It would be counterproductive to provide quotas for Muslims as a group and expect the *ajlaf* and *arzals* to compete with the socio-economically advanced *ashrafs*. Additionally, it would be rather short-sighted to suggest that a separate quota for Muslim OBCs within the OBC category would solve the issue of social exclusion and economic deprivation. However, not providing a separate quota for Muslims OBCs would only further marginalise them.

Part-II: Higher Education and Public Employment as Spheres of Reservations in India

This section of the chapter will look at the best possible reasons for choosing higher education as one of the main spheres of reservations. As a first step, it is important to compare questions of justice and equal opportunity in higher education with similar questions in health care or primary education. The differences are rather stark because it would be untenable to argue that issues of fairness and equality of opportunity should determine access to health care and primary education. The argument as far as health care and primary education are concerned proceeds on the agreement that everyone is entitled, as a matter of right, to a bare minimum. Of course, there could be disagreement on what amounts to a 'bare minimum' but I am not concerned with that debate currently. There is a principled agreement that everyone must have access to healthcare and primary education. There are never really any questions about who should be excluded and the terms on which such exclusion should be decided.[286]

II-A: Higher Education Generally and in India Particularly

Equity of access in higher education has been a significant concern of the UNESCO and the UN Special Rapporteur on the Right to Education. UNESCO's World Declaration on Higher Education for the Twenty-First Century, in Article 3, recognises the need to proactively facilitate equity of access to higher education

[286] Henry S. Richardson, 'On the Sites of Remedial Justice' in Zoya Hasan and Martha Nussbaum (eds), *Equalizing Access: Affirmative Action in Higher Education in India, United States, and South Africa* (Oxford University Press 2012) 21, 34.

for 'members of some special target groups, such as indigenous peoples, cultural and linguistic minorities, disadvantaged groups, peoples living under occupation and those who suffer from disabilities…'.[287] The Report of the Special Rapporteur on Education in April 2011 also recognises that there must be equity of access not just in primary and secondary education but also in higher education.[288] However, Article 26(1) of the Universal Declaration of Human Rights (UDHR) and the 2011 report of the Special Rapporteur[289] acknowledge that the right to higher education is not an unconditional and compulsory right like the right to elementary education. The UDHR in Article 26(1) clearly states that higher education shall be made 'generally available' and then goes on to emphasise that it shall be 'equally accessible to all on the basis of merit'. Therefore, the 'equal accessibility' aspect of higher education is critical given that it is not a universal right. And it is in that context that 'equity of access' becomes critical and the clarifications from UNESCO's World Declaration on Higher Education and the Report of the Special Rapporteur becomes important.

Two aspects of the importance of the 'equity of access' in the Indian context are highlighted in the first. On the relationship between higher education and social mobility in Indian society, Satish Deshpande's work[290] is heavily drawn

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[287] UNESCO, World Conference on Higher Education, Paris, *World Declaration on Higher Education for the Twenty-First Century: Vision and Action* (Oct 9, 1998).

[288] Kishore Singh, Report of the Special Rapporteur on the Right to Education, UN Doc A/HRC/17/29 (April 18, 2011) para 17.

[289] ibid para 11.

[290] Satish Deshpande, 'Exclusive Inequalities' (2006) XLI(24) Economic and Political Weekly 2438; Satish Deshpande, 'Inclusion Versus Excellence: Caste and the Framing of Fair Access in Indian Higher Education' (2009) 40(1) South African Review of Sociology 127.

upon. The second aspect considered is the role of higher education as a social and cultural indicator in the context of subordination. Satish Deshpande argues that by virtue of being a limited resource, there necessarily has to be a process of exclusion in higher education and that there is no reason to believe that seats available in higher education will ever match the number of applicants. This rings particularly true for countries like India and this section of the thesis proceeds on the assumption higher education will necessary have to exclude certain applicants. The important discussion in the context of higher education is around the terms on which such exclusion takes place. Entry into higher educational institutions in India is invariably linked to some form of examination, which further relies on notions of merit. The discourse on merit in independent India when the State invested heavily in higher education has obviously favoured the upper caste and upper class groups who have historically monopolized the resources necessary to be 'meritorious'. To benefit from higher education access to cultural, political and economic resources are required and requires us to graple with 'resource discrimination'. There is often confusion between differential treatment based on 'merit' and 'resource discrimination'. In a country like India, higher education plays a significant role in facilitating upward mobility.[291] Since jobs both in the government and private sector are extremely competitive, more education holds out the promise of upward mobility. Higher education is an accelerator to achieve upward mobility and is also tasked with the function of equalising opportunity. The subsequent question is – equalizing opportunity for what? And the most obvious response would be that higher

[291] Jean Dréze and Amartya Sen, *India: Development and Participation* (Oxford University Press 2002) 144.

education equalises opportunity for employment mainly and additionally gives a set of skills for an individual to effectively pursue her interests.

In addition to Satish Deshpande's point about upward mobility and Nussbaum's argument that higher education, like primary and secondary education, must also be seen as contributing to 'human development' and 'preparation for citizenship'[292], there is another aspect to higher education. The role of higher education must be viewed in the context of subordination and discrimination that informs so much of social relations in India. As a cultural and social indicator it plays a very significant role by opening up opportunities that have been previously denied to various sections of society. It serves the role of sending a message out, both to the marginalised and dominant groups, that aspects of the public sphere like higher education are no longer the monopoly of certain sections and that marginalised groups have a legitimate claim over them.[293] The analysis of the access to higher education in India indicates how it reflects the social and cultural subordination in the larger society.[294]The claim of 'equality of opportunity' is without merit or substance when viewed in the context

[292] Martha C. Nussbaum, 'Affirmative Action and the Goals of Education' in Zoya Hasan and Martha Nussbaum (eds), *Equalizing Access: Affirmative Action in Higher Education in India, United States, and South Africa* (Oxford University Press 2012) 71; Also see Martha C. Nussbaum, 'Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121 Harvard Law Review 4, 69-73.

[293]Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 198.

[294] Amartya Sen, 'Radical Needs and Moderate Reform' in Jean Dréze and Amartya Sen (eds), *Indian Development: Selected Regional Perspectives* (Oxford University Press 1997) 1, 14; Sonalde Desai and Veena Kulkarni, 'Changing Educational Inequalities in India in the Context of Affirmative Action' (2008) 45(2) Demography 245; Also see Karuna Chanana, 'Accessing Higher Education: The Dilemma of Schooling Women, Minorities, Scheduled Castes and Scheduled Tribes in Contemporary India' (1993) 26 Higher Education 69.

of disproportionate group 'results',[295] both in the context of higher education and public employment. Precisely because of those hierarchiesand intense competition for places in higher educational institutions, reservations in education ensure the presence of members of subordinated groups in higher education and sends out a strong message that these spaces are no longer the privilege of the social and class elites.[296]

II-B: Importance of Reservations in Public Employment

Upward mobility and 'presence' as an indicator of countering subordination are contributions that reservations in public employment can make as well. However, the manner in which public employment contributes to upward mobility, compared to higher education, is different. While education is characterised much more as an accelerator towards upward mobility and equalising opportunities, public employment can be viewed as culmination of those opportunities to a significant extent. While public employment cannot be seen as an absolute end, it does signify that those who are eligible for it do enjoy a certain degree of equality of opportunity by virtue of having the qualifications to apply for the job. However, having those minimum qualifications do not ensure that hiring decisions, appointments and promotions will be executed in a fair and non-discriminatory manner. The disproportionate representation of certain groups in public

[295] John C. Livingston, *Fair Game? Inequality and Affirmative Action* (WH Freeman and Co 1979) 10-11.

[296] Amartya Sen, *India: Development and Participation* (n 291) 145-146; Richardson (n 286) 21, 37-38; Mary E. Hawkesworth, 'The Affirmative Action Debate and Conflicting Conceptions of Individuality', (1984) 7(5) Women's Studies International Forum 335, 344.

employment is indicative of the lack of equal opportunity.[297] Selection procedures that make claims about being 'objective' and 'neutral' ignore the subjective elements in hiring and those claims are exposed by skewed group outcomes. Reservations are a way of correcting the clear lack of equal opportunity in employment as demonstrated by the lack of equality in outcomes.

Part III: Reservations – In Which Sphere and for Whom?

The above discussion on the different beneficiaries and spheres of reservation was directed towards establishing the argument that the justifications for all groups cannot be the same in all same spheres. In this part, I will argue that mapping justifications for different groups on to the different spheres of reservations will produce a hierarchy of entitlements. The aim is to rebut a framework of analysis that proceeds on the assumption that the justification for reservations for all groups across all spheres is the same. The discussions in the previous sections indicate that that is not the case and that a far more nuanced framework is called for.

The reasons for providing reservations of Scheduled Castes and Muslim OBCs are significantly different from providing reservations for the remaining OBCs. The discrimination and marginalisation suffered by Scheduled Castes and Muslim OBCs are a thorough combination of social exclusion and socio-economic deprivation. As can be seen from the criteria adopted for identification for OBCs,

[297] Anne Phillips, 'Defending Equality of Outcome', (2004) 12(1) The Journal of Political Philosophy 1, 18.

while social discrimination is accounted for to a certain degree, it is certainly not as strong a factor as in the identification (and lived experience) of Scheduled Castes or the contemporary experience of Muslims. The intensity and the nature of social exclusion suffered by Scheduled Castes and Muslims must set them apart as beneficiary groups. Muslim OBCs are included in the larger OBC category by virtue of satisfying the conditions identified by the Mandal Commission but as shown in I-C, Muslim OBCs are marginalised within that category. The question then is whether by virtue of social exclusion all Muslims should be given a separate quota and not just Muslim OBCs. However, as has been discussed in the section on Muslim OBCs, the *ajlafs* and *arzals* are situated very differently in terms of the social position and socio-economic deprivation than the *ashrafs*. It is important to acknowledge both the socio-economic deprivation and the social exclusion of OBC Muslims as factors that distinguish them from the larger OBC category and *ashraf* Muslims. Carving out a separate quota for Muslim OBCs from the 27% quota for OBCs cannot be seen as the solution to the marginalisation of Muslim OBCs. However, the lack of a separate quota marginalises Muslim OBCs further within the OBC category. The issue of a sub-quota for Muslim OBCs within the OBCs is discussed in greater detail in Chapter 5.

Just as all beneficiary groups cannot be viewed within a homogenous analytical framework, there is a need to distinguish between the spheres of reservation as well. If we were to view school education, higher education and public employment as a continuum, it would be evident that the justification for special measures gets narrower as we move from one sphere to another. There is hardly any debate that the State must do all it can to ensure that primary and

secondary education is as inclusive it can be. It is my argument that as we move along that continuum it becomes more difficult to justify reservations at each stage. We could identify two reasons for that – a) The roles played by special measures in public employment in comparison to primary, secondary and higher education are narrower; b) Beneficiary groups are worst off and most vulnerable at the school education stage and experience more equality of opportunity as we move along the continuum. In the context of this thesis, there exists a wider range of roles and justifications for reservations in higher education than public employment. By the time individuals are in a position to be considered for public employment, they must meet the eligibility criteria and that signals that the candidate has come a significant distance in terms of equality of opportunity. However, that is certainly not to argue that equality of opportunity has been achieved. The argument here is that the candidate by virtue of having gone through school and higher education, is in a much better position than an individual who has not received school or higher education. This argument cannot be taken to mean that the candidate has achieved parity with members of the dominant groups. It only means that enquiry into the legitimacy of reservation in public employment must be more stringent than the enquiry into the legitimacy of reservations in higher education.

Therefore, we have a situation where the basis for reservations for Scheduled Castes and Muslim OBCs is along similar lines and probably represents the strongest entitlement for special measures. Also, higher education as a sphere of reservation lends itself to a stronger and more expansive claim than public employment. Therefore, if one were to view it as a system of entitlement to special

measures, reservations for Scheduled Castes and Muslim OBCs in higher education has the strongest claim in the context of the thesis while non-Muslim OBCs in public employment have the weakest claim and therefore require the most stringent justifications.

CHAPTER FOUR: THE INDIAN SUPREME COURT ON RESERVATIONS: NORMATIVE DIFFICULTIES, UNCERTAIN DIRECTIONS

The aim in this chapter is to examine the normative foundations of the Supreme Court's discourse on reservations and its relationship with equality. The normative foundation of the Supreme Court's jurisprudence since the mid-70s has been that reservations are a facet of equality. Also of central concern in this chapter are the consequences of such a normative position. While the Court's move away from the 'reservations are an exception to equality' paradigm is encouraging, my argument in this chapter is that it has not accurately identified the consequences of that normative shift. The chapter focuses on the strategies evolved by the Court to limit the operation of reservations and in that context examines the 50 per cent maximum reservation rule, identification of backward classes and issues of merit/efficiency. The discourse of the Court on these issues has not undergone the necessary changes to reflect the Court's normative shift and still seems to draw on the framework that views reservations as an exception. Drawing on the framework developed in Chapter III, I argue that concerns of costs incurred by society due to reservations cannot form the basis for limiting reservations once the Court has committed to the position that reservations are a facet of equality. I acknowledge and agree with the argument that the State cannot be given unrestricted power to provide reservations across all stages of higher education and public employment. It is crucial to identify the terms on which a limitation on the State's power can be developed that are consistent with the principle position that reservations are a facet of equality. I argue that a more

appropriate framework would need to acknowledge the fact that the justifications for all groups and within and between all spheres cannot operate in a homogenous fashion. While the need to acknowledge and engage with the lack of homogeneity in beneficiary groups is addressed in Chapter V, this chapter puts forward a framework that can factor in the dynamics between equality of opportunity and reservations at different stages of higher education and public employment.

Part I provides details of the process that was used to determine the cases that I engage with in this chapter. The multiple facets to constitutional challenges to reservation required me to develop a strategy of short listing cases that was well suited for the purposes of this chapter. Part II provides an introduction to the equality, anti-discrimination and reservation-enabling provisions of the Constitution. The evolution of the Court's current position that reservations are a facet of equality is traced in Part III. Further, Part III also undertakes an analysis of the Supreme Court's position on the various facets of reservations including the constitutional relationship between reservations and all other special measures, the burden of justification on the State while implementing reservations and other special measures, and the 50 per cent cap on reservations as finally decided in *Indra Sawhney*. In Part IV, I examine the Supreme Court's understanding of backwardness amongst the OBCs. Part IV in essence lays the foundation for a more detailed analysis of sub-classification of beneficiary groups in Chapter Five. The focus in Part V is the continuity that has been maintained in the discourse onmerit/efficiency in the pre and post *Indra Sawhney* phase. In the post-*Indra Sawhney* phase, I have chosen to engage with two specific spheres of reservation

that are a normative challenge for reservations – issues of seniority in the context of reservations in promotions, and reservations in advanced postgraduate degrees. These difficult cases forced the Court to explicitly articulate its normative basis for limiting reservations and the resulting picture is a confusing one which does not maintain normative coherence with the Court's position on the reservations – equality relationship. In Part VI, I attempt to further flesh out the normative framework for adjudicating reservation cases in the context of the preceding discussions. While the correction of the Supreme Court in *N.M.Thomas* and later *Indra Sawhney* after decades of confusion must be appreciated, the conclusion that the Supreme Court has not developed its jurisprudence on reservations in a manner that would have enabled the full realisation of substantive equality is inescapable.

Part-I: Methodology

Given the number of cases that exist on the various aspects of reservations, I used the following strategies to select the cases that I have engaged with. In my opinion, these cases are best suited for the purposes of this chapter in terms of identifying judicial trends, highlighting the normative challenges and as the testing ground for prescriptive frameworks. In this chapter I analyse the strongest normative position of the Supreme Court concerning reservations and equality. There can be very little doubt that the defining position of the Court in this regard has been the view that reservations are a facet of equality rather than an exception to it. However, this has not always been the position of the Court and therefore my first set of cases looks at the Court's initial position on the

relationship between reservations and equality. It was then an obvious choice to consider *State of Kerala v N.M. Thomas* and *Indra Sawhney v Union of India* in detail since these two decisions radically altered the Supreme Court's normative discourse on the relationship between reservations and equality.

In this chapter I have analysed the impact of the principle that 'reservations are a facet of equality' on two central themes of the reservation policy in India – identification of backward classes and the role of merit/efficiency in higher education and public employment. As far as cases on identification of backward classes are concerned, I have relied on my exhaustive research of articles that appeared on the subject in the Journal of the Indian Law Institute, Delhi Law Review and the Supreme Court Cases Journal. While my analysis of the issue, both in terms of its aim and strategy, is different from the manner in which the existing academic writing approaches the issue, I nonetheless concur with what are considered as landmark cases on the issue.

On the issue of efficiency, I have chosen to engage with cases that presented the most difficult normative challenge for reservations in public employment – those that dealt with reservations in promotions and its impact on seniority. These are also cases that forced Parliament to amend Article 16 twice. I have also examined *M. Nagaraj v Union of India* on this issue, which considered the constitutionality of the said amendments. Even with the Court's discourse on merit in higher education, I have chosen the most difficult normative challenge – special measures in courses at the very top of the higher education pyramid. Choosing the toughest normative questions serves two purposes. First, it allows

me to examine the normative coherence of the Court's discourse on these aspects of reservations in the context of its ruling that reservations are a facet of equality. Secondly, it also provides a tough testing ground for what I argue is the more appropriate normative framework for the adjudication of reservation cases.

Part-II: Brief Overview of the Relevant Constitutional Provisions on Reservations

The Constitution of India contains general equality provisions, anti-discrimination protection and also provisions that enable the State to take special measures in favour of certain groups.

Article 14, which is the general equality provision, provides:

> Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

The Supreme Court in its jurisprudence has permitted reasonable classifications under Article 14 as long as the conditions of intelligible differentia and rational nexus were satisfied by the State.[298] The Court in the mid-70s also developed a new doctrine under Article 14, which sought to test the validity of State action against arbitrariness rather than using the reasonable classification test.[299]

[298] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.

[299] *E P Royappa v State of Tamil Nadu* AIR 1974 SC 555.

Special measures taken in favour of beneficiary groups in the sphere of higher education are justified under Article 15 (4). However, Article 15 in the original draft of the Constitution contained only an anti-discrimination clause in Article 15(1) and an enabling provision for special provisions for women and children under Article 15(3):

> Article 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children.

It was only after the Supreme Court in 1951 struck down reservations in higher education[300] that Parliament inserted Article 15(4) through the First Constitution Amendment Act, 1951, which explicitly empowered the State to make special provisions in favour of certain groups without explicitly mentioning education:

> Article 15(4): Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Faced with a Supreme Court that repeatedly questioned the State's power to mandate reservations in private unaided higher educational institutions, Parliament inserted Article 15(5) through the 93rd Constitution Amendment Act, 2005:

> Article 15(5): Nothing in this article or in sub-clause (g) of clause (1) of Article 19[301] shall prevent the State from making any special provision, by law, for the advancement of any socially and

[300] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

[301] Article 19(1)(g) of the Constitution of India, 1950: 'All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.'

> educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

Article 16 of the Constitution deals explicitly with public employment and the original text of Article 16 contained an equality of opportunity clause [16(1)], anti-discrimination clause [16(2)] and an enabling provision for reservations [16(4)]

> Article 16(1): There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
> Article 16(2): No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.
> Article 16(4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Article 16(4A) was inserted only in 1995 and its text, as it currently stands, was the result of the 77th and 85th Constitution Amendment Acts in 1995 and 2001 respectively.

> Article 16(4A): Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Part-III: Reservations as a Facet of Equality and Not an Exception

The Supreme Court's change in approach to reservations and equality has been dramatic. One of the major points of disagreement in the evolution of the Supreme Court's discourse on reservation was the relationship between reservations and the equality guarantee in the Constitution of India. Until the mid-70s, the dominant position in the Court was that reservations under Articles 15(4) and 16(4) in higher education and public employment were exceptions to the equality and non-discrimination clauses. However, the first major shift happened in *State of Kerala v N.M. Thomas*[302] in 1975 where five out of seven judges ruled that reservations were a facet of equality rather than an exception to it. This position was consolidated in *Indra Sawhney v Union of India*[303] in 1992 and has never been under any real threat since then. However, it is important to trace the evolution of this crucial position to better understand the consequences of viewing reservations as a facet of equality, which is addressed in III-C. In III-C, after analysing the judgment in *Indra Sawhney* I come to the conclusion that the Supreme Court has erroneously imposed the same burden on the State in the context of reservations and all other special measures in public employment for backward classes. Clearly, the Constitution of India permits different kinds of special measures. While reservation is only one example of a special measure, other special measures like concessions in age limit, number of attempts at a qualifying examination, concession in application fees etc are also used by the State. I also argue that the 50 per cent ceiling limit should have been more firmly

[302]AIR 1976 SC 490.

[303]AIR 1993 SC 477.

done away with by the judgment in *Indra Sawhney* once the Court committed to the position that reservations were a facet of equality.

III-A: The Pre-Thomas Era

The Supreme Court's decision in *General Manager, Southern Railway v Rangachari*[304] was amongst the very first decisions to explicitly examine the relationship between reservations and equality. As a case relating to public employment, *Rangachari* dealt with the relationship between the provision for reservations in Article 16(4) and the equality of opportunity and non-discrimination in Articles 16(1) and 16(2) respectively. The Court was called upon, in essence, to decide whether Article 16(4) permitted reservations only in initial appointments or whether reservations in promotions were constitutional as well. All five judges read Article 16(4) to be an exception to Articles 16(1) and 16(2) but reached differing conclusions. Despite reaching different conclusions, their position on Article 16(4) and its relation to Article 16(1) and 16(2) demonstrated the problem in viewing reservations as an exception, albeit in different ways.

Justice Gajendragadkar's majority judgment upholds reservations in promotions despite finding Article 16(4) to be an exception. The critical question in the case was whether the phrase '…. *provision for the reservation of appointments or posts in favour of any backward class of citizens….*' in Article 16(4)

[304]AIR 1962 SC 36.

covered promotions as well. While the majority opinion found the word 'posts' in Article 16(4) to cover promotions as well, its general approach to Article 16(4) laid the foundations for much of the constitutional confusion that would follow. By viewing it as an exception, the majority opinion agreed that Article 16(4) had to be interpreted narrowly.[305] While in this case the majority found even a narrow interpretation of Article 16(4) to permit reservations in promotions, the Court made it very clear that the scope of Article 16(4), by virtue of being an exception, was far more limited than Articles 16(1) and 16(2).[306] It ruled that the only permitted exception to the guarantee of equality of opportunity and non-discrimination should be in line with a strict interpretation of Article 16(4). Therefore, strictly construing Article 16(4), the Court ruled that matters other than 'reservation' were outside the scope of Article 16(4). This in essence meant that any special measures other than quotas could not be justified under Article 16(4) because the term used there in was 'reservation'.

Justices Wanchoo and Ayyangar in their dissenting opinions demonstrate a further peril of reading Article 16(4) as an exception. Unlike the majority, on a narrow reading of Article 16(4), they did not find reservations permissible in promotions but it is their conceptual understanding of Article 16(4) that is more relevant for our current purposes. By virtue of being an exception, Justice Wanchoo was of the view that 'all' or even a 'majority' of appointments could not be reserved under Article 16(4) because that would destroy the protection

[305]ibid para 21. (**all paragraph numbers of Indian cases hereafter correspond to the Manupatra version of the judgments**)

[306]ibid para 22.

guaranteed by Articles 16(1) and 16(2).[307] This is the genesis of the 50 per cent rule as the maximum limit for reservations. While it made perfect normative sense in a context where reservation is seen as an exception to equality, it will be seen later in this chapter that the Supreme Court continues to give this rule a dominant role despite abandoning the view that Article 16(4) must be seen as an exception.

The crossover of the above reasoning into the field of reservation in education under Article 15(4) was made in *M.R. Balaji v State of Mysore*[308]. In *Balaji*, five judges of the Supreme Court (including three judges from *Rangachari)* unanimously held that Article 15(4) was an exception to the non-discrimination clause in Articles 15(1) and 29(2)[309]. In *Balaji*, the Supreme Court was adjudicating the constitutional validity of an order of the State Government that reserved 68 per cent of the seats in engineering and medical colleges for Scheduled Castes, Scheduled Tribes and Other Backward Classes. The Court explicitly stated that since Article 15(4) was an exception, reservation under that provision for education 'should be less than 50 per cent'[310]. The Court, however, felt that the exact quantum of reservation below 50 percent had to be decided depending upon the circumstances in each case. Given the scope of Article 15(4) articulated by the Court, the 68 per cent reservation in higher education was held

[307]ibid 34.

[308]AIR 1963 SC 649, para 33.

[309] Article 29(2) of the Constitution of India, 1950: 'No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.'

[310]*M R Balaji v. State of Mysore* AIR 1963 SC 649, para 36.

to be unreasonable and in doing so, the Court referred to the decision in *Rangachari*. Therefore, with *Rangachari* and *Balaji*, the Court had reached the position that the reservation provisions were undoubtedly exceptions to the equality provisions. The unanimous decision is *Balaji* was clearly influenced by both the majority and minority opinions in *Rangachari*, even though it dealt with promotions in public employment. While the majority in *Rangachari* did not express any view on the quantum of reservations, the unanimous opinion in *Balaji* endorses Justice Wanchoo's dissent in *Rangachari* on that point without explicitly referring to it. It picks up on the majority opinion that Article 16(4) is an exception and then transposes Justice Wanchoo's conclusion that a majority of positions cannot be reserved.

Only one dissenting judge (Justice Wanchoo) in *Rangachari* addressed the quantum of reservations in public employment and the opinion in *Balaji* that the scope and restrictions in Articles 15(4) and 16(4) were similar must be held as obiter. It was in *T. Devadasan v Union of India*[311] that the Supreme Court explicitly decided the question of quantum of reservations in public employment. The question in *Devadasan* concerned the 'carry forward' rule, whereby unfilled reserved vacancies from one year were added to the quota in the subsequent round of recruitment. The Supreme Court had to decide whether it was constitutionally valid for the government to end up reserving 65 per cent of the vacancies in any given year by application of the 'carry forward' rule. The decision on the quantum of reservations in public employment is not significant in and of

[311]AIR 1964 SC 179.

itself for our current purposes but it serves to show the influence of the Court's position that reservations were an exception to equality. Just like in *Balaji*, the Supreme Court in *Devadasan* held that reservations in Article 16(4) cannot be to an extent that it destroys or renders the protection in Articles 16(1) and 16(2) illusory. Invoking *Balaji* and taking forward the equivalence between Articles 15(4) and 16(4), six of the seven judges in *Devadasan* upheld the 50 per cent limit even when the 'carry forward' rule was applied in any given year. Referring to the decision in *Balaji*, the Supreme Court held that:

> What this Court has laid down there would also apply to the present case. The ratio of this decision appears to be that reservation of more than half the vacancies is per se destructive of the provisions of Article 15(1) which is to the effect that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them…….. Further, this Court has already held that clause (4) of Article 16 is by way of proviso or an exception to clause (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) would in effect efface the guarantee contained in clause (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein.[312]

Therefore, from the three cases above we have seen the manner in which the Supreme Court developed its discourse on reservations as an exception to equality. Clearly, the Court was preoccupied with devising a method to limit reservations and its initial step towards imposing those limitations was to view reservations as an exception to equality. While the Court did invoke certain notions of 'backwardness', merit and efficiency during this period as limiting factors (dealt with in detail in Parts IV and V), these were built on the

[312] *TDevadasan v Union of India* AIR 1964 SC 179, 23, para 19.

foundationdiscussed above. By viewing reservations as an exception, the Court not only restricted the kind of measures the State could take in public employment, it also limited the extent of reservations to 50 per cent in both higher education and public employment. The normative anomalies that arose from this position were remedied partially in *State of Kerala v N.M. Thomas*[313]and then in *Indra Sawhney v Union of India*[314]. However, it will be argued in this chapter that the Court never completely recovered from this assumption that reservations were an exception to equality. While having formally adopted the position since *Indra Sawhney* that reservations are a facet of equality,the various strategies adopted by the Court since then to limit reservations ('backwardness', merit, efficiency) are very much situated within the paradigm of viewing reservations as an exception to equality.

III-B: Reservations as a Facet of Equality: *N.M. Thomas* Starts a New Phase

State of Kerala v N.M. Thomas[315] was decided in 1975 by a seven-judge bench of the Supreme Court and drastically changed the terms of the relationship between reservations and equality under the Indian Constitution. The Court had to rule upon the constitutionality of a government order issued by the Kerala government, which allowed SC/STs in a particular service to be promoted without taking a prescribed exam, which all others were required to clear before being

[313]AIR 1976 SC 490.

[314]AIR 1993 SC 477.

[315]AIR 1976 SC 490.

promoted. The order also provided that SC/STs had to clear the exam within two years of being promoted.

However, the very first step in challenging the discourse that reservations were an exception to the equality guarantees in the Constitution was taken by Justice Subba Rao in his dissent in *Devadasan*[316]. He argued that the whole of Article 16 was an instance of the general rule of equality in Article 14 because a purely formal view of equality in a society with such widespread social discrimination would only ensure that the backward communities had no real opportunities. He was of the view that Article 16(4) had 'not really carved out an exception but (had) preserved a power untrammelled by the other provisions of the Article'.[317]

It was this line of argument that the majority followed in *Thomas*. All seven judges in *Thomas* rendered opinions with five judges upholding the impugned measure. Though Justice M.H Beg upheld the measure, his reasoning was markedly different from the approach adopted by Justices A.N. Ray, K.K. Mathew, Krishna Iyer and Fazal Ali. Among the majority, Justice Beg was the only one to proceed on the basis that Article 16(4) was an exception to Articles 16(1) and 16(2) and therefore found the impugned measure to satisfy the requirements of Article 16(4). Given the fact that the measure in question was a temporary exemption from taking an exam for promotions, the remaining six judges were of the view that the measure did not fall under the term 'reservations' in Article

[316]AIR 1964 SC 179, para 32 (Subba Rao J, dissenting opinion).

[317]ibid para 35.

16(4) but instead had to be examined whether it could be justified under Article 16(1). Four out of the five judges in the majority (Justices Ray, Mathew, Iyer and Ali) upheld the measure under Article 16(1) with Justice Beg upholding it under Article 16(4). The two dissenting judges, Justices H.R. Khanna and A.C. Gupta, agreed with Justice Beg that Article 16(4) was the only provision under which special measures for backward classes could be justified but disagreed with him that the impugned measure could be justified under Article 16(4). They also disagreed with the four other majority judges and held that special measures for backward classes could not be justified under Article 16(1) and that Article 16(4) was the sole repository for such measures.

Therefore, Justices Beg, Khanna and Gupta proceeded on the basis that Article 16(4) was an exception to the guarantees in Article 16(1) and 16(2) whereas Justices Ray, Mathew, Iyer and Fazal Ali held Article 16(4) to be a facet of equality. For the four majority judges, Article 16(4) was only one example of what the State could do under Article 16(1) by way of reasonable classification. They viewed Article 16(4) as only explaining that reservations on the basis of 'backwardness' would not fall foul of the prohibition against discrimination on the basis of religion, race, caste, sex, descent, place of birth, residence in Article 16(2).[318] Therefore, they took the position that Article 16(4) was not the sole provision under which special measures for backward classes could be taken. While Article 16(4) controlled providing reservations, other forms of classification favouring backward classes were permitted under Article 16(1).

[318]*State of Kerala v N. M. Thomas* AIR 1976 SC 490, para 37 (dissenting opinion of Ray CJ), para 103-109 (dissenting opinion of Mathew J), para 161-162 (dissenting opinion of Iyer J), para 193, 219-220 (dissenting opinion of Ali J).

Justice Khanna in his dissent disagreed with this interpretation based on his view that Article 16(4) was an exception to the general guarantee of equality of opportunity and non-discrimination. By virtue of being an exception, Article 16(4) controlled the entire spectrum of special measures that could be taken in favour of backward classes. Therefore, if a certain measure could not be justified under the terms of Article 16(4), it could not be justified under any other provision of Article 16.

At this juncture, it might be instructive to highlight the differences between Article 15(4) and 16(4) in this context. Article 15(4) permits the State to make '*any special provision*' for the advancement of socially and educationally backward classes. However, Article 16(4) refers only to '*reservations*' in the context of public employment. It is important to note the different requirements placed by these two provisions. Article 16(4) permits reservations only once 'backwardness' of a class of citizens has been established and it is shown that, in the opinion of the State, that class is not adequately represented. While Article 16(4) does not make any reference to the nature of backwardness that needs to be established, Article 15(4) is explicit that it is 'social and educational' backwardness that has to be established. Also, it is evident that the 'adequacy of representation' criterion is absent from Article 15(4). This discussion is relevant in the context of *Thomas* because of the different approaches taken by the judges.

I would agree with the four judges in the majority that special measures for backward classes can be taken under Article 16(1) as well. However, I would also argue that Article 16(4) controls the field as far as providing reservations to

backward classes is concerned. If the State wants to provide reservation, it must do it under the terms of Article 16(4) and the adequacy of representation is integral to that. What the four majority judges have failed to highlight is the possible difference of justifying a measure under Article 16(1) rather than Article 16(4). The most accurate reading of the relationship between Article 16(4) and Article 16(1) would be that reservations for backward classes in public employment could have been done under Article 16(1) even if Article 16(4) was not part of the Constitution. However, what Article 16(4) does is to set out the conditions that need to be satisfied if the State wants to provide reservations, i.e. identify a 'backward class' of citizens and come to a conclusion about the adequacy of representation. In that sense, it imposes additional conditions to what the State would have to establish under a reasonable classification approach purely under Article 16(1). The corollary is just as important. It would be evident that the measures for backward classes under Article 16(1) (everything other than reservations) need not satisfy the conditions set out in Article 16(4). Therefore, the ruling of the four judges in *Thomas* that reservations in Article 16(4) are a facet of equality and special measure (other than reservations) for backward classes must be justified under Article 16(1) comes with certain consequences, which the judges do not engage with.

As will be seen in the sub-section below, the Supreme Court failed to recognise in this dynamic between Articles 16(1) and 16(4) in *Indra Sawhney v Union of India*[319] as well. While the Supreme Court does clarify many important

[319]AIR 1993 SC 477.

issues in *Indra Sawhney*, it commits the same error as the four majority judges in *Thomas* and does not tease out the differences between Articles 16(1) and 16(4). The Court's failure to do that, in my opinion, leads it to commit a fatal error by holding that all special measures for backward measures had to be justified under Article 16(4). The burden on the State to justify reservations on the one hand and all other special measures must be different. Not only is this borne out by the text of Article 16(4) but also other special measures have a less direct impact on equality of opportunities than quotas. Quotas can undoubtedly be understood in terms of equality of opportunity but it is perhaps the most radical form of ensuring equality of opportunity. It is radical because it completely excludes individuals from accessing certain positions in higher education or public employment. None of the other special measures have such an exclusionary effect but that does not mean that reservations are not legitimate or constitutional. However, that distinction must serve to place different burdens of justification depending on whether it is adopting reservations or special measures other than reservations. While the reasoning of the Supreme Court in *Indra Sawhney* is explored in the sub-section below, the full import of the Court's error will be seen when the judicial discourse on the 'adequacy of representation' is analysed in Part IV.

III-C: The Attempt in *Indra Sawhney* to Resolve Normative Tensions

In III-A and III-B, I developed two strains of normative tensions that arose. In III-A, it was seen that the Supreme Court saw reservations as an exception to equality and relied on the 50 per cent rule to limit the operation of reservations. In the

analysis of *Thomas* in III-B, it was established that different consequences would flow depending on whether the measure was justified under Article 16(1) or 16(4). The project of considering reservations as a facet of equality was completed in *Indra Sawhney v Union of India* by a nine-judge bench of the Supreme Court. The manner in which that project was completed has important implications to the concerns identified in III-A and III-B. Though the Court held reservations to be a facet of equality, the details of its arguments reveal that it did not manage to break out of the 'reservations as an exception' framework in terms of the 50 per cent rule. Also, the manner in which it characterised the relationship between Articles 16(1) and 16(4) made it more burdensome for the State to accord preferential treatment for backward classes using methods other than reservations.

Very rarely has the Indian Supreme Court received as much attention as it did during the days in which it was hearing the arguments in *Indra Sawhney v Union of India*. The Court found itself having to hand down a judgment in a case that had become extremely volatile politically. At the heart of the case, was the constitutional challenge to two Office Memorandums issued by the Government of India in August 1990 and September 1991 that essentially provided:

a. 27 per cent of the vacancies in posts and services under the Government of India would be reserved for 'socially educationally backward classes' (SEBCs).
b. Within the 27 per cent quota, preference would be given to the poorer sections of the SEBCs.

c. 10 per cent would be reserved for economically backward sections not covered by the 27 per cent quota for SEBCs.

The identification of the SEBCs was based on the report of the Mandal Commission that listed SEBCs as a list of caste groups. This forced the Court to consider whether 'caste' could be used as a criterion for determining backward classes under Article 16(4). In addition to that, the Court also ruled on whether reservations in promotions would be constitutional. The Court's discourse on the use of caste as a criterion will be analysed in Part IV and its views on reservations in promotions are considered in Part V. In this sub-section, the focus is on the Court's views on the relationship between Articles 16(1) and 16(4).

The nine judges in *Indra Sawhney* produced six opinions. Chief Justice Kania and Justices M.N. Venkatachaliah and A.M. Ahmadi concurred with Justice B.P. Jeevan Reddy's opinion[320] whereas Justices Ratnavel Pandian, T.K. Thommen, Kuldip Singh, P.B. Sawant and R.M, Sahai wrote individual opinions. The opinions by Justices Thommen, Singh and Sahai are dissenting opinions.

All nine judges agreed that Article 16(4) was not an exception to Article 16(1) and that reservations were a facet of equality. Justice Reddy was of the view that Article 16(1) permitted classification just as the general equality provision in Article 14 did. Agreeing with the approach taken by Justices Ray, Mathew, Iyer and Fazal Ali in *Thomas*, Justice Reddy saw Article 16(4) as an example of what

[320] Any reference hereinafter to Justice Reddy's opinion includes the concurrence of the three other judges.

was anyway permitted under Article 16(1).[321] Justice Pandian viewed Article 16(4) as an enabling provision and permissive in character and as the source of reservations for backward classes in public employment.[322] Justice Sawant highlighted the anomaly that would arise if Article 16(4) were held to be an exception to Article 16(1). If all exceptions to Article 16(1) had to be made according to the terms laid down in Article 16(4), then it would impermissible for the State to take preferential measures to benefit groups like the differently abled, former army personnel etc.[323]

While the Court is correct in establishing that foundational principle, it is in the understanding of its consequences that it flounders. And this is evident in the majority's response to: i) whether Article 16(4) is exhaustive of all special measures that can be taken in favour of backward classes; ii) whether Article 16(4) is exhaustive of reservation per se. On the first issue, Justice Reddy felt 'the constitutional scheme and context of Article 16(4) induce(d) the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration.'[324] While Justice Reddy agreed with the four judges in *Thomas* that Article 16(4) was not an exception to Article 16(1), he disagreed with them that those special measures other than reservations for backward classes

[321]*Indra Sawhney* (n 279) para 56.

[322]ibid para 304.

[323]Ibidpara 530.

[324]Ibidpara 57.

fall under Article 16(1). On this point, he agreed with Justice Beg's approach in *Thomas* and came to the conclusion that 'where the State finds it necessary for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under Clause (4) itself……. In this sense, Clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of the backward class of citizens'[325]. However, Justices Singh and Sahai in their dissenting opinions held that Article 16(4) was exhaustive of the State's power to provide reservations per se in public employment but other measures could be provided under Article 16(1). [326]

The position taken by majority in *Indra Sawhney* is not compatible with the position that Article 16(4) is a facet of equality. The majority has ended up requiring the State to meet the same burden to provide something like age concessions for backward classes as it would to provide reservations. As discussed in the concluding paragraphs of III-B, the State could have provided reservations under Article 16(1) within the paradigm of substantive equality even if Article 16(4) did not exist. However, Article 16(4) imposes certain conditions to provide reservations for backward classes. By holding that 'all' special measures for backward classes must be justified under Article 16(4), the majority has set a much higher bar than required. If Article 16(4) is indeed a facet of equality provided for in Article 16(1), the measures other than reservations in favour of backward classes should have been justifiable under Article 16(1).

[325]ibid.

[326]Ibidpara 528-529 (dissenting opinion of Singh J), para 681 (dissenting opinion of Sahai J).

What makes the above position of the majority even more baffling is the response to the question whether Article 16(4) is the exhaustive provision for providing reservations per se. Justice Reddy answers that in the negative and holds that reservations, other than for backward classes, are possible under Article 16(1).[327] Such a position gives rises to two concerns. First, it makes the conditions for providing reservations, other than for backward classes, less burdensome. Article 16(4) requires the State to show inadequacy of representation, which is not required under Article 16(1) and a classification under Article 16(1) is subject only to a reasonableness test. More importantly, reservations, which are seen as one of the more radical forms of affirmative action, have to satisfy less stringent conditions than certain other attempts of the State to provide preferential measures. Those other special measures for backward classes have to satisfy the more burdensome requirements of Article 16(4) but reservations other than those for backward classes have to only meet the lesser requirements of Article 16(1).

III-C(i): *Indra Sawhney* on the 50 per cent limit on reservations

As discussed in III-A, the 50 per cent rule first emerged as a method to control the extent of reservations. This control was being exercised in the context of the Supreme Court's position that reservations must be viewed as an exception to the equality protection in the Constitution. Given the foundational shift in understanding the relationship between reservations and equality, it is important

[327]ibid para 58.

to analyse the precise nature and extent of that shift by examining its impact on the 50 per cent rule. Different conclusions were reached on this issue in the opinions handed down in *Indra Sawhney.* Despite making strong and emphatic statements about reservations being a part of equality, the judges were reluctant to let go of the 50 per cent rule as the maximum reservations possible. The terms on which the most of the judges engaged with this issues remains within the paradigm of viewing reservations as an exception.

Drawing attention to the fact that Article 16(4) is couched in terms of 'adequate representation' rather than proportional representation[328], Justice Reddy argued that the mandate made permissible in Article 16(4) must 'be exercised in a fair manner and within reasonable limits'.[329] Justice Reddy then went on to hold that nothing could be 'more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations.'[330] Though not an exception to Article 16(1), Justice Reddy was of the view that Article 16(4) was a special provision that needed to be harmonised with Article 16(1) because Article 16(4) 'conceived in the interest of certain sections of society' had to 'be ***balanced against*** the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society'.[331] Justice Reddy concluded that while 50 per cent would be the rule, in extraordinary situations it would be

[328] Articles 330 and 332 invoke proportional representation to decide the extent of reservations in Lok Sabha for Scheduled Castes and Scheduled Tribes.

[329] *Indra Sawhney* (n 279) para 94A.

[330] ibid.

[331] ibid.

permissible to provide reservations above that. It is precisely in the context of this reasoning that Justice Reddy's earlier conclusion, that reservations are a facet of equality, becomes strained. As can be seen above, Justice Reddy views the interests being pursued in Article 16(4) pulling in the opposite direction from the interests articulated in Article 16(1). By setting up the interests of certain groups in Article 16(4) as different from individual and society's interests, Justice Reddy has not taken the discourse on reservations being a facet of equality to its logical conclusion.

The dissenting opinions by Justices Singh[332] and Sahai[333] went a step further and held that reservations under Article 16(4) could under no circumstance exceed 50 per cent. However, Justices Pandian and Sawant felt that the constitutional scheme did not require reservation to be limited to 50 per cent. Justice Pandian was of the view that the extent of reservation should depend on concerns of adequacy of representation in any given case and that fixing any rule would be counterproductive.[334] Justice Sawant also preferred to leave the door open for reservations above 50 per cent depending on the circumstances in each case and saw no reason to set down a rule limiting reservations to 50 per cent.[335] With this issue, it is obvious that the judges were grappling with concerns about limiting reservations. The approach of Justice Reddy and the two dissenting judges fits into the paradigm of thinking about reservations as an exception, as

[332]ibid para 530.

[333]ibid para 681.

[334]ibid para 322-323.

[335]ibid para 589.

something that must be necessarily restricted. It is indeed important to think about the manner in which reservations can be limited, to guard against its capture by the political class. However, the approach adopted by the majority in *Indra Sawhney* has no normative basis to impose the 50 per cent ceiling.

In this part we have seen the evolution of the normative tensions surrounding reservations in the Indian Supreme Court. The foundational tension, since the early days of the Court, was about reservation as an exception to equality. Though the early decisions of the Court held reservations to be an exception, the decisions in *Thomas* and *Indra Sawhney* have firmly entrenched the position that reservations are a facet of equality. However, what the Court has not succeeded in doing is engaging in a focused discussion on the consequences of taking that position. In its attempt to limit the extent of reservations, the Court has resorted to a framework from an era where it believed reservations to be antithetical to equality. The relationship between Articles 16(1) and 16(4) is crucial because ensuring equality of opportunity for the backward classes is not just about fixing quotas. States do take various other measures in favour of backward classes and unfortunately the Court in *Indra Sawhney* has adopted a more burdensome approach. The attempt to streamline the operation of reservations would be much better served by adopting the model in Chapter Three. In the current analysis, the Court has not been able to develop a discourse that views reservations as making a positive contribution to society and instead views it as something society must guard against. Once the Court committed itself to the position that reservations are a facet of equality, the foundational idea informing structuring reservations should be the achievement of equality of

opportunity and the limitation to reservations should be based within that discourse and not the need to limit reservation because society pays a price. The framework developed in Chapter Three demonstrates how reservations can be limited across spheres of reservation and different beneficiaries by using the language of equality of opportunity in favour of the backward classes. The Court in *Indra Sawhney* should have held that the 50 per cent rule would no longer apply. The limitation should have been based on a system that required the State to discharge a higher or lower burden based on the stage at which reservations were being provided and the group it was being provided for. Therefore, undoubtedly the State would have a higher burden while providing reservations in promotions as compared to initial appointments. It would, however, remain open to the State to provide reservations in promotions as well but the reason for the higher burden would not be that society is paying a price in terms of efficiency of services but that equality of opportunity has been achieved to a fair extent for someone who is eligible for promotions in public employment. However, if the State were to present evidence that demonstrated the need for reservations in higher posts, it would only be in society's interest to provide those reservations.

In Parts IV and V, I examine the Court's understanding of 'backwardness' and its discourse surrounding merit and efficiency in detail. In both these aspects, the Court has tended to adopt a homogenous approach. The Court has not factored in the complexities informing the 'backward classes of citizens' and neither has it examined the differing role of merit/efficiency across different stages of public employment and higher education.

Part IV: The Supreme Court on Identifying Backward Classes

This section looks at the Supreme Court's discourse on understanding 'backwardness' and its views on identification of backward classes. The Court has had a strong tendency to attribute homogeneity to backward classes and its only contribution to engaging with the heterogeneity that exists among the backward classes has been to make it permissible to create the category of 'most backward classes' within the backward classes. I will be using the term 'Other Backward Classes (OBCs)' hereinafter to denote all those backward classes under Article 16(4) (other than Scheduled Castes/Scheduled Tribes) and the 'socially and educationally backward classes' under Article 15 (4). While Article 15(4) uses the terms 'socially and educationally backward classes' and Scheduled Castes/Scheduled Tribes separately, Article 16(4) only uses the term 'backward classes of citizens'. However, this difference in terminology has not led the State to identify 'backward classes' any differently for those two provisions and hence the use of the term OBCs to denote backward classes in both Articles 15(4) and 16(4).

Specifically, this Part analyses the evolution of the use of caste as a criterion to understand backwardness and its relation to understanding 'class' within the Constitution. This part will argue that the Supreme Court has not attempted to analyse the OBCs as a group from an internal perspective. In understanding the nature of the OBCs, the Court has attributed 'backwardness' that is similar in nature and intensity to all groups within that category. A

concrete example that I analyse in this part is the claim of Muslim and Christian Dalits for Scheduled Caste status.

This section also analyses the latest case law from the Supreme Court about the procedure that the State is expected to adopt before providing reservations in public employment. It essentially relates to the units that the State must utilize while establishing 'backwardness' and 'adequacy of representation'. I argue that the Court has adopted a very narrow metric and is an aspect on which the Court should show more deference to State. The Court seems to be advocating a far too rigid approach to deal with a complex social problem with myriad implications.

While Part III demonstrated that the Court has not accurately identified the consequences of viewing reservations as a facet of equality, this Part argues that the Court has, by treating OBCs as one homogenous group, failed to differentiate the different kinds of disadvantage that informs the constitutional category of 'backward classes'. The chapter also argues that the Court's most recent discourse on the data required while designing reservations has only further narrowed its understanding of backwardness. Part V will argue that the lack of nuance displayed in understanding 'backwardness', is also seen in the Court's understanding of merit in higher education and efficiency in public employment.

IV-A: The Role of Caste in Identifying Backward Classes: The Judicial Discourse before *Indra Sawhney*

As we have seen, the First Amendment to the Indian Constitution inserted Article 15(4) in 1951, which explicitly provided that the State has the power to make 'any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'. The first case that the Supreme Court decided on the role of caste in identifying OBCs after Article 15(4) was inserted[336] was *M.R. Balaji v State of Mysore*[337]. In 1961 Mysore (one of the states in India and subsequently renamed as Karnataka in 1973) issued a notification that identified the backward classes and stated that the committee (the Nagan Gowda Committee) formed to identify the OBCs had 'come to the conclusion that ….the only practicable method of classifying backward classes in the State (was) on the basis of caste and communities'. In 1968, Mysore issued another order that reserved 68 per cent of the seats in engineering and medical colleges for OBCs and SC/STs. That order also sub-classified the OBCs into Backward Classes and More Backward Classes. Justice Gajendragadkar, writing a unanimous opinion for a five-judge bench, came to the conclusion that OBCs could not be identified solely on the basis of caste, as was the case with the orders from Mysore.[338] Clarifying the scope of Article 15(4), the Supreme Court said the concept of backwardness contained in the provision was not meant to be relative, i.e. the aim was not to identify classes that were backward only in comparison to the most advanced classes. Acknowledging the sociology and history of caste in

[336] It was the Supreme Court's decision in *State of Madras v Champakam Dorairajan* in 1951 (AIR 1951 SC 226) that prompted Parliament to amend the Constitution and insert Article 15(4).

[337] AIR 1963 SC 649

[338] ibid para 37.

India, the Court was of the view that while caste cannot be the sole or dominant criterion, it may be relevant to consider caste as one of the factors.[339]It said that if caste were to be made the sole criterion, it would render identification of backward classes impossible for other groups in India like the Muslims, Christians, Jains etc that do not recognise caste.[340]

The unanimous judgment also declared the sub-classification of OBCs into Backward Classes and More Backward Classes to be unconstitutional and held that:

> Article 15(4) authorises special provisions being made for the really backward classes. In introducing two categories of Backward Classes, what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced, compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of Backward and More Backward. The classification of the two categories, therefore, is not warranted by Article 15(4).

The period after *Balaji*, until the decision in *Indra Sawhney*, saw many conflicting decisions being handed down by the Supreme Court on caste as a criterion in identifying OBCs. Despite the ruling in *Balaji* that caste could be considered as one of the factors but not the sole or dominant factor, decisions post-*Balaji* ranged from prohibiting the use of caste whatsoever to viewing caste as 'class' and thereby permitting it as a sole criterion.

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[339]ibid para 23-24.

[340]ibid para 25.

After *Balaji*, the Supreme Court in *Chitralekha v State of Mysore*[341] had to decide whether determining backwardness without any reference to caste whatsoever would fall foul of Article 15(4). Without using caste, Mysore had identified OBCs only on the basis of occupation and income while reserving 30 per cent for them in professional educational institutions. Writing for the majority, Justice Subba Rao held that there was nothing in the Constitution that obligated the State to consider caste as a criterion and that the word 'classes' in Article 15(4) was not synonymous with castes.[342] He also reasserted the holding in *Balaji* that caste could not be the sole or dominant criterion in determining the backward classes.[343] However, five judges in *Rajendran v State of Madras*[344]had to decide the constitutionality of a rule governing admissions to medical courses that listed various castes as comprising the OBC category. The unanimous opinion by Justice Wanchoo, on behalf of a five-judge bench, marked a significant departure from the ruling of the Court in *Balaji* and *Chitralekha*. Justice Wanchoo's judgment held that

> If the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(1)……it is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes

[341]AIR 1964 SC 1823.

[342]ibid para 28.

[343]ibid.

[344]AIR 1968 SC 1012.

> are also not a class of socially and educationally backward citizens.....In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violate of Article 15.

It was for the first time that the Supreme Court had upheld the constitutionality of entire castes being declared socially and educationally backward. As a consequence, the judgment in *Rajendran* had set itself up against the position taken by the Court in *Balaji* and *Chitralekha*. This move of the Court created significant confusion in the judicial response to the question whether castes as a whole could be declared to be 'socially and educationally backward'. The Courts were also suddenly faced with the issue of reconciling the decisions in *Balaji* and *Chitralekha* with the one in *Rajendran*.

While declaring a castewise listing of OBCs to be unconstitutional, Justice J.C. Shah's judgment on behalf of a three-judge bench in *State of Andhra Pradesh v P.Sagar*[345] declared that the judgment in *Rajendran* was consistent with the position of the Court in *Chitralekha*, which it clearly was not. The confusion could be seen once again in *Triloki Nath v State of Jammu and Kashmir*[346]. In one part of the judgment, the Court quoted *Chitralekha* with approval to express the view that 'backward classes' in Article 16(4) were not the same as 'backward castes' but then immediately quoted *Rajendran* to indicate that it would be possible to declare entire castes as backward. Reflecting on this state of confusion in the Supreme Court, one commentator wrote:

[345]AIR 1968 SC 1379.

[346]AIR 1969 SC 1.

> This bewildering variety of judicial views on the role of caste in the classification of backward citizens may puzzle and perplex the policy-makers and the High Courts. Should the policy-makers treat caste and classes as synonymous and classify castes as a whole as backward, or seek the inclusion of such castes by Parliament in the list of Scheduled Castes? For the High Courts, which is the law declared by the Supreme Court – *Rajendran* or *Chitralekha*?[347]

The Court then went on to strongly affirm the identification of OBCs on the basis of caste in *Periakaruppan v State of Tamil Nadu*[348] and *State of Andhra Pradesh v Balaram*[349]. With the decisions in *Rajendran, Periakaruppan and Balaram*, the Supreme Court had effectively negated the ruling in *Balaji* and *Chitralekha*. However, this trend was reversed starting with *Janki Prasad v State of Jammu and Kashmir*[350]. The Supreme Court said that the State had not discharged its burden in showing that all the castes included in the OBC list were in fact entirely socially and educationally backward. In doing so, the five-judge bench of the Supreme Court made no reference to the decisions in *Rajendran, Periakaruppan* and *Balaram*. The decision in *Janki Prasad* once again started to challenge the view that entire castes could be declared socially and educationally backward. The Court was also of the view that the groups identified as OBCs must be comparable to the SC/STS in their backwardness. The Supreme Court then swung to the other extreme in *State of Uttar Pradesh v Pradip Tandon*[351]. A three-judge bench of the Court ruled that caste could not be considered asa criterion

[347]Mohammad Ghouse, 'Judicial Control of Protective Discrimination' (1969) 11 Journal of the Indian Law Institute 371, 378.

[348]AIR 1971 SC 2303.

[349]AIR 1972 SC 1375.

[350]AIR 1973 SC 930.

[351]AIR 1975 SC 563.

whatsoever in determining 'social and educational backward classes'. Chief Justice A.N Ray stated that

> Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1).

The view expressed in *Pradip Tandon* went against both lines of cases. Neither the reasoning adopted in *Balaji–Chitralekha* nor the *Rajendran-Periakaruppan-Balaram* line of cases held that caste was completely irrelevant in determining backwardness.Karnataka finally requested the Supreme Court in the early 1980s to issue clear guidelines in the identification of OBCs in a matter that had been pending for long. A five-judge bench of the Court heard the matter in *K.C. Vasanth Kumar v State of Karnataka*[352]. Each of the judges wrote a separate opinion and it was evident that the Supreme Court was far from reaching a clear position on the issue. Chief Justice Y.V. Chandrachud stated that identification of OBCs for both education and public employment must include a means (economic) test and that the groups must be comparable to the SC/STs in their backwardness.[353] Justice D.A. Desai stated that only economic criteria that must be adopted in light of the secular values the Constitution seeks to propagate. He argued that adopting the economic criteria would go to the very heart of caste discrimination and would also contribute towards alleviating poverty.[354] Justice Chinnappa Reddy

[352]AIR 1985 SC 1495.

[353]ibid para 2.

[354]ibid para 30.

advocated adopting a 'group poverty' approach rather than an 'individual poverty' framework. He felt that if this 'group poverty' were reflected as an identifiable group phenomenon in castes, sub-regional groups, occupational groups etc., it would not be unconstitutional to list them as such. [355] Justice A.N. Sen held in no uncertain terms that poverty should be the sole criterion to determine the beneficiaries of reservations under Articles 15(4) and 16(4). He was of the view that caste should only play a role when the groups in question were comparable to SC/STs.[356] Justice E.S. Venkataramiah's focus was on the lowest castes that would form part of the OBCs. In his opinion it was imperative that the groups included in the OBC list be comparable to the SC/STs in their backwardness and he thought that the use of caste was permissible to that extent. He argued that if this were not done, more advanced groups would corner the majority of benefits with and the most deserving groups would be left with very little.

It is important to highlight the fact that only the decision in *Vasanth Kumar* came after *Thomas*. All the other cases were decided in the pre-*Thomas* era, where reservations were considered to be an exception to the guarantee of equality in the Constitution. The important point from the above analysis is not the confusion that the Supreme Court found itself in. The fundamental discomfort of the Court in viewing an entire caste as backward is based on the view that not all members of the group experience that backwardness. But what the Court failed to appreciate in that discussion is the fact that that concern does not apply equally across all caste groups. The Court's attempt to evolve a single standard of backwardness is

[355]ibid para 80.

[356]ibid para 84.

at the very heart of the confusion analysed above. Just as the 50 per cent rule analysed in Part III was a method the Court was exploring to limit the extent of reservations, identification of beneficiaries on the basis of backwardness also represents another step towards the same aim. The discussion in *Janki Prasad* and *Vasanth Kumar* on the need for comparability to SC/STs is indicative of the problem with the Supreme Court's approach. Undoubtedly, there are groups who are far closer to the SC/STs in their backwardness compared to other groups in the OBC category that while being backward are not in the same position of disadvantage. It is not to say that those at the top of the OBC category do not suffer from disadvantages, but that the difference in backwardness within the OBCs should have been the starting point of the Supreme Court's discussion. Acknowledging the possibility of different levels of backwardness within the OBC category would have prevented this search for a single standard that was capable of capturing the various facets of backwardness.

It is in the context of this confusion surrounding the use of caste as a criterion that the Supreme Court considered the issue in *Indra Sawhney v Union of India*[357]

IV-B: Caste and Backwardness in *Indra Sawhney*

All six opinions in *Indra Sawhney* responded to the question whether caste could be used in the identification of OBCs. Justice Jeevan Reddy's opinion put forth the

[357]AIR 1993 SC 477.

most obvious solution to the confusion that existed on the issue of the use of caste. He was of the view that the word 'class' was used in order to facilitate identification of backward classes beyond Hindus as well and in anticipation that backward classes would not be drawn only from Hindus. It is for that reason, he argued, that it 'cannot be concluded either that 'class' is antithetical to 'caste' or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens'[358]. Specifically addressing the issue of caste, Justice Reddy took the position that any given caste was 'a social class – a socially homogenous class'. And that it was 'also an occupational grouping, with (the) difference that its membership (was) hereditary'.[359] He then went on to hold the most quoted part of the judgment in *Indra Sawhney*. He ruled that the State could begin its attempt to identify backward classes with caste. Beginning with caste, he clarified, meant that the State had to evolve various criteria of backwardness which would then have to be applied to each caste. The castes that satisfied those criteria of backwardness could be declared as backward classes. Justice Reddy was also very clear about the fact that this exercise of applying the criteria of backwardness did not need to be restricted only to castes and it could be undertaken with other groups as well. In particular, he cited the possibility of the Muslim community as a whole being declared as a 'backward class', as was the case in Karnataka. Therefore, Justice Reddy came to the conclusion that 'once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State.

[358]ibid para 81.

[359]ibid para 82.

Justice Ratnavel Pandian's opinion also highlights the position that for a caste to be included in the OBC list, it will have to satisfy the tests of social, educational and economic backwardness. Viewing caste as a class of citizens, Justice Pandian concludes that once a 'caste satisfies the requisite tests of backwardness, then the classification of that caste as a backward class is not opposed to Article 16(4).'[360] However Justice Kuldip Singh in his dissenting opinion is of the view that the term 'class' in Article 16(4) can never be taken to mean caste. Justice Singh sought to rely on secularism as part of the basic structure to support his argument since he found caste to be anathema to 'Muslims, Christians, Sikhs, Jains, Arya Samajis, Lingayats and various other denominations'[361]. Justice R.M. Sahai in his opinion presents the view that occupation, and not caste, should be the starting point for determining backward classes.[362] However, he then goes on to hold that 'if in the ultimate analysis any Hindu caste is found to be occupationally, socially, educationally and economically backward it should be regarded a eligible for benefit under Article 16(4) because it would be within constitutional sanction'[363].

IV-B(i):Sub-Classification in *Indra Sawhney*

One of the issues before the Supreme Court in *Indra Sawhney* was whether it was legitimate to create another category within OBCs called the Most Backward Classes (MBCs). The opinions by Justices Jeevan Reddy and P.B Sawant explicitly

[360]ibid para 215-249.

[361]ibid para 495-497.

[362]ibid para 671.

[363]ibid.

addressed this issue and upheld the constitutionality of such a classification. The Supreme Court was faced with two contradictory approaches discernable from precedents. The five-judge bench in *Balaji* had unanimously held that such a classification would be impermissible under Article 15(4) whereas Justice Chinnappa Reddy in *Vasanth Kumar* had upheld the classification by arguing that in some cases it would be necessary to ensure that the MBCs can access the benefits of reservation. Justice Reddy in *Indra Sawhney* agreed with Justice Chinnappa Reddy and held that it was constitutionally permissible to classify the OBCs as backward and more backward. Justifying this position, Justice Reddy drew attention to the fact that the SC/STs were allowed to have separate reservations as part of Article 15(4). Also, in Article 16(4), despite there being no explicit separation of SC/STs and OBCs, it was never contested that the Constitution permitted providing SC/STs a separate quota. He reasoned that SC/STs were permitted a separate quota even under Article 16(4) because of the recognition that if they were clubbed together with the OBCs, it was highly likely that the OBCs would corner a disproportionate share of the vacancies.[364] Justice Reddy concluded that the same process of reasoning justified classifying the OBCs under Article 16(4) into backward and more backward. Justice Reddy, however, highlighted the fact that this was not mandatory and that the Court was merely ruling it to be constitutionally permissible. Justice Sawant also upheld the constitutionality of the sub-classification and clarified that it would be necessary only when there was a substantial difference between the two categories. However, Justice Reddy's opinion does offer a rather curious qualification while

[364]ibid para 92-92A.

upholding this measure. Justice Reddy is of the view that such classification would be permissible only if there was 'equitable apportionment' between the two categories. His opinion explicitly rules that it is not open to the State to provide the entire quota available for the OBCs only to the MBCs. It is indeed surprising that the Court completely missed the strong normative argument that could justify setting aside the entire quota for MBCs. By upholding the classification per se, the Court recognised the fact that there are some groups whose exclusion is qualitatively different from that of other groups in the OBC list. Then it would only be fair to consider the argument that it is the most disadvantaged amongst those identified for reservation that need it the most. The most disadvantaged have the least capacity to compete with the other groups in the OBC list and therefore the State would be justified in making its priority to empower the most disadvantaged. Given that there are only limited vacancies or seats, a meaningful understanding of substantive equality would mean that the State could legitimately seek to give preference to the MBCs. It might be quite a different issue if the State sought to completely exclude the non-MBCs within the OBC category. But a policy that gives preference to the MBCs to first access the entire OBC quota would be in tune with the requirements of substantive equality. By ruling that there necessarily has to be equitable division of the quota, the Court essentially ensured that the MBCs would compete with the remaining OBCs on unfair terms.

IV-C: Dalit Muslims and Dalit Christians as OBCs and their Demand for Scheduled Caste Status

The concern with the Supreme Court's approach to understanding the nature of OBCs as a group is brought to the fore in the context of Dalit Muslims and Christians. The Supreme Court has not paid attention to the nature of backwardness that exists within the OBCs internally. It has proceeded on the assumption that once groups are properly identified as being 'backward classes', the nature of backwardness to be remedied is the same for all the groups. There is a limited acknowledgement of this concern in *Indra Sawhney* when the Court permits the creation of a Most Backward Classes (MBC) category. However, that categorisation still proceeds on the assumption that the nature of the backwardness that informs the group is the same and along a very limited axis. It is important to recognise the multiple forms and sources of backwardness that exist amongst the OBCs along lines of gender, religion, class and caste in order to tailor policies, reservations and otherwise, for their empowerment.

The inclusion of Dalit Muslims and Dalit Christians in the OBC list highlights the importance of this concern. Dalits convert to Christianity and Islam in an attempt to escape the caste discrimination they suffer as part of Hindu society. It is evident that conversion to Christianity and Islam has not helped Dalits escape the discrimination they suffer.[365] However, this social reality has not been reflected in the law. The Constitution (Scheduled Castes) Order, 1950 denies Scheduled Caste status to Dalits who have converted to Islam or Christianity.

[365] Prakash Louis, 'Dalit Christians: Betrayed by State and Church' (2007) XLII(16) Economic and Political Weekly 1404; Editorial, 'Dalit Christians: Victims of Injustice' (1995) XXX(48) Economic and Political Weekly 3041; Yoginder Sikand, 'A New Indian Muslim Agenda: The Dalit Muslims and the All-India Backward Muslim Morcha' (2001) 21(2) Journal of Muslim Minority Affairs 287; Rowena Robinson, 'Indian Muslims: The Varied Dimensions of Marginality' (2007) XLII(10) Economic and Political Weekly 839.

Paragraph 3 of the original 1950 Order provided that 'no person who professes a religion different from the Hindu religion shall be deemed to be a member of a Scheduled Caste'. However, after amendments in 1956 and 1990 Dalits amongst Sikhs and Buddhists were also recognised as Scheduled Castes. The exclusion of Dalit Christians was challenged in *Soosai v Union of India*[366] before a three-judge bench of the Supreme Court. In 1982 the State of Tamil Nadu surveyed the working conditions of cobblers who offered their services on the streets of Madras and ordered that free bunks be provided to many of them. In the order providing free bunks, it was specifically mentioned that Scheduled Castes who had converted to Christianity would not receive these bunks. The petitioner belonged to the Adi-Dravida caste (a Scheduled Caste in Tamil Nadu under the 1950 Presidential Order) but had converted to Christianity and challenged the order of the Tamil Nadu Government as violating the equality provision in Article 14 and the anti-discrimination provision in Article 15. Though precedents existed on both sides of the issue about retention of caste status upon conversion, the Supreme Court decided to proceed on the assumption that the individual retained caste status upon conversion. However, the Court was of the view that it was not whether the individual retained the caste status that was important. Instead, it was 'necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin - Hinduism – continue in their oppressive severity in the new environment of a different religious community'. The Court held that no authoritative evidence had been placed before it about the conditions of Christian society in India and had to

[366]AIR 1986 SC 733.

therefore reject the constitutional challenge to the 1950 Presidential Order. Similarly, in *Aqeela Khanam v City of Nagpur Municipal Corporation*, the Bombay High Court in 2004 set aside an order of the Maharashtra government that sought to provide reservations to Dalit Muslims under the Scheduled Caste quota while appointing school teachers. The Bombay High Court reaffirmed the position that there could be no Scheduled Castes amongst Muslims.[367]

The significance of the above discussion for our current purposes is not whether Dalit Muslims and Dalit Christians must be given Scheduled Caste status. Its significance here is to demonstrate the nature of discrimination experienced by groups in the OBCs at one end of the spectrum. The law treats them as OBCs and yet their discrimination, both its nature and intensity, is very different from the large majority of lower castes included in the OBC list. Undoubtedly, the backwardness of the other Hindu lower castes entitles them to reservation but to expect Dalit Muslims and Dalit Christians to compete with them does not take the project of substantive equality very far. The categorisation of 'backward class' and 'most backward class' is not suited to capturing the spectrum of backwardness that exists within the rather large category of OBCs. Considerations of untouchability, religion, caste, class and gender are relevant and interact in different ways to inform the backwardness of groups in the OBC category. There is recognition within the text of the Constitution itself that we are concerned with the pluralities of backwardness.[368] There is recognition of this within the Mandal

[367] *Aqeela Khanam v City of Nagpur Municipal Corporation* 2005 (2) BomCR 169, para 8.

[368] Article 15 of the Constitution explicitly recognises the difference between SC/STs and 'socially and educationally backward classes'. The use of the phrase 'backward classes' (in the plural) in Articles 15 and 16, indicates constitutional recognition for position that it need not be one

Commission Report as well. L.R. Naik, one of the members of the Mandal Commission, authored the only dissenting opinion in the Commission's Report. And his dissent was based on his disagreement concerning the homogeneity of backwardness that was being ascribed to the groups included in the list of backward classes. Given the significance of his views in this context, an extract from his dissenting note in the Mandal Commission Report is provided below:

> I held very sincerely that castes/classes mentioned in the common list, each having homogeneous and cohesive characteristics, are not at the same degree or level of social and educational backwardness and I fear that the safeguards recommended for their advancement will not percolate to more unfortunate sections among them and the constitutional objectives proclaiming an establishment of an egalitarian society will remain a myth. Some of the communities in the common list who would be called hereinafter as 'Intermediate Backward Classes' on the lines delineated in the report of the Tata Institute of Social Sciences have made their presence felt in the caste hierarchical society in India, either on their numerical strength or their age-old co-existence along with other advanced communities in the villages and towns. Given better opportunities and encouragement in future, I have, no doubt, in my mind that they would integrate with the general populace sooner than later. But there are a number of castes and classes in the common list who are incapable of making such a dent, in the near future, being extremely backward, both socially and educationally and economically. Their economical backwardness is evidently the consequence of their age-old social and educational backwardness. By way of clarity they would be hereinafter, called 'Depressed Backward Classes' as distinct from the intermediate Backward Classes'. I am of the opinion that these unfortunate classes of people, i.e., 'Depressed Backward Classes' steeped as they are in massive backwardness would take time for their enlistment and advancement, unless, of course, concerted efforts, at national levels, are made by way of sagacious inputs of safeguards the benefits of which should be percolated to them in a large measure. So there is a compelling need to shift them carefully from the main common list and create a separate entity of equals or near-equals to bring about a healthy competition among them for the benefits of safeguards. The rest of the communities in the common list should then form a distinct category for the same reason of creating an atmosphere for

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homogenous class in terms of backwardness. By constituting a legal category called the 'backward classes' by including in it different groups, it cannot be taken to mean that the groups then suffer from similar levels of backwardness.

> competition among equals for the safeguards. This device is necessary in the interest of the nation as a whole.[369]

L.R Naik's dissent in the Mandal Commission Report serves to demonstrate the Supreme Court's inadequate response to the normative challenge of identifying backwardness and concerns of distribution of benefits within the beneficiary group, the OBCs. While the Court made significant progress through its decision in *Indra Sawhney*, it did not engage sufficiently with the dynamics of backwardness that exist within the OBC group. The strong tendency of the Court to view the OBCs as one large category where the nature of backwardness is similar (though its intensity might differ) without acknowledging the multiple factors of backwardness has limited the project of achieving substantive equality for the backward classes. The constitutional logic applied to the very creation of the backward classes and provision of special measures has not been applied with special rigour within the group itself. The constitutional logic that groups cannot benefit from opportunities if they are not similarly situated needs to be applied within the OBCs so that the most disadvantaged amongst them have a fair chance. Even within a category such as the Scheduled Castes, where the degree of homogeneity ascribed is far greater, there exist significant differences within the group that affect the distribution of benefits. The internal difference amongst beneficiary groups goes to the very core of the reason behind providing reservations. It goes to the very core because the question about who should access reservations is a critical one. Given that the pie is limited and many would argue that it is an ever-shrinking pie, it is important that we develop a normative

[369]L R Naik (Dissenting Note),Report of the Second Backward Classes Commission (1980) vols III-VII.

basis for distribution of benefits within the group. It serves no purpose to assume that beneficiary groups are homogenous internally because the same criteria have been applied in identifying them. This challenge posed by sub-classification in terms of identification of beneficiaries is explored in Chapter V in the context of Scheduled Castes and the claim for separate reservations for Muslims amongst the OBCs.

Part V: The Supreme Court's Discourse on Merit and Efficiency: Tensions with the 'Reservations are a Facet of Equality' Paradigm

In the context of merit in higher education and efficiency in public employment, this part of the chapter traces the tensions that arise from the Supreme Court's position that reservations are a facet of equality. I will argue that the Court has not been able to sufficiently reconcile its position on the relationship between reservations and equality with its discourse on merit and efficiency. In this Part I analyse some of the toughest issues that have come before the Court, which gave it the opportunity to clarify its attitude towards merit and efficiency. Initially this Part looks at the Supreme Court's discourse on merit and efficiency during the phase in which reservations were viewed as an exception to equality. In the post-*Indra Sawhney* phase of the Court's jurisprudence, I have chosen to examine reservations in admissions to postgraduate courses and reservations in the context of promotions to reflect on the Court's discourse on merit and efficiency. Being situated at the very top of the education and employment pyramid, these areas present significant challenges for testing the rationale of reservations and the ideas that are really driving it. Close to being the most difficult cases where an

argument for reservations or special measures could be mounted, it serves as a useful testing ground about the consistency of any normative position. My agreement with the Supreme Court in this context is limited to the extent that the operation of reservations and other special measures in these particular areas should be more limited than their operation in other aspects of higher education and public employment. However, I disagree with the path adopted by the Supreme Court to reach that conclusion. The Court's strategy, as reflected in the arguments advanced by it to limit reservations in these specific areas of higher education and public employment, is drawn from the 'reservations are an exception to equality' discourse. This strategy of the Court continues in the post-*Indra Sawhney* era where the Court is very often seen as having buried the ghost of treating reservations as an exception to equality.

In the context of promotions in public employment and admissions to courses near the top of the higher education pyramid, the Court's scepticism about reservations is apparent, treating them as being antithetical to society's larger interests and the project of nation building. It must, however, be acknowledged that the Court has been forced to play this role because governments have repeatedly used reservations without much thought. However, that cannot be a satisfactory explanation for the manner in which the Court has sought to limit reservations and the arguments it has adopted in doing so. I do believe that the framework developed in Chapter III is far more suitable to developing arguments for the progressive limiting of reservations as we move up the ladder in higher education and public employment. The framework in Chapter

III is developed within the paradigm of equality of opportunity rather than making the argument that reservations impede the progress of society.

V-A: Discourse on Merit and Efficiency before *Indra Sawhney*

As discussed in the earlier sections of this chapter, the phase before *Indra Sawhney* was one where the Court viewed reservations as an exception to equality. During this phase, the Supreme Court was very clear that reservations in higher education were being provided at a significant cost to societal and national interests. While adjudicating the constitutional validity of 68 percent reservations in engineering and medical colleges in *M.R. Balaji v Union of India*[370], five judges of the Supreme Court in 1962 unanimously held that:

> … In considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats in all Technical, Medical or Engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be a special provision which excludes the rest of the society altogether.[371]

Given that the case was decided in 1962, the Court was clearly uncomfortable with the impact of reservations on the project of building a young nation. The best thing for the country to have would be 'meritorious' technicians,

[370]AIR 1963 SC 649.

[371]ibid para 34.

scientists, doctors etc. It is important to note the terms on which national interest is being defined. It is tied in with a very narrow understanding of merit that has been critiqued in Chapter I.

In the context of reservations in public employment, the Supreme Court engaged with concerns of efficiency quite early on. The main provision of Article 335 of the Constitution states that:

> **Claims of Scheduled Castes and Scheduled Tribes to services and posts** - The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State

Article 335 has been at the heart of the Supreme Court's strategy to limit reservations in employment. However, it is clear from the discussion in Chapter II that the evolution of this provision is a complex one. It was initially meant to acknowledge the claim of SC/STs and other minorities to their share in public employment and then due to the turn of events outlined in Chapter II, the claim of the minorities in public employment was dropped. This provision was initially inserted in the context where the decision was taken not to provide reservations in public employment. In that sense the claims of the groups mentioned in Article 335 were at the heart of the provision. The Supreme Court in its discourse has made efficiency the primary concern of Article 335. Of course, this is not to argue that the Supreme Court is bound to see it as the constitutional drafters did but only to suggest that there is an alternative view to the Supreme Court's use of Article 335 outlined below. Another interpretational anomaly with an approach that takes efficiency to be the centrepiece of Article 335 needs to be pointed out.

As is evident, Article 335 talks only of Scheduled Castes and Scheduled Tribes and of efficiency in that context. However, Article 16(4) permits reservations in public employment to 'backward classes' as a whole. Undoubtedly, 'backward classes' is a term that includes SC/STs but is surely not limited to them and includes OBCs as well. Since Article 335 refers only to SC/STs and refers to efficiency in that context, should it to be taken to mean that efficiency is a concern only for reservations concerning SC/STs and not OBCs? That is obviously an unsustainable position and the Court has glossed over this by applying concerns of efficiency to the whole of Article 16(4). This problem arises only if efficiency is viewed as the main purpose of Article 335. The main purpose of Article 335 is to highlight the claims of SC/STs. It is an instance of prioritising the claims of SC/STs over those of all other groups, including minorities and OBCs. The role of efficiency in Article 335 is secondary and should not be seen as its main purpose.

However, the Supreme Court's view of Article 335 is quite different. It has used the reference to efficiency in Article 335 from very early on to establish the framework within which it would develop limitations on reservations in public employment. In *General Manager, Southern Railway v Rangachari*[372], while the Supreme Court did uphold the constitutionality of reservations in promotions for SC/STs under Article 16(4), it is instructive to examine the Court's view on efficiency in 1961:

> It is true that in providing for the reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be

[372]AIR 1962 SC 36.

> forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts.[373]

This view expressed by Justice Gajendragadkar in *Rangachari* is critical because it has positioned Article 335 as a check on the State's power under Article 16(4). The discourse of the Court is set up such that reservations and efficiency are seen as fundamentally opposed to each other. The Court does permit reservations, even in promotions as seen in *Rangachari*, but it is the normative move by the Court that is of significance here. And the impact of such a normative move was immediately seen in Justice Wanchoo's dissent in *Rangachari*. While four of the judges did not see reservations in promotions for SC/STs as unconstitutional, Justice Wanchoo held that Article 335

> lays down that the claims of the scheduled castes and the scheduled tribes (which are part of backward classes of citizens) shall be considered consistently with the maintenance of efficiency of administration. It seems to me that reservation of posts in various grades in the same service is bound to result, for obvious reasons, in deterioration in the efficiency of administration; and reading Article 335 along with Article 16(4) which to my mind is permissible on the principle of harmonious construction (.....), it could not be the intention of the Constitution-makers that reservation in Article 16(4), for at any rate a part of those comprised therein, should result in the impairment of the efficiency of administration.[374]

Though Justice Wanchoo thought that reservation in promotions would result in deterioration of efficiency for 'obvious reasons', it is far from clear what

[373]ibid para 29.

[374]ibid para 38.

those obvious reasons are. There is no discussion around the meaning of efficiency in the context of public employment that precedes attributing this limiting role to Article 335. There is certainly no exploration about whether efficiency has the same meaning or the same relevance across all services in public employment and without such a discussion, efficiency and Article 335 become an anchor-less limitation on the State's power to provide special measures in public employment under Article 16.

V-B: No Normative Coherence Forthcoming in *Indra Sawhney*

In *Indra Sawhney*, the issue on which the nine-judge bench of the Supreme Court provided the greatest clarity was on the use of 'caste' as a criterion in identifying backwardness. However, the judgment is just as famous for holding that reservations are a facet of equality and that reservations are not anti-merit. Nevertheless, the details of the Court's argument in that regard are not entirely convincing. Grappling with a very difficult issue, the Court started its judgment on this issue by saying that it did not find it necessary to give a decision on the correctness of the opposing viewpoints argued before it on the relationship between merit, efficiency and reservations. Having said that, the Court went on to explore the relationship between merit and efficiency in the context of public employment. Justice Jeevan Reddy's opinion for the majority made a promising start on this issue by stating that it would be a mistake to understand the mandate of Article 335 to be maintenance of efficiency rather than the claims of the SC/STs. However, the remaining parts of Justice Reddy's opinion on this issue slips back into the Court's earlier discourse as discussed in V-A.

Justice Reddy's is of the view that

> ...the relevance and significance of merit at the initial stage of recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed…… While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations it may not be advisable to provide for reservations. For example, technical posts in research and

> development organisations/departments/institutions, in specialties and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable…….. We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence, some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.

One aspect that immediately stands out about the majority's opinion is that the conservative notion of merit is retained. The Court sees selection of individuals through reservations as essentially selecting less meritorious persons and sees it as a 'cost' that has to be paid for social justice. And it is this cost that becomes the justification for creating limitations on reservations. As I stated earlier, I do agree with the Court that reservations must be limited in some manner. But the method of the Court to limit reservations becomes apparent when it addresses the issue of reservations in technical posts and specialties/super-specialties. It invokes the efficiency argument in full force to prohibit reservations in these areas. Arguments of efficiency to limit reservations do not fit in with the rationale that reservations are a facet of equality. By viewing reservations as a facet of equality, the Supreme Court has committed to the position that reservations are a legitimate tool to ensure that all individuals have the equality of opportunity. The limitation for reservations, building on the framework outlined in Chapter III, should be based on the level of equality of opportunity that has been achieved. The language of justifying limitations cannot

be in terms of unacceptable costs to society, it must be in terms of reservations having achieved some of the aims it set out to achieve.

V-C: Efficiency and Merit in the Post-*Indra Sawhney* Phase

The reliance on efficiency to limit the State's power to provide reservations in promotions resulted in a constitutional tussle between Parliament and the Supreme Court. Following the ruling in *Indra Sawhney* that reservations were not permitted in promotions, Parliament introduced Article 16(4A) through the 77thConstitution Amendment Act, 1995, which explicitly permitted the State to provide reservations in promotions. In 1996 the Supreme Court in *Ajit Singh Januja v State of Punjab*[375]*(Ajit Singh I)* limited the application of this provision by holding that reservations in promotions would not entitle beneficiaries to 'consequential seniority'.[376] Parliament responded by amending Article 16(4A) through the 85th Constitutional Amendment Act, 2001[377] that explicitly provided for 'consequential seniority' as an outcome of reservations in promotions. In *Ajit Singh (II) v State of Punjab*[378], the Supreme Court was called upon to clarify the

[375]AIR 1996 SC 1189.

[376]Consequential Seniority -- Let us assume that A, belonging to the General Category, currently holds a job in Level 3 of a government service and B, appointed under the Scheduled Caste quota, is junior to A in Level 3. When promotions to Level 4 are to be decided, let us assume further, that due to reservations in promotions B has to be promoted to Level 4 before A because there are no Scheduled Caste candidates at a seniority similar to that of A. The question that then arose was whether A would regain seniority over B when she is promoted to Level 4 in due course. 'Consequential Seniority' means that A will not regain her seniority and B will now be considered senior to A within Level 4.

[377] Article 16 (4A) of the Constitution of India, 1950: 'Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented'.

[378]AIR 1999 SC 3471.

point from which seniority would operate for reserved category employees under Article 16(4A). While the details of the Government Orders in *Ajit Singh (II)* are not relevant for the discussion, it is revealing to see the terms on which a five-judge bench of the Supreme Court tested the validity of the Government Orders. Articulating the role it envisaged for Article 335, the Supreme Court held:

> It is necessary to see that the rule of adequate representation in Article 16(4) for the Backward Classes and the rule of adequate representation in promotion for Scheduled Castes and Scheduled Tribes under Article 16(4-A) do not adversely affect the efficiency in administration. In fact, Article 335 takes care to make this an express constitutional limitation upon the discretion vested in the State while making provision for adequate representation for the Scheduled Castes/Tribes. Thus, in the matter of due representation in service for Backward Classes and Scheduled Castes and Scheduled Tribes, maintenance of efficiency of administration is of paramount importance.[379]

The shift in the role for Article 335 is very clear. Concerns of efficiency in Article 335 was now an '*express constitutional limitation*' and no longer one of factors that had to be considerations while balancing reservations with the larger interests of society. The requirement of efficiency was equated to the actual constitutional limitations of backwardness and 'adequacy of representation', which were to found in Article 16(4) itself. Article 335 appears in a completely different part of the Constitution than Article 16(4) - Part XVI of the Constitution, whose title is 'Special Provisions Relating to Certain Classes'. Another five-judge bench of the Supreme Court in *M. Nagaraj v Union of India*[380] further confirmed this role for Article 335 while examining the constitutional validity of the constitutional amendments referred to above. While the Court upheld the validity of those

[379]ibidpara 39.

[380]AIR 2007 SC 71.

amendments that authorised the State to provide reservations in promotion and 'consequential seniority', the State would be required to satisfy certain conditions during every instance of exercising power under Article 16 (4A). In each instance, the Court said, the State would 'have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.'[381] Through the decision in *Nagaraj*, the Supreme Court has elevated the concerns of efficiency in Article 335 as a limitation even to the constituent power of Parliament. The constituent power of Parliament was exercised through the introduction and amendment of Article 16(4A) and while it would be entirely legitimate to limit that power within the terms of Article 16 generally, invocation of efficiency is a rather forced limitation on the State's power. It is not important in this context to discuss the merits/demerits of 'consequential seniority'. I agree with the Supreme Court that the State's power will be restricted far more while providing reservations in promotions rather than reservations in initial appointments.

The concern with the Court's discourse on efficiency is the increasing constitutional role it has come to play. Emerging as a factor to be considered while balancing society's interests against those of beneficiary groups, efficiency became

[381]ibid para 77; It must be pointed out here that *Nagaraj* is an extremely problematic decision on the question of identification of backwardness. Though Article 16(4A) is applicable only for SC/STs, the judgment suggests in various places that in every instance that the State exercises its power under the provision it will have to establish backwardness. This clearly cannot be the case for SC/STs because it is a settled position that there can be no creamy layer amongst the SC/STs. Therefore, this requirement of repeatedly establishing the backwardness of the beneficiaries is seen as an attempt by the Court to bring in the creamy layer requirement through the back door.

an explicit constitutional limitation on the executive power of the State and then finally even as a limitation on the constituent power of Parliament. Efficiency based arguments must be viewed with scepticism because they could make it very difficult for the State to provide reservations at all stages of public employment. As will be argued later in this chapter, efficiency as a consideration provides the Courts with a tool to restrict reservations at all stages. While there certainly has been no evidence of the negative impact on efficiency due to reservations, the Court has played it out as a purely normative position. Justice Wanchoo's statement way back in 1961 in his dissent in *Rangachari* captures the problem. He said *'that reservation of posts in various grades in the same service is bound to result, for obvious reasons, in deterioration in the efficiency of administration.'* As I said earlier in Section V-A, there is nothing obvious about it. Efficiency opens up a framework that provides very high levels of discretion to judges on issues of reservation in public employment without any real empirical basis. It essentially brings it down to the mainstream rhetoric on reservations, not based on any rigorous normative or empirical foundations. The Court has stated it as though it is a self-evident truth without articulating the precise meaning of efficiency in this context or providing any evidence of inefficiency resulting from reservations. Prabhat Patnaik is of the view that supporters of reservations almost always invoke only 'social justice' to justify reservation and concede the efficiency argument to their opponents. By never addressing the efficiency argument, proponents of reservations seem to have no argument against it,relying instead on the argument that 'social justice' can trump efficiency. However, Patnaik argues that reservations contribute to efficiency and should not be seen as imposing a negative cost. The efficiency argument essentially states that the quality of

services is lowered in terms of its money-equivalent by providing reservations. Patnaik argues that this 'efficiency loss' would be undesirable only if it did not make any section of society better off and that is not the case with reservations. He argues that in a situation where there is efficiency loss coupled with some becoming better off and some worse off, a 'specific distributive judgment' is required. If 'a loss of efficiency is associated with a distribution of output that is considered socially 'better', then this so-called 'less efficient' state is socially preferable to the more efficient one'. Patnaik's effort is to establish the argument that efficiency is not always socially preferable. Therefore a loss in efficiency due to reservations certainly does not mean that it is a loss to social welfare and reservations in fact contributes to social welfare by ensuring a larger degree of distributive justice.[382]

V-D: Supreme Court on Merit in Higher Education

Just as with promotions in public employment, in the case of reservations in higher education I consider it to be a case where I agree with the Court's call for more restrictions on the State's power to provide reservation. I will be looking at a case that deals with the State's power to provide reservations at the very top of the higher education pyramid. In *Dr. Preeti Srivastava v State of Madhya Pradesh*[383], the Supreme Court had to decide the constitutionality of providing lesser qualification marks for reserved category students in the entrance

[382]Prabhat Patnaik, 'Affirmative Action and the Efficiency Argument' in Zoya Hasan and Martha Nussbaum (eds), *Equalizing Access: Affirmative Action in Higher Education in India, US and South Africa* (Oxford University Press 2012) 89-99.
[383]AIR 1999 SC 2894.

examinations that determined entry to postgraduate and super-specialised courses in medical colleges. The Court held that the difference in qualifying marks could not be more than the difference that was provided in the undergraduate medical courses and invoked, in very strong terms, arguments about the need to protect the national interest. Given the strong terms in which this justification was used, I am taking the liberty of providing a substantial portion of the Court's reasoning verbatim:

> At the level of higher postgraduate university education, however, apart from the individual self-interest of the candidate, or the national interest in promoting equality, a more important national interest comes into play. The facilities for training or education at this level, by their very nature, are not available in abundance. It is essential in the national interest that these special facilities are made available to persons of high calibre possessing the highest degree of merit so that the nation can shape their exceptional talent that is capable of contributing to the progress of human knowledge, creation and utilisation of new medical, technical or other techniques, extending the frontiers of knowledge through research work- in fact everything that gives to a nation excellence and ability to compete internationally in professional, technical and research fields…….. This Court has repeatedly said that at the level of super-specialisation there cannot be any reservation because any dilution of merit at this level would adversely affect the national goal of having the best possible people at the highest levels of professional and educational training. At the level of a super-specialty, something more than a mere professional competence as a doctor is required. A super-specialist acquires expert knowledge in his specialty and is expected to possess exceptional competence and skill in his chosen field, where he may even make an original contribution in the form of new innovative techniques or new knowledge to fight diseases. It is in the public interest that we promote these skills. Such high degrees of skill and expert knowledge in highly specialised areas, however, cannot be acquired by anyone or everyone…… At the next below stage of postgraduate education in medical specialties, similar considerations also prevail though perhaps to a slightly lesser extent than in the super-specialties. But the element of public interest in having the most meritorious students at this level of education is present even at the stage of postgraduate teaching. Those who have specialised medical knowledge in their chosen branch are able to treat better and more effectively patients who are sent to them for expert diagnosis and treatment in their specialised field. For a student who enrolls for

> such specialty courses, an ability to assimilate and acquire special knowledge is required. Not everyone has this ability. Of course intelligence and abilities do not know any frontiers of caste or class or race or sex. They can be found anywhere, but not in everyone. Therefore, selection of the right calibre of students is essential in the public interest at the level of specialised postgraduate education. In view of this supervening public interest which has to be balanced against the social equity of providing some opportunities to the backward who are not able to qualify on the basis of marks obtained by them for postgraduate learning, it is for an expert body such as the Medical Council of India, to lay down the extent of reservations, if any, and the lowering of qualifying marks, if any, consistent with the broader public interest in having the most competent people for specialised training, and the competing public interest in securing social justice and equality.[384]

Once again, I agree with the Court that the State's power in the specific category of 'higher postgraduate courses' should be far more limited that its power to provide reservations in undergraduate courses. However, the Court's strategy to reach that conclusion is flawed and does not fit the 'reservations are a facet of equality' principle. Similar to the Court's approach to reservations in public employment, the Court has an uncritical approach to merit, which forms the basis of its entire analysis. The priority the Court seems to be attaching to 'higher postgraduate courses' in terms of its connection to national interests is intriguing. The Court does not explain the reasons for such a priority and the reasons for not attaching the same level of priority to other levels of higher education. Given that very few individuals access what the Court terms 'higher postgraduate courses', it is not clear why the very same concerns of national interest cannot be applied to other stages of higher education where there are many more members of the future citizenry involved. Admittedly the Court is currently concerned with postgraduate and super-specialty courses in medical colleges but the Court's

[384]ibid para 22-24.

reasoning reveals what it thinks the ideal default position should be. The burden on the State to justify special measures at the top end of higher education pyramid should certainly be higher than the burden to justify measures towards the bottom of the pyramid. The exact problem with adopting a 'national interest' framework while limiting reservations is that it then leaves it open to challenge reservations at all levels of higher education on that basis.

And we see a precise example of that in Justice Dalveer Bhandari's opinion in *Ashoka Kumar Thakur v Union of India*[385]. In *Thakur*, a five-judge bench of the Supreme Court decided the constitutionality of the 93rd Constitution Amendment Act, 2005 which inserted Article 15(5) into the Constitution. Article 15(5) authorised the State to provide reservations to OBCs and SC/STs in all educational institutions, including private educational institutions. The provision also made it clear that the State had this power irrespective of whether the educational institution received aid from the government and the only category of institutions excluded were minority institutions established under Article 30(1). The challenge to the constitutional amendment came to the Court in the context of the Central Educational Institutions (Reservations in Admissions) Act, 2006, which sought to provide 27 per cent reservation for OBCs in all central educational institutions. These institutions were fully funded by the central government and the 2006 Act did not seek to exercise the power under Article 15(5) to provide reservations in private educational institutions. All judges upheld the validity of the 2006 Act and the 93rd Constitutional Amendment Act in so far as it applied to

[385](2008) 6 SCC 1.

central educational institutions. Since the 2006 Act did not seek to cover private institutions, four out of the five judges did not express an opinion on whether that part of the constitutional amendment would be valid. Justice Bhandari was the only judge who ruled on the validity of the amendment on the issue of reservations in private institutions. Justice Bhandari determined the constitutional amendment to be violative of the 'basic structure' doctrine in so far as reservations in private institutions was concerned because it took away the rights of the citizen under Article 19(1)(g) to carry on an occupation. He held that that the right to admit students purely based on merit was an integral part of the right to administer an educational institution under Article 19(1)(g). Justice Bhandari gave four reasons for his view[386]:

- Reservations in private institutions would have a negative impact on the quality of the students graduating and that there would be a drop in the standards of excellence. Admitting students with lower marks, he believed, would lead to the 'university's final product' being rather weak.
- State control of the right to select students would 'weaken the incentive' for citizens to create private educational institutions.
- Since the students being admitted would no longer be the 'brightest', it would further reduce the incentive for individuals to join academia.
- It would have a negative impact on job opportunities, as recruiters will not look upon reservations favourably (presumably because of the first reason).

[386]Ibidpara 174-176.

It is clear that Justice Bhandari's reasoning applies across the board for higher education provided by private institutions, irrespective of whether it is an undergraduate or an advanced postgraduate degree. Justice Bhandari makes the rather common error concerning reservations, which views marks scored in an entrance exam, or qualifying examination as determinative of the merit of the student. He also reaches the conclusion that 'merit' at the level of admission will determine 'merit' at the point of completing a course. Justice Bhandari might have been better off entering into a discussion about the purpose of reservation not ending with merely facilitation of entry and that the project of substantive equality would include meaningful attempts at equalisation of opportunities post-admission through various means. As private universities mushroom in India and the demand for higher education increases, it is important that India develops the appropriate framework to facilitate inclusive access to higher education. A model based on the negative impact of reservations on national interests will certainly not drive the discourse on higher education towards meaningful inclusivity.

Part VI: Towards a More Appropriate Judicial Approach to Reservations

The fundamental problem identified in Part V is that the strategy of the Supreme Court to limit reservations by citing concerns of efficiency and costs to national interest is not an appropriate fit with its position that reservations are a facet of equality. It is not an appropriate fit because those grounds for limitation leave it open to the Court to limit reservations not just at the top ends of higher education and public employment, but throughout those spheres. This must be seen in the context of the spirit of the Constitution that envisages an important role for the

State in designing special measures for beneficiary groups like the SC/STs and OBCs. Any framework developed by the judiciary must be capable of demonstrating the appropriate level of deference with sufficient level of certainty. The manner in which the judiciary has developed its discourse on efficiency and merit does not lend itself to that. Perhaps just as importantly, its discourse on efficiency and merit is also not internally consistent with its overall position on reservations and equality. In this part I will be bringing together the critique of the Court's discourse discussed in this chapter and the framework developed in Chapter III.

It was established in Chapter III that an appropriate framework for implementing reservations cannot adopt a homogenous approach towards both beneficiary groups and spheres of reservation. While the need to move away from a homogenous approach for beneficiary groups is dealt with in detail in Chapter V, I am currently concerned with the spheres of reservations. In Chapter III I argued that education and employment must be seen as a continuum, where the justifications for special measures get narrower as we move from one sphere to another. Just as that would be required as we move from one sphere of reservation to another, it would also be required within each sphere of reservation. At the same time it is important to recognise that the progression might not be exactly so linear between education and public employment. While the inadequacies of the Court's approach to limiting reservations has been discussed in earlier parts of this chapter, it is important to avoid the underlying themes of those inadequacies while discussing a more appropriate judicial approach. As the analysis of cases has revealed, very often the challenge is to address the complexities within each sphere of reservation as well. The challenge

is to develop a satisfactory framework that can respond just as well to reservations in undergraduate admissions as it can to entry into super-specialised courses. It must also be a framework that allows us to meaningfully explain the reason behind our discomfort with, for e.g., 'consequential seniority' in the upper echelons of the civil service or perhaps in any other aspect of public employment.

It is my argument that the reason for giving the State far lesser discretion in providing reservations in advanced postgraduate courses cannot be connected to concerns about the cost that the nation will pay. A coherent framework, that is consistent with viewing reservations as a facet of equality, would argue that a far stronger reason would be that the candidates applying for these advanced postgraduate courses have achieved a fair degree of equality of opportunity in terms of the educational pyramid. A Scheduled Caste student who awaits admission to an undergraduate degree is surely positioned differently, in terms of equality of opportunity, than a Scheduled Caste student who has completed her undergraduate, graduate degree and now seeks admission to an advanced postgraduate course. It is not my argument that attainment of educational qualifications ensures equality of opportunity but it certainly does influence it. And it is this change in circumstances that must account for the room for manoeuvring that the State has while providing special measures for beneficiary groups. The assumption that society will pay an unacceptable cost if reservations with 'consequential seniority' are provided at the upper end of the public employment spectrum should not be the basis for restricting the State's power. It is rather that by the time an individual is in a position to benefit that measure she has achieved a higher degree of equality of opportunity than when she first

entered public employment.

It is important to clarify at this stage that it is not my argument that it would be more acceptable for the State to provide reservations in all instances of education than public employment. While the use of the metaphor of a continuum might suggest that, it is important to understand the complexities that inform the equality of opportunity within these two spheres of reservation as well. The extent of the obligation on the State to justify special measures must bear a connection to the stage within each sphere of reservation. For example, the qualifications to be employed as a peon in the lowest rung of public employment might require very low educational qualifications as compared to admissions to a postgraduate degree. This continuous and complex interaction between educational attainment and public employment must occupy a central place in a framework based on equality of opportunity.

Just as critical to this framework is the attention that must be paid to reservations even in the easiest cases. The focus of an equality of opportunity framework cannot end with the mere entry into educational institutions or public employment. There must be an obligation on the relevant institutions to implement the project of substantive equality once individuals gain entry through reservations. The equality of opportunity model of limitation is predicated on the 'real' increase in equality of opportunities during each stage at which reservations is provided. In order for the normative framework to be coherent, there must be real efforts to move beyond just ensuring entry. The actions of institutions once entry is achieved are just as important.

The importance of this framework is to establish the broad terms on which justifications must be sought from the State while providing special measures. The aim is not to provide a formulaic approach but set the broad parameters of the State's obligation to provide justifications while taking special measures for beneficiary groups. For example, the 25 per cent quota under The Right of Children to Free and Compulsory Education Act, 2009 in the sphere of primary education is where the judiciary must show maximum deference to the State under the equality of opportunity framework. The quota under the 2009 Act provided for 'children belonging to disadvantaged sections'[387] aims to increase the equality of opportunity in the most fundamental sphere. However, the Courts must also ensure that the State fulfils its obligations to provide meaningful equality of opportunity to children within these schools. While the Supreme Court did uphold the constitutional validity of the 2009 Act in *Society for Un-aided Private Schools of Rajasthan v Union of India*[388], the challenge for the Court will be to ensure the meaningful implementation of the 2009 Act. As we move along the continuum as discussed above, the obligation of the State to justify special measures will progressively increase in terms of identification of beneficiary groups, indices of backwardness and questions of adequacy of presence. The Court's current approach to create small islands of absolute exceptions at the very end of the higher education and employment spectrum does not take into

[387] s.2(d) of The Right of Children to Free and Compulsory Education Act, 2009 defines 'child belonging to disadvantaged group' as: 'a child belonging to the Scheduled Caste, Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender, or such other factor, as may be specified by the appropriate Government, by notification'

[388] 2012 (4) SCALE 272.

consideration the relevant dynamics of providing reservations. Even adopting the equality of opportunities framework, we might achieve the same result as far as the absolute ends of the spectrum are concerned but it is the method of getting there that has consequences across the spheres of reservation. The equality of opportunity framework leaves open the possibility of providing special measures at the very extremes of higher education and public employment. However, that would require the State to meet a very heavy burden of justification. The burden on the State would not be in terms of justifying why society should bear the cost but rather in terms of establishing a more positive case that the special measure in question takes project of substantive equality further.

CHAPTER FIVE: THE SUB-CLASSIFICATION DEBATE: THE CASE OF SCHEDULED CASTES AND MUSLIM OBCS

In this chapter the focus is on the identification of beneficiaries and in particular the manner in which legal categories of Scheduled Castes and OBCs are constructed. My aim in this chapter is to reflect on the distribution of benefits of reservations within those beneficiary groups. The law grants constituent groups of these legal categories equal access to the quota set aside for them[389] and my attempt is to challenge that approach. In Chapter Four my focus was on the spheres of reservation and the framework of analysis that must be adopted while distributing benefits within those spheres. In this chapter my focus is on the terms on which these categories are created while bringing into sharp focus the composition of these categories. For this purpose I engage with the demand for sub-classification of Scheduled Castes and the claim from Muslim OBCs for a separate quota within the OBCs. This chapter challenges the homogeneity that has been attached to the Scheduled Castes and OBCs using the framework of intersectionality.

These categories present different sets of challenges and that was precisely the reason for choosing them. Attached to the Scheduled Castes, in both mainstream political and legal discourse, is a strong sense of homogeneity. It has been difficult to make inroads into this discourse and the views of the Supreme Court on the issue are indicative of that. It is also an issue on which there has been

[389] I have acknowledged in Chapter Four that the Supreme Court has permitted the creation of the 'Most Backward Class' category. However, in Parts IV-B and IV-C of that chapter I have discussed its limitations.

sustained engagement from social scientists, given its inextricable link to the academic discourse on caste in India. The claim of Muslim OBCs is however far less explored both in terms of the political and legal discourse. While there is widespread acceptance of reservations for Scheduled Castes, there is severe resistance to the idea amongst certain sections of the polity, media and public intellectuals. While evidence of the marginalisation of Muslims in contemporary India is compelling, its meaning and consequences for public policy have been severely contested. And reservations for Muslim OBCs are the arena in which this contestation is at its peak.

This chapter is divided into three parts. In Part-I, I analyse the legal category of Scheduled Castes, its sociological foundations and the judicial treatment the claim for sub-classification has received. In Part-II, my focus is on the diversity of marginalisation that exists within the OBCs. While significant aspects of marginalisation of Muslims have been addressed in Chapters Three and Four, I analyse the experience of Muslim women in detail in Part-II. I bring together the general marginalisation of Muslims in contemporary India and the legal treatment of Dalit Muslims and Muslim women to demonstrate the lack of homogeneity amongst the OBCs. In both Part-I and Part-II, I use the framework of intersectionality to demonstrate that it is counter-productive to use single axis criteria while identifying beneficiary groups because it tends to leave out the most marginalised. In Part-III, I argue that a new standard of judicial review for reservations is needed that will facilitate a meaningful substantive equality approach to implementing reservations. A standard of judicial review that

requires the state to necessarily consider axes of marginalisation is argued for in Part-III.

Part I: Backwardness amongst Scheduled Castes and Its Judicial Treatment

I-A: Constitutional Commitments to the Dalits

Sixty-five years of Indian independence have seen Dalits achieve a certain degree of flexibility in terms of occupations along with an ever-increasing political consciousness and presence. At the same time, it would be a misrepresentation to argue that the severe forms of oppression and discrimination that Dalits suffer from have completely disappeared. Constitutional commitments at the time of independence were in the form of Article 17 formally prohibiting untouchability; Articles 15 and 16 explicitly authorizing the State to use special measures like providing quotas in educational institutions and public employment for Scheduled Castes (SCs); and Articles 243D, 330 and 332 providing reservations for SCs in local governance bodies, the Lok Sabha (lower house comprising directly elected members of the Indian Parliament) and legislative assemblies of states respectively.

As is evident, it is the term 'Scheduled Castes' that is used in the Constitution. The term is a colonial classification that was first used to refer to the list of Untouchable castes created under the 1935 Government of India Act.[390]Article 341 of the Constitution empowers the President to notify the list of

[390] The Government of India Act 1935 was the pre-independence constitution enacted by the British Parliament which sought to give a fair degree of autonomy to the provinces in British India.

castes that constitute the SCs. The Presidential Order of 1950 replicates the list in the 1935 Government of India Act. Under the Presidential Order, the composition of SCs differs for each state within the Union of India. Ever since reservations for SCs were introduced in educational institutions and public employment, there has been a serious concern that relatively dominant castes within the SCs have cornered a large proportion of the benefits.

I-B: Understanding Dalit Identity: Hierarchies without Consent

The question whether Dalits possess an identity and a culture that is at complete variance with that of upper castes has baffled anthropologists and sociologists for a very long time. It is crucial to understand the significance of this debate. If there is a distinct and separate identity and culture that all Dalits share, then the position of the Supreme Court that Scheduled Castes are a homogenous group might have significant force. However, the analysis of the different theories of Dalit identity shows that hierarchy exists within Dalits (without Dalits consenting to their subordination by upper castes), and they provide a strong basis for taking into consideration these differences and contestations amongst the SCs while implementing beneficial measures.

Louis Dumont's 'Homo Hierarchicus'[391] is an influential work in this area. Dumont argued that Untouchables replicated the very hierarchy which subjugated

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Seats were reserved in the legislatures of these provinces for Scheduled Castes as enumerated in the Act.

[391] Louis Dumont, *Homo Hierarchicus: The Caste System and its Implications* (Paladin 1972).

them, amongst themselves, and further that, such replication was evidence of consent to their position in the caste system (theory of unity). Dumont's central argument is that rank in the caste hierarchy defined in terms of purity and impurity is just as clear amongst Untouchables as it is among the dominant castes and, therefore, that Untouchables organize themselves socially according to these very notions of purity and impurity as a continuum on the scale of purity and impurity. Michael Moffatt in his book on Endavur village in Chingleput District, Tamil Nadu rejects the idea of a Dalit sub-culture and seeks to support Dumont's argument that Dalits accept the 'moral basis of their own inferiority' by living in consensus with the wider Indian culture by replicating amongst themselves 'a microcosm of the larger system.'[392]

However, writers like Kathleen Gough and Gerald Berreman present the values and practices of Dalits as opposites to those of the dominant castes based on relevant ethnographies. Gough particularly notes the status of women as there was no practice of paying dowry to the bridegroom, rules of divorce and widow re-marriage were far easier and the woman retained strong ties with her home.[393] However, amongst the Dalits Gough studied in Thanjavur, she observed the

[392] Michael Moffatt, *An Untouchable Community in South India: Structure and Consensus* (Princeton University Press 1979) 3; For another instance of such a hierarchy but based on proximity to dominant elite castes, see N. Sudhakar Rao, 'The Structure of South Indian Untouchable Castes: A View' in Ghanshyam Shah (ed), *Dalit Identity and Politics: Cultural Subordination and the Dalit Challenge* (Sage Publications 2001) 74-96; Also see Oliver Mendelsohn and Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge University Press 1998) 19.

[393]Kathleen Gough, 'Brahman Kinship in a Tamil Village' (1956) 58(5) American Anthropologist 826; Gerald Berreman, 'The Brahmanical View of Caste' (1971) 5 Contributions to Indian Sociology 16-23.

existence of hierarchies and the notion of 'polluting' activities.[394] Berreman's work amongst rural untouchables in a Himalayan village argues that Dumont's model of consensus is essentially only a brahmanical perspective and that untouchables reject a model based on the perspective of the higher castes.[395]

The 'Dalit Culture as Diversity' model looks at the differences between the Dalits and the upper castes but proponents of this model like Bernard Cohn and Pauline Kolenda do not believe that there is a complete rejection of upper caste culture. They advocate the position that Dalits adopt either an alternate system or variants of the culture of the dominant castes depending on the needs and experiences of Dalits as determined by economic, communicative, historical and political situations.[396]

These theories, however, miss out an important dynamic that Robert Deliege's work has sought to highlight.[397] Deliege agrees that there is very strong evidence of replication of hierarchy in Dalit societies. However, I agree with Deliege that such replication cannot be construed as consent. While some Untouchable castes may use the notions of purity and pollution to assert their superiority over other Untouchable castes, they never consider themselves impure in that process. Untouchables in India, Deliege notes, have never been a

[394] ibid (Gough); Kathleen Gough, 'Harijans in Thanjavur' in Kathleen Gough and Hari Sharma (eds), *Imperialism and Revolution in South Asia* (Monthly Review Press 1973) 225.

[395]Berreman (n 393).

[396] Michael Moffatt, *An Untouchable Community in South India: Structure and Consensus* (Princeton University Press 1979) 14-21.

[397] Robert Deliege, 'Replication and Consensus: Untouchability, Caste and Ideology in India' (1992) 27(1) Man 155-173.

homogenous group and have never been able to oppose and challenge the system in an organised manner. Their powerlessness in submitting to such a culture cannot be, Deliege argues, construed as consenting to the basis of their exclusion.[398]

I-C: Colonial India and Identity of Dalits

The homogeneity that has come to be associated with Dalits is in no small measure due to the notion of untouchability. Untouchability as a lived experience is perceived to be the factor that is common to the Dalits. However, the seeming homogeneity that the term 'untouchability' lends is extremely misleading. This part looks at the evolution of the term in official and legal parlance during colonial rule and demonstrates that the uniformity that the term seems to provide is misplaced.

I-C(i): Initial Colonial Attempts at Understanding and Ranking Castes

Classifying and ranking castes in India had baffled colonial rulers[399] and therefore the initial efforts were limited to creating a list of castes in alphabetical order. It

[398] ibid.

[399] There is some disagreement over the attitude of the British to caste and untouchability in India. Some writers like Oliver Mendelsohn and Marika Vicziany argue that the British were ideologically ambivalent towards the issue of untouchability. They did not take proactive efforts to address this discriminatory practice and at the same time were careful not to proactively support a system that could not stand up to their moral scrutiny. In contrast, GS Ghurye argues that this view cannot be accepted in light of statements from British officials after First War of Indian Independence in 1857. Ghurye argues that the British saw the upper castes being the cause of the revolt and therefore decided to use the caste issue to keep the population divided and prevent any further united uprisings; See Oliver Mendelsohn and Marika Vicziany, *The Untouchables: Subordination,*

was Sir Herbert Risley who first took up the task of classifying and ranking castes as the Commissioner of the 1901 Census and is credited with introducing the word 'untouchability' in the twentieth century. Risley's scheme contained four categories of Shudras, the last of which was 'Asprishya Shudra', which translates into 'not to be touched Shudra', whose very touch was considered polluting. Only the Superintendents from Rajasthan found any use for this category. However, Simon Charsley also notes that the Census Commissioner often faced the problem of 'native gentlemen' being interested only in their own castes and refusing to account for the lowest castes. When Risley received reports from all the provinces in India it was evident that there could be no single unified scheme which could be used to classify and rank castes. Risley resorted to racial theory and used different 'tracts' on the basis of their racial composition. He believed that he could find greater unity within each of these racial tracts. A category of 'Castes Untouchable' was included only in the 'Indo–Aryan Tract' which covered Kashmir, Punjab and Rajasthan. Even amongst these three states, Risley had received significant information on 'untouchable castes' only from some parts of Rajasthan.[400]

Some of the criteria that Risley used in his 1901 scheme did not have relevance in parts of India. For example the criteria stated above to determine which section of the Shudras a person belonged to depended on whether Brahmins accepted water from them or not. In South India and in Bombay, this was rendered wholly irrelevant because Brahmins never accepted water from

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Poverty and the State in Modern India (Cambridge University Press 1998) 17-18; GS Ghurye, *Caste and Race in India* (5thedn, Popular Prakashan, Bombay 1969) 284-285.

[400] Simon Charsley, 'Untouchable: What is in a Name?' (1996) 2(1) The Journal of the Royal Anthropological Institute 1, 3.

anyone except people from their own caste. However, Simon Charsley notes that in Madras 'the spirit, though not the detail' of Risley's scheme was relevant where pollution by touch was practiced. Though the officers responsible for the Census did not use Risley's description of 'Asprishya Shudra', these castes in spirit captured the meaning of that term.[401] This clearly shows that untouchability, as we understand it, was not an invention of the British.

The colonial impact on the rigidity of caste identities will be discussed later in the chapter. However, it is evident even here that although a very large category of people were considered to be 'polluting', everyone within that group was not considered to be equally polluting. Some were more polluting than others and thereby indicating a hierarchy of ritual status even within the 'polluting' category of people.

I-C(ii): Difficulty of Establishing Criteria to Determine Dalit Castes

The Morley-Minto Reforms of 1909 brought about a significant shift in the challenges faced by colonial administrators during the census. After the Morley-Minto Reforms, many prominent Hindu leaders publicly proclaimed Dalits to be part of Hindus, a complete reversal of their earlier attitudes. The reason was that the Muslims claimed the Hindu electorate was artificially inflated by including

[401]ibid 1, 3-5.

Dalits and in response Hindu leaders were forced to claim that they were Hindus as well. [402]

In the context of the Morley –Minto reforms, the Census Commissioner in 1911 was accused of sending out a circular that favoured the stand of the Muslims. Communities could be regarded as Hindu, the circular said, depending on their responses to the following questions:

1. Do members of the caste or tribe worship the great Hindu gods?
2. Are they allowed to enter Hindu temples or to make offerings at the shrine?
3. Will good Brahmins act as their priests?
4. Will degraded Brahmins do so? In that case are they recognized as Brahmins by persons outside the caste, or are they Brahmins only in name?
5. Will clean castes take water from them?
6. Do they cause pollution, a) by touch; b) by proximity?[403]

It is evident from the questions that the Dalits would not be regarded as Hindu. The Census Commissioner came under immense pressure and was forced to clarify that he had always intended to count Dalits as Hindus.[404]

[402] Oliver Mendelsohn and Marika Vicziany, *The Untouchables: Subordination, Poverty and the State in Modern India* (Cambridge University Press 1998) 27-28.

[403]ibid 28.

[404] ibid.

Marc Galanter in 'Competing Equalities' documents the difficulties in creating the category of 'depressed classes' during the colonial period. Colonial administrators for a long period time believed that Untouchables across India were the same and that there were strands of common practices that could be found. Galanter cites the Government of India's 1919 Despatch:

> ..though they are defined in varying terms, [they] are broadly speaking all the same kind of people. Except for the differences in the rigidity of their exclusion they are all more or less in the position of Madras Panchamas, definitely outside that part of the Hindu community which is allowed access to their temples

Clearly this assumption raised difficulties because of the lack of uniformity concerning the practice of Untouchability across India. Pollution based on touch and distance did not find uniform expression across North India. Galanter's use of the testimony by G.S. Pal representing the United Provinces Hindu Backward Classes League before the Indian Franchise Commission, 1932 is instructive of this difference. While responding to a question from B.R.Ambedkar on whether the list of 115 castes he had drawn up for inclusion as 'Depressed Classes' was based on socio-economic and educational backwardness or on untouchability, G.S. Pal offers the following explanation:

> ….this is a list of all the castes which in the opinion of the League are depressed classes; untouchability in the sense in which it is understood in Madras or Bombay does not exist here. Bhangi is the only caste that is universally untouchable, pollution by whose touch is regarded as something very undesirable. Here untouchability exists, of course, but in a very mild form or exists in some form or another in all the castes I have enumerated

On being asked the basis on which he defined 'Depressed Classes', G.S Pal responded:

> Not in the sense of the definition in Bombay or Madras but apparently here the Hindu class is divided into high and low castes. The problem is very acute, as acute as untouchability is in Bombay and Madras. I apply three tests, the first is we are socially despised; then there is economic backwardness; and educational bankruptcy.

The above discussion demonstrates the lack of uniformity that existed amongst the Untouchables and the complications surrounding their identification. It is evident that the experience of untouchability was not the same throughout the country and that concerns of either under-inclusion or over-inclusion was very real.

I-C(iii): The Government of India Act 1935 and the Introduction of Scheduled Castes

An examination of the basis on which the 'Scheduled Castes' list of 1935 was drawn illustrates the wide range of differences amongst Dalits in India that had to be accounted for. The criteria make it clear that all Dalits across India did not suffer exclusion and subordination in the same way. Galanter lists the nine criteria used by J.H Hutton, the 1931 Census Commissioner:

a. Whether the caste or class in question can be served by Brahmans or not.
b. Whether the caste or class in question can be served by the barbers, water carriers, tailors etc who serve the caste Hindus.
c. Whether the caste in question pollutes a high-caste Hindu by contact or proximity.
d. Whether the caste or class in question is one from whose hands a caste Hindu can take water.

e. Whether the caste or class in question is debarred from using public conveniences such as roads, ferries, wells or schools.
f. Whether the caste or class in question is debarred from the use of Hindu temples.
g. Whether in ordinary social intercourse a well-educated member of the caste or class in question will be treated as an equal by the high caste men of the same educational qualifications.
h. Whether the caste or class in question is merely depressed on account of its own ignorance, illiteracy or poverty and but for that, would be subject to no social disability.
i. Whether it is depressed on account of the occupation followed, and whether but for that occupation it would be subject to no social disability.[405]

An analysis of the criteria shows the manner in which it provides for variations in determining the composition of Dalits. Lelah Dushkin argues that the criteria of poverty and illiteracy were added to prevent the application of the criteria from breaking down. Dushkin argues that if these particular criteria were not included, in parts of South India a very large proportion of the Hindu population would have been classified as SCs. In North India, it was the opposite problem. If the criteria were based only on ritual untouchability, a very low proportion of the population would have been included because untouchability was suffered in a much milder form in North India. Significant parts of the

[405] Galanter (n 107) 127-128.

population who were subordinated in ways other than through ritual untouchability would have been excluded.[406] Ambedkar argued that differences in tests of untouchability should not be inferred as differences in conditions of Untouchables.[407] However, Galanter also highlights the objections to this view of Ambedkar's in the Franchise Committee.[408] When the list of Scheduled Castes was finally created through the Government of India Act, 1935 it lent the category of 'Untouchable' people a 'spurious social definitiveness and homogeneity'.[409] Rudolph and Rudolph cite the examples of Mahars and the Bhangis who were both in the Scheduled Caste list. The Mahars had a literacy rate that was almost the same as the national average and 'several generations separating its leading sections from the practice of polluting occupations'. The Bhangis on the other had an abysmal literacy rate and continued to engage in their traditional occupation of cleaning dry toilets.[410]

I-C(iv): Conclusions from the Theories of Identity and the Colonial Experience

The aim of engaging with the various sociological theories on the Dalit identity and evolution of the legal and administrative category of 'Untouchables' during

[406] Lelah Dushkin, 'Scheduled Caste Policy in India: History, Problems, Prospects' (1967) 7(9) Asian Survey 626, 630.

[407]Galanter (n 107) 129.

[408]ibid 130.

[409] Lloyd Rudolph and Susanne Rudolph, *The Modernity of Tradition: Political Development in India* (University of Chicago Press 1967) 134.

[410] ibid.

the colonial period was to demonstrate the argument that there exists no homogeneity amongst the Dalits. It is evident that notions of purity and pollution exist among Dalits in their social interactions without them consenting to their own subordination. This conclusion is crucial for implementing measures for the upliftment of SCs under the Constitution. The lack of consent removes any obstacle in branding these measures as paternalistic measures. They contest their subordination in various ways and the constitutional commitments made at the time of independence require the State to use special measures like reservations to ensure their inclusion in the Indian mainstream. However the existence of a hierarchy without consent is crucial in yet another way. It provides the guiding light for the manner in which the special measures for SCs must be implemented. The existence of a hierarchy and lack of homogeneity amongst the Dalits must necessarily require the State to factor in such differences amongst SCs while formulating and implementing beneficial special measures. Ignoring the existence of differences and hierarchy while pursuing implementation of special measures in a manner that treats all SCs as being on par would only result in maintaining and perpetuating the hierarchy that exists. The project to achieve effective inclusion and participation of the India's most marginalised and subjugated castes will never be achieved by a system that attributes equal capabilities to communities that are essentially different. The intended benefits will never trickle down, and thereby ensure their exclusion.

I-D: The Lack of Homogeneity amongst Scheduled Castes: Evidence from Andhra Pradesh

Andhra Pradesh is the only state in India that has attempted sub-classification of Scheduled Castes by enacting legislation.[411] On the basis of existing population and taking into account the empirical evidence provided by the Justice Ramachandra Raju Commission, Andhra Pradesh enacted the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 (hereinafter 'the 2000 AP Act'). The 2000 AP Act divided the 15% reservation available to the SCs as a whole in the following proportion: Group A (Relli Satellite groups) which constitutes 1.67% of the SC population was given 1% since they were the most backward; Group D (Adi-Andhra Satellite groups) which constitutes 8.96% of the SC population was also given 1% because they were considered to have benefited and advanced the most; Group B (Madiga Satellite groups constituting 48% of the SC population) was given 7% and Group C (Mala Satellite groups constituting 41% of the SC population) was given 6%.

The origins of the 2000 AP Act lies in the political history of the Dalit movement from the 1930s in Andhra Pradesh, which demonstrates Madiga opposition to Mala dominance[412]. This opposition from the Madigas culminated in the Dandora Movement in the mid-1990s which succeeded in pressurizing the

[411] Punjab is another state that has attempted sub-classification but it was implemented through executive orders of the Government rather than legislation. On the status of sub-classification in Punjab see, Surinder Jodhka and Avinash Kumar, 'Internal Classification of Scheduled Castes: The Punjab Story' (2007) XLII(43) Economic and Political Weekly 20.

[412] P. Muthaiah 'Dandora: The Madiga Movement for Equal Identity and Social Justice in AP' (2004) 54 Social Action 187-189; P.Muthaiah, 'Sub-Caste Conflict and Dalit Movement in Andhra Pradesh' (Unpublished article on file with the author).

Andhra Pradesh Government to conduct an empirical study on the flow of benefits amongst SCs in Andhra Pradesh[413]. At the national level, the report of the BN Lokur Committee submitted in 1965 considered the revision of the Scheduled Caste and Scheduled Tribes list. The report explicitly referred to the problem of certain castes in the list of SCs cornering a disproportionate share of the benefits and the Malas were part of a list comprising 28 SCs that the Committee believed to be sufficiently advanced so as to not require reservations any longer.[414] Analysing literacy levels, educational attainments and access to post-matriculation scholarships, empirical evidence presented by Uma Ramaswamy in her 1986 article in the *Economic and Political Weekly* clearly suggests that Malas, for a significant period of time since independence, had benefited far more than the rest of the SCs in AP.[415]

I-D(i): Ritual Hierarchy amongst Scheduled Castes in Andhra Pradesh

There also exists ritual hierarchy amongst the Scheduled Castes in Andhra Pradesh. In the chapter entitled 'Views of the Commission on the Issue of Sub-Categorisation of Scheduled Castes in AP', the Justice Usha Mehra Report

[413] The Malas are the dominant SC group in Andhra Pradesh and comprise a little over 40 per cent of the total SC population in that state. Though their occupation patterns are diversified now, they were traditionally employed as guards, labourers or skilled workers. The Madigas are also amongst the dominant groups but they have always been aggrieved by Mala dominance and are seen to enjoy a lower ritual status than Malas. Traditional occupations of the Madigas included tanning leather which was considered to be highly 'polluting'.

[414] Justice Usha Mehra, Commission to Study the Issue of Classification of Scheduled Castes for the Purposes of Reservations (2008) 43 (Mehra Commission Report); P Muthaiah, Submission to the Justice Usha Mehra Commission (on file with the author) (June 2007) 5.

[415] Uma Ramaswamy, 'Protection and Inequality among Backward Groups' (1986) XXI(9) Economic and Political Weekly 399, 401.

(2008)[416] elaborates on the nature of the structural relationships between the various SC groups in AP. The report notes that the Malas consider themselves to be superior to the Madigas based on the purity attached to their respective occupations. Since the Madigas engage in tanning leather they are considered to be more polluting. The Commission also notes that within the Malas there exists a hierarchy where the Mala Jangam and the Mala Dasari (the priestly class amongst the Malas) consider themselves to be on the top of this particular hierarchy. The Madigas too have their own internal hierarchy with the Sangari and the Madiga Dasus as the priestly class occupying the highest ritual position and the Dakkals (wandering beggars and those engaged in rearing of pigs and donkeys) occupying the lowest position with even the Madigas treating them as untouchables. The Mehra Committee Report also documents the ritual rules surrounding food and water between the groups amongst the Malas and Madigas. The priestly class within both these groups does not accept food or water from others in the group. No group across the Mala and Madiga spectrum accepts food or water from the Dakkals.[417]

I-D(ii): The Empirical Basis for the 2000 AP Act and Its Limitation

The 2000 AP Act was drawn up on the basis of the Report of the One Member Commission of Inquiry into Certain Demands by Scheduled Castes for

[416] Appointed by the Government of India in 2006 to look into the claims for sub-classification in AP, the Justice Usha Mehra Commission submitted its report to the Ministry of Social Justice and Empowerment in May 2008. The Commission was appointed after the Supreme Court struck down the 2000 AP Act as being unconstitutional.

[417] Mehra Commission Report (n 414) 126-130.

Categorization [May 1997] headed by Justice Ramachandra Raju (hereinafter referred to as the 'Justice Raju Report'). The Commission divided the 59 SC groups (as it was then) into four groups on the basis of their ritual status and demonstrated the disproportionate flow of benefits amongst these four groups. This classification of the SCs into four groups has been followed in the 2000 legislation. In the context of public employment, the Raju Commission examined the patterns in public employment in AP and came to the conclusion that they occupied slightly over 50% in central government public sector undertakings, local governance bodies and state government offices. In state owned corporations, welfare schools, secretariat departments and universities Malas occupied nearly 60% of the total jobs available for SCs. The Adi Andhras held posts way above their share in the total population of the SCs while Rellis held posts way below their share in population.[418]

The most significant contribution of the 2000 AP Act was the political recognition of the disproportionate distribution of benefits amongst SCs. However, the crucial error in the legislation was the method adopted to address the problem. By creating four groups, the legislation ignored the operation of hierarchies and varying capabilities within these groups to access the benefits available to the SCs. The argument in the first part of the chapter demonstrated that the external hierarchies are replicated within the sub-groups. This strongly suggests that the more numerous, well organised and powerful groups within these four groups will benefit the most leaving the marginalised groups behind

[418]Justice Ramachandra Raju, Commission Report on Categorization of Scheduled Castes (1997) 35-46 (Justice Ramachandra Raju Report).

yet again. While the approach adopted in the legislation would undoubtedly address the problem to some extent, the heterogeneity that exists within these groups would surely have proved to be an obstacle in helping reservations achieve their aim of creating an inclusive society. The empirical evidence provided in the Justice Usha Mehra Commission Report supports this conclusion.

The district wise analysis of the Mehra Commission is particularly revealing. The Commission takes into account the actual number of Scheduled Caste groups present in each of the 23 districts and presents the empirical data on that basis. In the context of public employment, of the 60 castes in the SC list, 54 castes have occupied some government post or the other, however low the post might have been. But the benefits have been widespread only for very few castes. Of the 54 castes that have benefited from reservations in government jobs, only nine castes have a presence beyond three districts of the total 23 districts in AP.[419]In the context of higher education, only 34 out of the 60 SC groups in AP have managed to access education in the 20 universities that were analysed (there are 23 universities in AP). Among those 34, 23 SC groups accessed only two or three universities. The Malas students were a majority of the SC students in almost all the universities for which data was received and very importantly their presence is much higher in institutions which offer engineering and medicine degrees. This is important to note because engineering and medicine degrees are most valued and sought after in India. The percentage of Madigas is mostly lower than their share in the total Scheduled Caste population of the state. An extremely

[419] Mehra Commission Report (n 414) 100-112.

large majority of the Scheduled Caste groups had only negligible or no access to education in the 20 universities that were analysed.[420] Despite noting the conclusion on the basis of individual Scheduled Caste groups rather than four main groups used by the Raju Commission, it is disappointing that the Mehra Commission affirms the remedies suggested by the Raju Commission and implemented in the 2000 AP legislation. This conclusion is all the more interesting in the context of the discussion of internal hierarchies within Scheduled Caste groups that the Mehra Commission undertakes in Chapter VI of its report.

I-E: Judicial Treatment of Sub-Classification of Scheduled Castes: Homogeneity Misunderstood and Misapplied

As Dalits continue to benefit from reservations there is an ever increasing need to understand the dynamic of two sets of relationships which the previous parts of this chapter have drawn attention to. The first is the dynamic between the dominant castes and the SCs. In terms of recognition and economic relationships, the dominant castes do not treat all the castes in the SC list in the same manner. The second dynamic is that amongst the castes within the SC list. While they do project a fair degree of unity over certain issues, it is apparent that there is fierce competition for economic, social and political power. As a result, amongst the SCs themselves, certain castes tend to dominate and marginalise certain others, both in terms of recognition and redistribution. The failure in judicial discourse to

[420]ibid 114-118.

appreciate this dynamic has led to the denial of claims of marginalised SCs for a more equitable distribution of benefits.

This part deals with the Supreme Court's treatment of the sub-classification of SCs in Andhra Pradesh in light of the dynamic mentioned. The lack of any mechanism to prevent relatively advanced groups and individuals from repeatedly benefiting from reservation thereby excluding significant marginalised sections led to the strong demand for sub-classification, especially amongst SCs in Andhra Pradesh. As we have seen, Andhra Pradesh sought to address this imbalance by passing the 2000 AP Act which divided the 15% reservation for SCs amongst four groups (in differing proportions).

In Part-I-E(i), a brief introduction to the relevant constitutional provisions is provided before looking into cases that were central to deciding the sub-classification issue in Part-I-E(ii). The argument that 'SCs are not castes' is central to the judicial reasoning for prohibiting sub-classification. Part-I-E(ii)begins by looking at the context in which this argument was established in *State of Kerala v N.M.Thomas*[421](*Thomas* hereafter) and argues that it was a strategy created to deal with a very difficult case with no basis in sociological or empirical evidence. Part-I-E(ii)then looks at the effects of the decision of a nine-judge bench in *Indra Sawhney v Union of India*,[422] (*Indra Sawhney* hereafter) on such an argument. The arguments of the High Court in upholding the legislation are then analysed to come to the conclusion that despite upholding the legislation, the High Court

[421]AIR 1976 SC 490.

[422]AIR 1993 SC 477.

incorrectly relied on the 'SCs are not castes' argument to dismiss a challenge to the statute on the basis of caste discrimination. Such an argument is clearly counter-productive as can be seen in the reasoning of the Supreme Court discussed in Part-I-E(ii). The Supreme Court uses the same argument to come to the conclusion that SCs are a homogenous group and that any sub-classification of such a class would be violative of the right to equality in Article 14.

The Supreme Court finds it difficult to balance the prohibition on caste-based discrimination on the one hand and the permission to use caste as the basis for special measures in favour of SCs on the other. However, the Court is clear that the measures taken in favour of SCs under the relevant provisions of the Constitution are a facet of equality and not an exception. The Court's decision in disallowing the sub-classification must be placed in the larger context of the aims of the reservation policy to ensure the presence of India's most subjugated sections in the critical areas of higher education and public employment.

I-E(i): Relevant Constitutional Provisions

The constitutionality of sub-classification of Dalits largely depends on the interplay between the equality clauses (Articles 14,15,16) and the provision relating to the creation of the SC list (Article 341). Article 341(1) gives the power to the President to determine which castes can be deemed SCs. It must be clarified that the text of article 341(1) gives the President the power to deem not just castes as SCs, but even a race or a tribe or part of a group within a caste, race or

tribe.[423] Article 366(24) defines Scheduled Castes as meaning 'such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution'. The analysis of the evolution of the current SC list however makes it very clear that the SC list is dominated by castes alone with negligible or no presence of groups based on race and tribes. The point that also needs to be remembered in further discussions is the rather obvious one that it is individual castes that are deemed to be SCs. Under Article 341(2), it is Parliament that is given the power to either include or exclude groups from the SC list. The Supreme Court's reasons for deciding that this individual caste identity is transformed into a class identity, for the purposes of the law, will be discussed later. Under the provision the President is given the power to deem castes as Scheduled Castes. The provision gives no indication whatsoever as to whether a measure taken by the State for the upliftment of the SCs has to be equally applicable to all groups within the SC list. All that Article 341(1) read with the Constitution (Scheduled Castes) Order, 1950 does is to identify the castes, race, and tribes in whose favour the state can take special measures.

I-E(ii): The Path to Striking Down Sub-Classification of Scheduled Castes

At the heart of the Supreme Court's decision to strike down the sub-classification of SCs is the position that SCs are a class by themselves and therefore by virtue of

[423] Article 341(1) of the Constitution of India, 1950: The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

being a class, by definition, cannot be divided. The notion that SCs are a 'class' emerged as a strategy to prevent special measures for SCs from falling foul of the prohibition on caste discrimination in Articles 15 and 16. The word 'class' is used not in the Marxist sense but to connote groups of people who form a larger group because of their similarities. The judicial meaning of the word 'class' in Article 16(4) was explained in *Triloki Nath v State of Jammu and Kashmir*[424] by the Supreme Court as '…. a homogenous section of people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution'.[425]Since the word 'class' is used in the sense of a socially homogenous class[426] the Court believes that dividing or sub-classifying them would be antithetical to the very basis on which the class was formed. Therefore, the first step towards recognizing the claims for sub-classification would be to challenge this notion that SCs, once notified by the President under article 341, are a homogenous class and not a list of castes. In this part I trace the evolution of the 'SCs are a class and not a list of castes' argument of the Supreme Court. Towards that goal, I first analyse the judgment of the seven judge bench in *State of Kerala v N.M.Thomas*[427] and highlight the reasons of the *Thomas* court for reaching

[424]AIR 1969 SC 1.

[425]ibid 3, para 4.

[426]*Indra Sawhney* (n 279), para 81-82.

[427]AIR 1976 SC 490.

the conclusion that SCs formed a class and could not be looked upon as just a list of castes. Following that I look at the judgment in *Indra Sawhney* and discuss those parts of that nine judge bench decision that have an impact on the sub-classification of SCs. I then discuss the decisions of the Andhra Pradesh High Court and the Supreme Court on the constitutionality of the 2000 AP Act. I argue that both decisions incorrectly rely on the argument that SCs are a 'class' argument, albeit while reaching different conclusions. The apparent homogeneity is applicable only vis-à-vis those outside the SC list and to apply it to claims from within the SC category are counter-productive to the stated aim of inclusion. Both the courts committed a strategic error by not considering the import of crucial developments in the concerned law after *Thomas* in *Indra Sawhney.*

However, it must be clarified before proceeding further that *Thomas* and *Indra Sawhney* were cases that dealt with Article 16 only.

I-E(ii)(a):Scheduled Castes are a 'Class' and not Castes --*State of Kerala v N.M.Thomas*[428]

As discussed earlier, Article 16(4) evidently uses the word 'reservations' but the Court in *Thomas* was confronted with a measure that was more in the nature of a concession than reservation. It was obviously very keen to uphold the measure due to the marginalisation of SC/STs in the posts to which they were being promoted. The Court had heard arguments detailing the benefits of the measure to ensure the inclusion and increase the participation of SCs in that particular

[428]ibid.

category of posts. No doubt the measure was a reasonable one, but it is the reasoning of the majority of the judges in *Thomas* that led to disastrous consequences for the sub-classification demand three decades later.

Of the seven judges, five judges (Ray (CJ), Mathew, Fazl Ali, Krishna Iyer and Beg JJ.) upheld the measure taken by the Kerala government. However, Beg J did not uphold the measure using the same reasoning as the other four judges. Beg J upheld the measure under Article 16(4) whereas all other judges upheld the measure under Article 16(1). And this varying strategy has great significance for the manner in which SCs are understood for purposes of constitutional interpretation. Once they held that the measure was not covered under Article 16(4) because Article 16(4) deals only with reservations and not concessions like the measure before the Court,[429] the four judges were forced to take the position that SCs were not castes in order to justify the measure under Article 16(1). For it to be a permissible classification under Article 16(1), it could not be done in a manner that contravened Article 16(2) which prohibits discrimination, inter alia, on the basis of caste. Therefore, the Court needed to come to the conclusion that SCs were a 'class' and not just a list of castes. Mathew J's opinion is illustrative of this point. He notes, 'the word caste in article 16(2) does not include Scheduled Caste. The definition of 'Scheduled Castes' in Article 366(24) means: 'such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this

[429]ibid 498, para 28-29 (Opinion of Ray CJ), 518, para 100 (Opinion of Mathew J), 526, para 134 and 163 (Opinion of Iyer J), 553, 555-556, para 219 and 228 (Opinion of Ali J).

Constitution'.[430] Three other judges, along with Justice Mathew, explicitly stated that since SCs are not 'castes', it was open to the State to take measures under Article 16(1) in favour of SCs, without contravening Article 16(2).[431]

However, a distinction should be drawn between trying to find an identity for Scheduled Castes as a whole, justifying measures aimed at redressing disadvantages relative to non-Scheduled Castes and recognising heterogeneity within the category of SC's in order to address the disadvantages of some SCs relative to other SCs. The construction of SCs as a collection or a unified class of backward groups rather than a list of backward castes is untenable because there is no separate determination of backwardness apart from caste identity. Membership in a particular caste automatically means backwardness and therefore inclusion in the SC list. As will be seen later, Justice Hegde in his judgment in *Chinnaiah* relies on this position taken by Justices Ray, Mathew, Fazl Ali and Krishna Iyer.

Justice Beg, while agreeing with the majority, took a different route to uphold the measure. He argued that SC/STs are a backward class under 16(4), and such a measures for the benefit of backward classes falls under article 16(4) because it amounts to partial or temporary reservation.[432] And since, Article 335 explicitly states that claims of SC/STs must be taken into account in making

[430]ibid 519, para 107.

[431]ibid 501, para 43 (Opinion of Ray CJ), 535 para 160 (Opinion of Krishna Iyer J), 549 para 200 (Opinion of Fazl Ali J).

[432]ibid 524, para 124-125.

appointments to posts in public employment, there is no determination that needs to be made that SC/STs are backward classes. However, Justice Beg treated Article 16(4) as the exception to Article 16(2). Justice Beg articulated the view that the only reason that SCs are not covered by the direct prohibition in Article 16(2) (and thereby endorsing the view that the SCs are a list of castes), is because Article 16(4) allows them a way out by being considered as 'backward classes'.[433]

I-E(ii)(b):*Indra Sawhney* and Its Relevance in the Sub-Classification Debate

The judgment of the nine judge bench in *Indra Sawhney v Union of India*[434] strongly suggests that the SC list can be viewed as a list of castes. While the case decided a range of issues concerning Article 16 primarily in the context of Other Backward Classes (OBCs), in this part I will focus only on those aspects relevant to the current discussion. The majority in *Indra Sawhney* agrees with certain aspects of the rationale adopted by four out of the five judges forming the majority in *Thomas* and agrees with Justice Beg on certain others. Six out of the nine judges in *Indra Sawhney* agree with the four judges in *Thomas* that Article 16(4) is not an exception within Article 16 and is part of the right to equality.[435] Five judges in *Indra Sawhney*, however agree with Justice Beg's approach on measures other than explicit reservations and hold that Article 16(4) covers all the beneficial measures that can be taken in favour of backward classes. Therefore all

[433]ibid 521, para 117.

[434]AIR 1993 SC 477.

[435]ibid 539-540, para 57 (Opinion of Reddy J, speaking for himself and on behalf of Kania (CJ), Venkatachaliah and Ahmadi, JJ.[hereinafter 'Reddy J']), 618-619, para 289-293 (Opinion of Pandian J), 643-644, para 396-400 (Opinion of Sawant J).

concessions, relaxation of age limits etc would fall under Article 16(4) despite it referring only to 'reservations'.[436] That brings us to the part in *Indra Sawhney* that deals with the identification of 'backward class of citizens'.

Justice Jeevan Reddy's opinion (speaking for himself and Justices Kania (CJ), Venkatachaliah and Ahmadi) explicitly states that even though the discussion surrounding identification of 'backward class of citizens' in the case before them did not concern SC/STs, it has to be noted that backward classes under Article 16(4) in some cases comprise solely of castes – 'for it cannot be denied that SCs include quite a few castes'.[437] Justice Jeevan Reddy's opinion acknowledges, in very clear terms, the fact that even the various groups within the SCs are not similarly situated.[438] As a general position of law under Article 16(4), the opinion of the four judges is clear that a caste as such can constitute a 'backward class of citizens' as envisaged under that provision.[439] Even in Justice Ratnavel Pandian's opinion there is a clear indication that in exceptional circumstances where 'the caste itself being identifiable with the traditional occupation of the lower strata', there would be no need for that group to satisfy any criteria that have been identified for establishing backwardness.[440] It is unmistakeable that Justice Pandian is referring to SCs. The majority is very clear that reservations cannot be made in favour of a 'caste' but instead that it is made in favour of a backward

[436]ibid 540, para 58 (Reddy J), 644, para 400 (Opinion of Sawant J).

[437]ibid 554, para 83 (Reddy J).

[438]ibid 560, para 88 (Reddy J).

[439]ibid 552, para 81 (Reddy J).

[440]ibid 604, para 205 (Opinion of Pandian J).

class.[441] But the majority, as shown above, acknowledges that in case of the SCs, the very belonging to a caste can mean backwardness. However, caste alone cannot be the basis for identifying OBCs. Therefore five judges in *Indra Sawhney* have strengthened the argument that SCs can be viewed as a list of castes.

I-E(ii)(c):The Logic of Sub-Classification in *Indra Sawhney*

The Court upheld the classification of the OBC category into 'most backward classes' and 'less backward classes' in *Indra Sawhney* and it is clear that the judges in *Indra Sawhney* did not view 'backward class of citizens' in Article 16(4) as one single unified class to that limited extent. The decision of the Court on this aspect and the reasoning behind it was not given sufficient attention in *Chinnaiah.* The reasoning that the Court provides for allowing classification amongst the OBCs holds significant import for the debate on sub-classification of SCs. Five judges in *Indra Sawhney* recognize and uphold the reasons behind the sub-classification of OBCs. In very explicit terms the five judges hold that if 'more backward' groups are put together with 'less backward' groups, it would result in the less backward groups monopolising the benefits of reservation and such benefits would not go down to those who need it the most. Four judges (Kania (CJ), Jeevan Reddy, Venkatachaliah and Ahmadi, JJ.) cite with approval the specific example of another Andhra Pradesh legislation, which split the OBCs into 4 groups and divided the reservation available amongst them.[442]

[441]ibid 555, para 83A (Reddy J).

[442]ibid 562-563, para 92-92A (Reddy J), 668-669, para 454-455 (Opinion of Sawant J).

The judges argued that SC/STs could not be grouped together with the OBCs because then the OBCs would monopolise the benefits, thereby resulting in further marginalisation of the SC/STs. The import of the ruling in *Indra Sawhney* is that 'backward class' is not a single unified class and the division into SC/STs and the OBCs is clearly constitutional. Similarly, the OBCs can also be further divided into 'more backward classes' and 'less backward classes'. The reasoning behind allowing such a division is undoubtedly sound. The court relies on the fact that imposing uniformity through the law would result in groups within these categories, who are 'in fact' less disadvantaged and more powerful, monopolising an unfair portion of the benefits that accrue from reservations.[443] However, it must be remembered that the Supreme Court's acceptance of sub-classification of OBCs by permitting the creation of 'Most Backward Classes' is rather limited and has been critiqued in Parts IV-B and IV-C of Chapter Four.

I-E(ii)(d):Sub-Classification of Scheduled Castes before the Andhra Pradesh High Court and the Supreme Court: Opposite Outcomes but Similar Errors

The High Court of Andhra Pradesh (the High Court) decided the issue of sub-classification of SCs in *Mallela Venkata Rao v State of Andhra Pradesh*[444] and the Supreme Court adjudicated the same issue in *Chinnaiah v State of Andhra Pradesh*[445]. The High Court and the Supreme Court arrived at opposite conclusions but both decisions make the same conceptual error in understanding the nature of

[443]ibid 562-563, para 92A (Reddy J).

[444]*Mallela Venkata Rao v State of Andhra Pradesh* MANU/AP/0723/2000.

[445]*E V Chinnaiah v State of Andhra Pradesh* AIR 2005 SC 162.

the Scheduled Caste category. Both the courts are reluctant to view SCs as a list of castes because they believe that would attract the prohibition in Article 16(2) and instead focus on establishing SCs as a homogenous class. However, in this sub-section I argue that once the position that reservations are a facet of equality is established, such a concern is misplaced in the context of SCs. This part undertakes an analysis of the judgments and argues that the understanding of the SC category as a 'homogenous class' in both judgments is incorrect. This misunderstanding arises from an incorrect reading of precedent and from adopting a reading of the constitutional status of Scheduled Castes that has no basis in fact.

I-E(ii)(e):Scheme of the Impugned Legislation

As we have seen, the 2000 AP Act divided the 59 SCs in Andhra Pradesh into four groups and split the 15% reservation available for SCs in educational institutions and public employment amongst these groups in the following manner: Group A – 1%, Group B – 7%, Group C – 6% and Group D – 1%.

I-E(ii)(f):Constitutionality of the Legislation Upheld by the High Court

Four among the five judges in *Mallela Venkata Rao*[446] found the legislation to be constitutional. However, the basis of finding the Act constitutional is not very convincing. Apart from issues of legislative competence, the majority relies on

[446]*Mallela Venkata Rao v State of Andhra Pradesh* MANU/AP/0723/2000.

three points: a) The need for the State to have the liberty to implement reservations for SCs on the basis of ground realities; b) The classification envisaged in the legislation does not in anyway exclude or include any group into the SC category and is therefore not violative of Article 341; c) The current classification is not on the basis of caste, which in turn protects the legislation from being unconstitutional on grounds of discrimination under Articles 15 and 16.

The first point raised by the majority defers to the State on its decision to sub-classify based on the empirical data collected. The judges recognised that in light of the constitutional sanction for reservations, the State must also be given sufficient power to determine the exact design of such reservations. The majority said that it was '…unable to comprehend, how once the power to make reservations is conceded to the State, the manner in which reservations are to be worked out, the mechanism to be worked out, to whom to be given and to whom to be denied, in what priority Scheduled Castes are to be uplifted, to what extent or working out the details could be denied to the State.'[447] The Court felt that since it is possessed with the details of the ground reality, the State had the power to provide for special measures for the groups contained in the SC category. The Court in this part of the judgment is clear that despite the adoption of the SC list, the State continues to have the ability to adopt the 'operational mechanism' on the basis of ground realities for the 'upliftment of the weaker sections of the society'.[448]

[447] *Chinnaiah Case* (n 445)para 66.

[448] ibid para 68.

On the question of whether the classification envisaged in the legislation amounts to an exclusion from the SC list, which is a power given to the Parliament under Article 341(2) of the Constitution, the High Court concludes the such a classification 'does not either include or exclude a caste in the Presidential Order in letter or spirit'.[449] Relying on the fact that that the Presidential Order 1950 enumerating the SCs is done state-wise, the High Court reasons that while the composition of the SC list is to be determined by the Parliament, the states must be given sufficient power to determine the methodology for implementing reservations amongst the groups constituting the SCs. The majority opinion found the legislation had not tampered with the constituent groups of the SC list and had only determined the manner in which reservations is to be implemented amongst them.[450]

The weakest part of the majority judgment is its response to the petitioner's argument that the legislation is unconstitutional because it discriminates purely on the basis of caste, which is a prohibited ground of classification under Articles 15 and 16. Relying implicitly on *NM Thomas* the High Court holds that the SC list of groups is not based on caste alone. Therefore their sub-classification cannot be based on caste alone either and the argument that the legislation discriminates purely on the basis of caste must fail.[451] However, as will be argued later the High Court falls into the same trap as the Supreme Court did in 2005. The High Court tries to get around the incorrect reading of precedent by

[449]ibid para 84.

[450]ibid para 69-84.

[451]Ibidpara 91-95.

misconstruing the nature of the SC list. The reliance on *NM Thomas* to construct SCs as a social 'class' is very evident.[452] The argument that the SC category as it stands is not a list of castes, despite the definition in Article 366(24), is to misunderstand the historical and sociological basis of the groups within that category. Moreover, the reliance on *NM Thomas* fails to appreciate the influence of *Indra Sawhney* for such an understanding of the SCs.

It must be however noted that the High Court does not construct the SCs to be a homogenous group. The track of arguments is quite different. While upholding the power of the State to design the mechanism to implement reservations, the High Court is quite clear that the group is not homogenous. In its response to the petitioner's argument that the SCs are one indivisible unit,[453] the High Court holds that such an argument 'would be an impediment to the upliftment of the Scheduled Castes. The contention if accepted would result in treating the conglomeration of castes itself as a caste. It would render the totally deprived caste under the tramples of feet of people who are less deprived especially the ones who are exposed to more professional and intellectual opportunities. It would encourage grabbing of the State largesse by some while depriving the others of the opportunity'.[454] It is clear from this argument of the High Court that it is aware of the differences that exist amongst the SCs. However, the High Court falters when it comes to responding to the caste discrimination

[452] ibid para 95; *State of Kerala v N M Thomas* was specifically argued before the Court as is evident from para 84.

[453]ibid para 70.

[454]ibid para 81.

challenge. It is clear in the above extract that the High Court views SCs as a 'conglomeration of castes'. But when it comes to the caste discrimination challenge the High Court changes track and holds that 'caste was not the sole consideration for such identification and specification'.[455] Suddenly the language of 'conglomeration of castes' is replaced with phrases like 'socially and educationally backward groups' and 'social class' in order to come to the conclusion that the legislation is not an instance of caste based discrimination.[456] The High Court concludes that merely naming castes in the various categories in the legislation 'would not and cannot be raised to the pedestal of classification on the basis of caste'.[457] The critical error was to ignore *Indra Sawhney's* ratio that Article 16(4) is a facet of equality and the clear indication in the case that in the context of SCs caste by itself is the cause and indicator of backwardness. The judgment must however be appreciated for resisting the temptation to argue for the homogeneity of SCs, which in turn is the approach of the Supreme Court while striking down the legislation.

I-E(ii)(g):The Decision of the Supreme Court

At the crux of the case was the question whether the list of SCs under Article 341(1) constituted a single homogenous group or whether it continued to be a list of different castes, races or tribes. The Supreme Court unanimously rejected the argument that the castes within the list under Article 341(1) remain separate

[455]ibid para 95.

[456]ibid.

[457]ibid.

castes and held that the Constitution 'deemed' all castes included in list to be one class of persons.

Justice Hegde (speaking also on the behalf of S.N Variava and B.P Singh, JJ.) essentially relies on the opinions of three judges, Justices Mathew, Krishna Iyer and Fazl Ali, in *NM Thomas v State of Kerala*[458]. In *Thomas*, Justice Mathew argued that it is the Presidential notification under article 341 that creates Scheduled Castes. That strand of Justice Mathew's argument in *Thomas* must be correct. Justice Mathew, however, went on to hold that the groups within the list achieve a new status and are not merely castes. Similarly, Justice Krishna Iyer used Articles 341 and 342 to argue that the groups in the Presidential list are not 'castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President.' Justice Fazl Ali also upheld the view that SCs form a class by themselves.[459]

Justice Hegde in *Chinnaiah* makes a critical move using the reasoning of the four judges in *NM Thomas* that SCs are not castes.He uses that finding to come to the conclusion that once castes are included in the Presidential list, they 'form a class by themselves'.[460] By virtue of the castes being in the same class any division amongst them is not possible because of the homogeneity that the law accords

[458]*State of Kerala v N M Thomas* AIR 1976 SC 490.

[459]ibid 519, para 107 (Opinion of Mathew J), 501, para 43 (Opinion of Ray CJ), 535, para 160 (Opinion of Krishna Iyer J), 549, para 200 (Opinion of Fazl Ali J).

[460]*Chinnaiah Case*(n 445) para 28.

them. The opinion states that 'the very idea of placing different castes or tribes or group or part thereof in a State as conglomeration by way of a deeming definition clearly suggests that they are not to be sub-divided or sub-classified further'.[461] Justice Sinha in his concurring judgment argues that what holds the class together is the backwardness of members and caste can never be a substitute. Justice Sinha is of the view that 'the backward class which may be given the benefit of clause (4) of Article 15 or 16 must consist of a homogenous group –the element of homogeneity being the backwardness characterizing the class. The link or the thread holding the class together, thus, should be the backwardness of its members which can never be supplanted by castes'.[462] It is my argument that the two opinions fail to read *Thomas* in its context. The Supreme Court in *Thomas* was faced with a particularly difficult question concerning Article 16 in the pre-*Indra Sawhney* era. Though *Thomas* departed significantly from the positions that had been articulated in cases before 1975 in relation to the nature of Article 16, Justice Hegde does not ask the question whether the court in *Thomas* would have put forth the same arguments after *Indra Sawhney.*

In another limb of the judgment, Justice Hegde holds that sub-classification is violative of the right to equality in Article 14. Using the conclusion that creation of the SC lists creates a 'class' of people by virtue of a deeming definition where all the castes are considered to be a 'class', Justice Hegde arrives at the position that sub-classification is violative of the right to equality.[463] The critical defect of this

[461]ibid 174, para 43.

[462]ibid 184, para 112.

[463]ibid 172, para 35-39.

reasoning and arguments about homogeneity referred to in the last paragraph is that no explanation is given as to why the status accorded to Scheduled Castes as a whole must apply within the group in exactly the same way as it operates in relation to those outside it. The homogeneity that informs a 'backward class' is in relation to those outside. It however does not in anyway imply that the 'backwardness characterizing' the class is the same for all groups within the category of SCs. The first two chapters have provided ample proof on this point.

Justice Hegde in *Chinnaiah* is of the view that arguments underlying the Court's approval of sub-classification of OBCs in *Indra Sawhney* is irrelevant in the context of the SCs.[464] Justice Sinha in his concurring judgment in *Chinnaiah* also makes the argument that sub-classification in *Indra Sawhney* was only in the context of OBCs. Justice Sinha however does not foreclose the possibility and reaches the conclusion that in this particular case, the State has not met its burden demonstrating a reasonable classification and its nexus with the object of the Act. I do not agree with Justices Hegde and Sinha that those strands of arguments in *Indra Sawhney* are irrelevant. The logic in *Indra Sawhney* (in the context of 'Other Backward Classes) that relatively dominant groups within a 'backward class of citizens' tend to monopolise the benefits meant for the entire group holds tremendous significance for the Scheduled Castes as well. The two opinions do not address this crucial argument in *Indra Sawhney* and instead rely on the unconvincing argument that since the law deems them to be a class, the backwardness within the group is uniform. In addition to that, the judges also

[464]ibid 173, para 40.

ignore those strands in *Indra Sawhney* that solved the predicament that the Court faced in *NM Thomas* (in terms of having to justify the special measure in that case under Article 16(1) and not Article 16(4)) leaving no reason to argue that SCs do not comprise a list of castes. The separation between caste and backwardness that the judges seek to draw is untenable in light of the sociological evidence presented.

I-E(iii): An Overall Analysis of the Judicial Position on Sub-Classification

The Supreme Court by relying on *Thomas* without addressing the context in which it was decided and not taking developments that affected the reasoning in *Thomas* into account, found itself unable to uphold the claims of marginalised castes within the Scheduled Castes category. The Supreme Court in *Chinnaiah*failed to realise that the reasoning of the four out of the five judges in *Thomas* was essentially, as Seervai calls it,[465] bad law arising from a hard case. Further evidence that the reasoning in *Thomas* was developed only to suit the case before the Court is provided by the judgment in *Akhil Bharatiya Soshit Karamchari Sangh v Union of India*[466]. Justice Krishna Iyer, who was one of the majority judges in *Thomas,* takes a very different approach to the one he took in *Thomas.* While in *Thomas*, he was vehement about the fact that SCs were not castes, his approach is quite different in *Karamchari Sangh*. In *Karamchari Sangh,* Krishna Iyer J held that Article 16(4) is an exception to Article 16(2), which is very different from what he

[465] HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 1 (3rd edn, N M Tripathi, Bombay 1983) 613.

[466] *Akhil Bharatiya Soshit Karamchari Sangh v Union of India* AIR 1981 SC 298.

held in *Thomas,* and conducted his analysis acknowledging that it is possible to understand the SCs as a list of castes.[467] Though Article 16(4) was not seen as an exception later in *Indra Sawhney*, for our current purpose it is important to note that the position that SCs are a 'class' was decided in a particularly difficult case when the prevailing judicial position provided very little space for manoeuvring.

The main effort in this chapter has been to challenge Justice Hegde's position that once castes are included in the SC list, the list ceases to be a mere list of those castes but instead reflects a homogenous class of people. It is essential then to establish that individual castes retain their group characters even once they are in the list. In this chapter so far, I have shown that the origins of the argument that deemed SCs to be a homogenous class arose from a hard case where the Court needed to arrive at a favourable result. After *Indra Sawhney*, the reasoning of the four judges in *Thomas* to uphold the measure in that case under Article 16(1) does not stand because all measures for the benefit of 'backward class of citizens' have to fall under Article 16(4). Since it has never been contested that SCs are beneficiaries under Article 16(4) and also since after *Indra Sawhney* all measures taken for the benefit for SCs (and 'backward class of citizens' in general) in the context of public employment falls under Article 16(4), there no longer exists any reason to deem SCs as a 'class' so that they can benefit from measures allowed under Article 16(1). Further, as has been pointed out in the relevant parts of *Indra Sawhney* (in judgments written by Reddy and Pandian JJ.), castes by themselves can be deemed to be backward classes without going into

[467]ibid 322, para 78.

any further criteria. The crux of the argument is essentially that the nature of the SC list cannot be construed to be the same in all circumstances and an appreciation of the dynamic discussed in the introductory paragraph is required. The understanding of SCs as a 'social homogenous class' is required when a special measure is introduced to benefit the SCs as a whole group as against those outside the SC list. In such a situation, the homogeneity vis-à-vis those outside the SC list exists. However, this same understanding of homogeneity cannot be applied when it comes to adjudicating claims from within the SC list for a more equitable distribution within the group. In such a situation the differences within the group have to be considered and addressed while adjudicating upon the claim. A mere reference to the homogeneity that applies in comparison to those outside the SC list cannot be a valid basis for repudiating the claim.

I-E(iv): The Importance of Sub-Classification for India's Scheduled Caste Reservation Policy

In independent India, the aim of the reservation policy for SCs has concentrated on ensuring the presence of Dalits in public employment and institutes of higher education. Sukhdeo Singh Thorat's book '*Dalits in India: Search for a Common Destiny*' presents exhaustive empirical evidence that puts it beyond doubt that SCs in India have benefited significantly from the system of reservations in terms of employment, education, ownership of land etc. Politically, reservations have been the rallying point for Dalits in India to be a force in Indian politics. Yet, reservations have bought with them significant negatives as well. SCs continue to suffer significant recognition harms at the work place and educational

institutions. Also, it has led to an intense conflict amongst the SCs to corner as much of the benefits as they can on the basis of their caste identity. As the initial chapters have shown, there exists a hierarchy, both in terms of ritual status and economic power, amongst the SCs and this in turn has resulted in some of the castes in the SC list benefiting in a disproportionate manner. If only members of certain castes continue to reap the benefits of the reservation policy, it goes against the stated aim of achieving the presence of the most marginalised sections in public employment and educational institutions. Even in Article 16(4) the constitutional mandate is to use the provision for ensuring the presence of backward class of citizens who are not adequately represented.

The situation in Andhra Pradesh clearly indicates how certain castes in the SC list clearly do not benefit from the reservation policy. While it cannot be denied that SCs as a whole are still not sufficiently represented in the realm of public employment, the effort should constantly be to ensure that it is the more backward sections of the SCs that have the opportunity to benefit from the reservation policy. By imposing a homogeneity that clearly does not exist, the Court has contributed towards ensuring that it is the dominant castes amongst the SCs that continue to reap the benefits to the exclusion of all else. Simply put, it is not the most marginalised sections of the SCs that benefit from the reservation policy. Justice Kuldip Singh's judgment in *Indra Sawhney* is instructive on this point. Amongst all the judges in *Indra Sawhney*, Justice Singh is the only one who provides a coherent constitutional framework to understand the true import of Article 16(4). The aim, as he correctly identifies is to cure the lack of 'presence' of certain class of citizens in public employment. Justice Kuldeep Singh in paras 512-

513 of the judgment argues that the emphasis in Article 16(4) is on under-representation in public employment and should not be on backward classes in the first instance. The State, he argues, must first determine which classes of people are not sufficiently represented in public employment and then proceed to determine the backward sections of people within such an under-represented class. It is a convincing argument that Justice Kuldeep Singh makes to show that the emphasis of the Mandal Commission and the case law has been on determining backwardness. His reference to Article 335 shows that the framers of the Constitution made a special provision urging the State to take into consideration the claims of SC/STs because of their stark (relative) absence in public employment. While it does not make an automatic assumption that SC/STs are absent in public employment, the framers were certainly aware of their plight and thus required the State to consider their claims compulsorily. Justice Kuldeep Singh also refers to the SC/STs as forming a class by themselves but the value of his judgment does not lie there. It lies in having to first evaluate the adequate representation of groups in public employment. If we were to accept that SCs continue to remain a list of castes, it is also then required to assess their presence in public employment as compared to their population. If the assessment is based on SCs as a whole, the results could be very misleading because it is very clear that certain castes in the SC list corner much more benefits than the others. Therefore, what would be more relevant is assessing the presence of each caste within the SC list in a particular state in public employment.

The Supreme Court in *Indra Sawhney* has upheld the reasoning that sub-classification, where it is essential to ensure a fairer distribution of benefits, is

constitutional. There is no reason, sociological, empirical or legal, as to why the same reasoning cannot apply to SCs. Sociological and empirical evidence clearly highlight the differences amongst the SCs. However, there are extremely important similarities amongst them as well which will be highlighted in the chapter on the suggested solution to the sub-classification issue. The differences however have influenced the manner in which certain castes in the SC list access benefits. The uniformity imposed by the law has maintained and perpetuated these differences. It is also one of the reasons that have prevented the benefits from trickling down. Reservation policies for SCs in India certainly need fine-tuning and the first step is to allow sub-classification. Along with the general judicial approach to reservation, which will be discussed in the chapter on the solution to this problem, the lack of trickle-down effect has only contributed to the recognition problems attached to reservations for SCs.

The issue of internal differences is just as important while analysing the OBC category as well. In many ways, the isuue is far more complicated for the OBCs because the category is so large and contains thousands of groups. However, in this thesis I will be examining the claims of Muslims included within the OBC category. The position of Muslim OBCs in contemporary India presents the opportunity to understand whether the State's creation of the Most Backward Class category (and the Supreme Court's approval of it) is sufficient to capture the complexity and dynamics of backwardness contained within the OBC category.

Part II: Backwardness amongst OBC Muslims and Its Judicial Treatment

II-A: Social Stratification amongst Muslims

While the debate on whether caste with all its trappings can be found amongst Muslims in India remains to be settled, it is clear that there exists social stratification similar to that of caste. Ghaus Ansari did the first extensive study of social stratification amongst India's Muslims in the context of Muslims in Uttar Pradesh.[468] As discussed in Part I-C of Chapter Three, Ansari's book viewed Muslims through three categories: a)*Ashraf*, b) *Ajlaf* and c) *Arzal*. The *ashrafs* traced their ancestry to the early Muslim immigrants and even high Hindu castes such as Muslim Rajputs. The *ajlaf* were lower castes engaged in occupations that were considered 'clean' and the hereditary professions of the *arzals* were considered polluting.

The existence of caste and social stratification amongst Muslims is a highly localised phenomenon and escapes any easy metanarratives. Drawing upon on a wonderful and rich collection of essays, Imtiaz Ahmad in the introduction to his book '*Caste and Social Stratification among the Muslims*'[469] attempted to tease out some of the larger observations. Ahmad notes that most of the contributors who studied different Muslim communities observed social stratification that was 'certainly comparable to the Hindu caste system though an exact parallel' was not

[468] Ghaus Ansari, *Muslim Caste in Uttar Pradesh: A Study of Culture Contact* (Ethnographic and Folk Culture Society, Lucknow 1960).

[469]Ahmad (n 263).

evident.[470] Endogamy was largely observed amongst Muslim groups though intermarriage was observed at higher levels of the social divisions. Strong connections between caste and hereditary occupation were observed as well. Ahmad also reaches the conclusion that 'there is a difference in the degree of correspondence between caste and traditional occupation at the various levels of the social hierarchy. Such links seem to be stronger at the bottom of the social hierarchy than at higher levels.'[471] Very importantly, from the various contributions, Ahmad distills the fact that there exists a notion of hierarchy amongst Muslim groups. However, the authors of the different essays are not in agreement about whether this hierarchy is dependent on notions of purity and pollution comparable to the Hindus. The importance of ritual purity is seen to vary across different parts of India. For example, writing about Muslims of Calcutta, M.K.A. Siddiqui finds that groups within the higher categories of Muslims do not interdine with the Lal Begis, a group of Muslim scavengers. The Dafalis, who perform priestly functions for Lal Begis, do not accept food or water from the Lal Begis.[472] However, there seems to be agreement that the ritual aspect of social stratification amongst Muslims is not as strong as amongst Hindus. There also seems to be agreement that the religious-philosophical justification that exists for caste amongst Hindus is absent amongst Muslims. Ahmad draws the conclusion that caste does exist amongst Muslims as a basis for social relations, albeit in a greatly weakened and modified manner than it does amongst Hindus. By virtue of

[470]ibid xx.

[471]ibid xxiii.

[472] MKA Siddiqui, 'Caste among the Muslims of Calcutta' in Imtiaz Ahmad (ed), *Caste and Social Stratification among the Muslims* (Manohar Book Service, Delhi 1973) 133-156.

the diminished role for ritual status based on purity and pollution, Ahmad's view is that 'a greater interplay of wealth and secular factors' is possible in determining the hierarchy of status.[473]

II-B: Reservations for Muslims

The legal treatment of certain Muslim groups as OBCs has varied in different parts of the country. Karnataka, for example, has given reservations for Muslims since 1921. Post-independence, the R Nagana Gowda Commission recommended the inclusion of approximately ten groups within Muslims in the OBC category. A legal challenge to the Government Order based on the report meant that it was never implemented. The Devraj Urs government in 1977 issued a Government Order implementing reservations for Muslims on the basis of the Havanur Commission Report. The Supreme Court in *K.C Vasanth Kumar v State of Karnataka* in 1983 asked the Government of Karnataka to revisit the list of OBCs by forming another commission. It was the Report of the Venkataswamy Commission set up in 1984 that included the entire Muslim community as a backward class. Since the report excluded the powerful Vokkaligas and Lingayats (both political dominant Hindu groups), it met with significant political opposition and was never implemented. The Chinnappa Reddy Commission of 1990 also recommended the inclusion of the entire Muslim community in Karnataka as a backward class. In the Government Order issued in 1994, Muslims were included as a separate category with 6 per cent reservations. As a result of the ruling in *Indra Sawhney* on the 50 per cent

[473]Ahmad (n 263) xxiv-xxviii.

ceiling on reservation, the reservations for Muslims were reduced to 4 per cent. This model of including the entire Muslim community in a state in the OBC list is followed in Kerala as well. The two other models where a large percentage of Muslims are included in the OBC list and the creation of the Most Backward Class category have been discussed in Part I-D of Chapter Three under the heading 'Muslim OBCs'.

II-B(i): Muslims as OBCs

As discussed in Chapter Three, there are Muslim groups that have been included in the OBC lists at the central and state level. Except for a couple of instances like in Kerala and Karnataka, there is no separate quota for Muslims within the OBC category. I have dealt with the marginalisation of Muslims in detail in Parts I-C and I-D of Chapter III. It would suffice to say here that the backwardness faced by Muslims across education, public employment and other socio-economic indicators is widespread and intense to an extent that it places them near the bottom rung of groups included in the OBC list. However, it is not the extent and intensity of the backwardness alone that differentiates Muslim OBCs from other groups in the OBC list. Part I-E of Chapter Three has paid close attention to the concept of 'social exclusion' in the context of groups identified for reservations. As discussed there, it is this fact of social exclusion coupled with the extent of backwardness that distinguishes Muslim OBCs from other OBCs. Such a distinguishing feature has very real consequences in the marginalisation of Muslim OBCs within the OBC category as well. The recognition-based harms that Muslims suffer in contemporary India makes it very difficult to jostle with all

other OBCs for the benefits of reservation. It is precisely for this reason that there has been an increasing demand for sub-quotas for Muslim OBCs within the larger OBC category. The political movement within the Muslim community concerning the reservations has seen disagreements over whether it is only Muslim OBCs that deserve reservation or it is the community as such. However, I am concerned only with reservations for Muslim OBCs since it relates to the question of sub-classifying the OBCs, which is the larger theme of this thesis. Also, I do believe that questions concerning classifying the entire Muslim community as a backward class requires data of a different nature than is currently available. Data from different Muslim groups occupying different levels of social stratification amongst Muslims needs to be studied before reservation for Muslims as an entire community can be dealt with in detail. The current empirical data looks at Muslims as a whole and such data can be useful to comment on the state of Muslims who are part of the OBCs. It is a reasonable position to take because it must be assumed that whatever little presence Muslims do have in higher education and public employment is due to the higher classes rather than the backward classes amongst Muslims. Therefore, I use the data available from the Sachar Committee Report and the Ranganath Misra Committee Report only in the discussion concerning a separate quota for Muslim OBCs.

II-C: Judicial Response to a Separate Quota for Muslim OBCs

In this section I will be analysing the judgment of the Andhra Pradesh High Court in *T. Muralidhar Rao v State of Andhra Pradesh*[474]. A seven-judge bench of the Andhra Pradesh High Court (hereinafter 'AP HC') decided the constitutionality of The Andhra Pradesh Reservation in Favour of Socially and Educationally Backward Classes of Muslims Act, 2007 (hereinafter '2007 AP Act'), which sought to provide four per cent reservation in higher education and public employment for backward classes amongst Muslims. While the 2007 AP Act envisaged a quota only for the backward classes amongst the Muslims, previous attempts by the Andhra Pradesh Government (AP Government) were focused on quota for the entire Muslim community. In 2004, the AP Government directed the Commissionerate of Minority Welfare to submit a report on the backwardness of Muslims in the state and then, based on the report, issued a Government Order in July 2004 setting aside a five per cent quota for the entire Muslim community. The AP HC in *Muralidhar Rao (I) v State of Andhra Pradesh*[475] struck down the Government Order for not having consulted the Andhra Pradesh Commission for Backward Classes (APBC Commission) as per the requirements of the Andhra Pradesh Commission for Backward Classes Act, 1993[476] (hereinafter '1993 Act'). Then AP Government then referred the matter to the APBC Commission and subsequently promulgated the Andhra Pradesh Reservation of Seats in

[474]MANU/AP/0003/2010.

[475]MANU/AP/0732/2004.

[476] As the majority judgment in *Indra Sawhney v Union of India*, each State had to create a Backward Classes Commission by enacting a legislation and a similar obligation was imposed at the Centre as well.

Educational Institutions and of Appointments/Posts in Public Services Ordinance, 2005. This ordinance declared the entire Muslim community as a backward class and set aside a five per cent quota for Muslims in higher education and public employment. In *Archana Reddy v State of Andhra Pradesh*, the AP HC declared that the Ordinance had not met the requirements of Articles 15(4) and 16(4). The AP HC was of the view that it was reservation based purely on religion and that Muslims were declared as backward class without the APBC Commission having gathered any evidence of social backwardness. While the appeal against the decision of the AP HC is pending before the Supreme Court, the AP Government asked the APBC Commission to identify the backward classes amongst Muslims in AP.

It was in the above context that the AP Government made the request to the APBC Commission in April 2007 to identify the backward classes amongst the Muslims. The Commission conducted two rounds of public consultations on the issue and also relied on the report of P.S. Krishnan, who was appointed as Advisor to the Department of Backward Classes Welfare. Krishnan's report was forwarded to the APBC Commission by the Principal Secretary with no indication whatsoever that the Commission must treat the report as binding. Ultimately, in its recommendations the APBC Commission relied on Krishnan's report, the findings of the Sachar and Ranganath Misra Committees, and a limited door-to-door survey to gather relevant data. Five judges of the AP HC held that the recommendations of the APBC Commission were unsustainable due to the methodology that was adopted and therefore the 2007 AP Act based on its recommendations was

unconstitutional. The majority cited the following reasons for not accepting the recommendations of the APBC Commission[477]:

- Failure of the Commission to evolve and spell out proper and relevant criteria for identification of social and educational backwardness or social backwardness and inadequate representation in public employment, among classes of persons belonging to the Muslim community.
- Failure of the Commission to obtain the population figures of the several classes, groups of persons belonging to the Muslim community for inclusion in Group 'E'.
- Failure of the Commission to adopt a scientific method for determining the appropriate location for conducting a survey of the population of each of the classes/groups recommended for inclusion; with a view to ensuring that the locations surveyed are representative of the inhabitants of the relevant classes/groups.
- Failure of the Commission to consider, determine and apply a scientific and statistically rational method of sampling like determination of sample size, location for sampling etc.
- Failure of the Commission to apply uniform criteria or even standards of analysis across the several classes/groups recommended for inclusion, while recording conclusions as to social or educational backwardness or under representation in public employment.
- The Commission had substantially relied on the data collected and observations made by the Anthropological Survey of India study (People of

[477] *T Muralidhar Rao v State of Andhra Pradesh* MANU/AP/0003/2010, para 204.

India Series) for the purpose of making its recommendation though the data collected by the Anthropological Survey of India study had no relevance or nexus with the affirmation action/reservation under Articles 15(4) and 16(4) of the Constitution, which the State was to take on the basis of recommendations made by the Commission. The data so collected by the Anthropological Survey of India was only to make anthropological profile of the Indian population. Similarly, the report made by P.S. Krishnan was substantially based on the research work done by others and that too for the purpose other than the one for which the Commission had to use the said material. Reliance of the Commission on such material, which was not scientifically collected and which was bereft of any survey made for the purpose, had led to incorrect conclusions.

The AP HC was clearly imposing a procedural standard that was unprecedented in the identification of backward classes. Even in *Indra Sawhney*, the Supreme Court had not subjected the Mandal Commission Report to such exacting scrutiny. The reasons cited above must be viewed in the context of the AP HC's position in this case that strict scrutiny would be applicable in such cases to test the validity of impugned law. The majority's position on strict scrutiny is addressed in Part-III.

The dissenting opinion by Justice Prakash Rao highlights the drawbacks of the majority's approach to the APBC Commission's report. Rightly citing the relevant parts of the judgment in *Indra Sawhney*, Justice Rao took the position that

> Therefore, in the matter of identification of the backward classes, there cannot be one single or uniform procedure that can be adopted by any Commission or authority entrusted with such task. It is for the body entrusted with such task to adopt such approach and procedure as it deems appropriate. The Apex Court recognizing the need for the Commission/Body to have discretion in adopting its own methods, did not choose to prescribe any particular procedure and categorically held that it is for the Commission to evolve its own procedure…… What is important in the matters of this nature is to have a rational criteria and as long as the Commission has evolved a rational criteria it is not open for the Courts to scrutinize the criteria in minute detail. The criteria/methodology is bound to differ from time to time, region to region claim to claim and from one exercise to other. The Courts would not interfere with the recommendations of the Commission only on the ground that the Commission could have adopted a different or better criteria/procedure. The Commission in fact has followed a particular criteria and the same is discernable from the very report of the Commission …… It is true that the Commission could have done a better job, conducted a better survey, collected some more statistical data, however, lack of efforts on the part of the Commission in this regard would not make the report rational or unscientific. As already pointed out the Commission has followed the guidelines issued by NCBC and rough and ready method of Mandal Commission and was only looking for contra material to find out if any of the insular groups, occupational groups within Muslims have moved socially upward so as to be discriminated against and have joined the main stream of Islamic society, but in vain.[478]

It is evident that the majority opinion was going far beyond the judicial mandate in such matters. The judiciary cannot be seen to have competence to adjudicate upon the intricate details of the methodology and sampling strategies followed by the Government. It can only lay down the broad parameters within which the investigation into backwardness must be conducted. These parameters were laid down in *Indra Sawhney* and Justice Rao in his dissenting opinion rightly relies on that ruling. There could be a discussion on what the relevant parameters should be and that is precisely the nature of the discussion on intersectionality

[478]ibid 22-25 (internal page numbers of Justice Rao's opinion).

later in this chapter. However, the Court cannot judge the validity of the determination of backwardness because it believes there exists a better methodology to meet the requirements of the broad parameters that have been set out.

Clearly the religious connotation to the issue before the AP HC complicated the legal analysis. In addition to the above reasons on the procedure adopted by the APBC Commission, the majority also found the 2007 AP Act to be religion specific and thereby violative of Article 25[479] of the Constitution. The majority viewed the 2007 AP Act as violative of the freedom of religion under Article 25 because it was of the opinion that reservations of the nature contained in the Act would lead to religious conversions to Islam. The majority offers no explanation to justify this conclusion. The reasons that motivate religious conversion in India is a complex field of sociological and anthropological study and the majority did not engage with any of those discussions while taking the position that reservations for Muslims would lead to religious conversions. And using this unexplained 'threat' of religious conversion, the majority came to the conclusion that the 2007 AP Act is violative of the spirit of secularism. The question of reservations for Muslims will always invariably be tied to ideas of secularism in the Indian Constitution and that will perhaps be the greatest stumbling block. It is precisely for this reason that the discussion in the Constituent Assembly Debates surrounding reservations for Muslims is of critical importance. This concern that

[479] Article 25 protects the right to freedom of religion and Clause (1) of Article 25 of the Constitution of India, 1950 provides: 'Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and right freely to profess, practise and propagate religion.'

reservations for Muslims would have a negative impact on the project of secularism in India can be traced back to the Constituent Assembly Debates and that is the precise reason I analysed the Debates from that perspective in Chapter Two. The discussion in Chapter Two on reservations for Muslims in the Constituent Assembly demonstrates the complex social and political context of the decision not to provide reservations for Muslims and other minorities in the original draft of the Constitution. To use the framework of secularism by invoking themes explored in the Constituent Assembly Debates to determine the constitutionality of sub-quotas for Muslim OBCs would only ignore the complex social and political context of those debates in the Constituent Assembly. The legitimate claims of the Muslim community must not be held hostage to what transpired in the Constituent Assembly on this issue.

Part III: Lessons from Substantive Equality and Intersectionality: The Way Forward

The problems with the judgment of the Supreme Court in *Chinnaiah* and the Andhra Pradesh High Court in*Muralidhar Rao* bring forth a complex set of issues involved in identifying beneficiaries while using group-based reservations to achieve substantive equality. It is evident that in identifying beneficiary groups, a single axis of understanding marginalisation and backwardness is inadequate and counterproductive. In order to effectively achieve substantive equality, an approach that utilises multiple axes of marginalisation, including inequalities of recognition, redistribution and power, to identify beneficiaries is essential. Legislative choices made in identifying beneficiaries must be subject to a high

degree of judicial scrutiny in order to ensure that identification of beneficiaries takes into account the intersection of multiple axes of marginalisation. Such scrutiny is required to ensure that the mechanism of identifying beneficiaries does not, in effect, exclude the most marginalised. Using the theoretical framework provided by intersectionality and the example of Scheduled Castes, Part-III-A of this chapter exposes the limitations of constructing a homogenous identity of a marginalised group using a single axis. Part-III-B attempts to delineate the role of intersectional analysis in the judicial scrutiny of the legislative identification of beneficiaries. The aim in this part is not to suggest a particular intersectional method that the legislature must use in the identification of beneficiaries. The attempt is to arrive at a standard of judicial scrutiny that makes it essential to examine the identification of beneficiaries using the intersectional analysis. The current standards of scrutiny employed by the Indian Supreme Court do not serve the purpose and an appropriate higher standard of scrutiny is required. Part-III-C argues that Andhra Pradesh's attempt at addressing the differences amongst Scheduled Castes by dividing them into four groups is also deficient from an intersectional perspective because such a measure does not address the problem of hierarchies within those four groups. The model suggested for addressing the marginalisation within SCs is a variation of the one followed for OBCs whereby the 'creamy layer'[480] criteria are applied to decide priority of access to reservation rather than exclude individuals.

[480] 'Creamy layer' refers to a set of criteria that the Government of India issued upon directions from the Supreme Court to exclude the most advanced sections of the OBCs who could no longer be considered backward.

III-A: Erroneous Construction of Beneficiary Groups: Scheduled Castes and Muslim OBCs

In this part I argue that in order to achieve a comprehensive understanding of marginalisation and discrimination suffered by Dalits and Muslim OBCs in contemporary India, the single axis approach of the Supreme Court and the appellate judiciary must be abandoned. There exists a critical and urgent need to acknowledge the various factors that play a role in determining the Dalit and Muslim experience of discrimination. Class, gender and status within Muslims and Dalits are some of the key factors that are crucial to understanding the various facets of discrimination. This part will argue that the attempted formulation of a single monolithic Dalit identity and a homogenous OBC category in terms of backwardness enables further marginalisation of the worst off within those groups. I borrow from the theories on intersectionality and anti-essentialism in the feminist movement to argue that identity and discrimination on the basis of identity are hardly ever the function of any single characteristic. Multiple influences on groups and individuals are determinative of their position in society and the treatment they receive. In the context of caste, I then refer to the role played by ritual status, gender and class being three key factors that prevent the construction of a homogenous Dalit identity. I look at questions of gender within the Muslim community to drive home the point that backwardness within the OBCs is not homogenous. I then proceed on the basis of the above argument to show that the courts have adopted a formal equality approach while adjudicating upon the implementation of a substantive equality measure.

III-A(i): Intersectionality and Anti-Essentialism

Kimberle Crenshaw uses the example of black women to demonstrate the futility of universal categories.[481] She convincingly argues that the discrimination faced by a Black woman is rarely captured by exclusive reference to either gender or racial discrimination. The discrimination a Black woman faces certainly includes the gender discrimination she faces as a woman and the racial discrimination she faces as a Black person but is not limited to the mere sum of those experiences.[482] The problem with identity politics very often, Crenshaw argues, is not that it creates divisions as much as glosses over intra-group differences.[483] Racism is experienced by women of colour in ways very different to that experienced by men of colour and similarly sexism is not a similar experience for women of colour and white women.[484] Crenshaw believes that the failure of antiracism to sufficiently problematise issues of gender within it results in replication of patriarchal hierarchies and similarly the failure of feminism to sufficiently address issues of race would mean the marginalisation of black women within the movement.[485] Intersectionality as a concept draws our attention to the ability of factors such as 'race, class and gender to mutually construct one

[481] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

[482]ibid 149.

[483] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990-91) 43 Stanford Law Review 1241, 1242.

[484]ibid 1252.

[485] ibid.

another.'[486]Intersections of gender, race and class in the context of Black women creates an understanding of identity that is far more fluid than the category of 'African-American' women. Patricia Collins allays fears that such fluidity might be detrimental to group identity by arguing that the 'fluidity of boundaries operates as a new lens that potentially deepens understanding of how the actual mechanisms of institutional power can change dramatically even while they reproduce long standing group inequalities of race, class and gender.'[487] Writers have expanded the theory of intersectionality by arguing that the intersection between race and gender is just one example. Properly understood, every individual has experiences arising out of multiple intersections of various fragments of identity. The various groupings that result from these multiple intersections are argued not only to have subordination but also privilege.[488]

Essentialism is the belief that there exists a single experience that can be found, minus other factors, for all members belonging to a particular group like women, Blacks, etc. Under this theory membership to any group brings with it an 'essential' experience of that group. In short, there is an 'essential' woman experience or there is an 'essential' Black experience or there is an 'essential' homosexual experience. Elizabeth Spelman, responding to the argument that for a

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[486] Patricia Hill Collins, *Fighting Words: Black Women and the Search for Justice* (University of Minnesota Press 1998) 205.

[487]ibid 205-206.

[488] Trino Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 Berkeley Women's Law Journal 16, 18; Stephanie Wildman, 'Language and Silence: Making Systems of Privilege and Subordination Visible' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory: The Cutting Edge* (2nd edn, Temple University Press 1995); Elvia Arriola, 'Gendered Inequality: Lesbians, Gays and Feminist Legal Theory' (1994) 9 Berkeley Women's Law Journal 103.

pure and clear understanding of gender in society it is necessary to remove factors like race and class, argues for the need to understand gender identity in a context in which other aspects of identity are crucial to the formation and expression of gender identity.[489] Spelman is of the view that in very simplistic terms all women are indeed females but as a socially constructed term, females 'become not simply women but particular kinds of women.'[490] It is best to use her own words to succinctly sum her position. She says that '(I)n this sense it is only if we pay attention to how we differ that we come to an understanding of what we have in common'.[491]

III-A(ii): Applying Intersectionality and Anti-Essentialism to Scheduled Castes

The basic premise on which the Supreme Court proceeds in *Chinnaiah* is that it is possible to understand Scheduled Castes as having a homogenous status. However, it ignores various factors that influence the Dalit experience. In light of factors like gender, class and internal status hierarchies it becomes quite impossible to develop a universal Dalit experience when it concerns issues of equitable distribution within the group. Undoubtedly, when compared to those outside the SC list, the groups within have the common thread of experiencing untouchability, albeit in varying degrees and ways. However, the same approach

[489] Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press, London 1988) 102-103.

[490] ibid 113.

[491] ibid.

cannot be taken when it concerns questions of equitable distribution of benefits, political and socio-economic, provided by the State among the SCs. The above framework provided by intersectionality and anti-essentialism applied in the context of Dalits will elucidate the various kinds of oppression that are concealed by attempts to build a universal Dalit identity.

Intersectionality as explained earlier has a rather complex application to SCs. At the very outset, there is a difference in approach to its application from that of Crenshaw. Crenshaw takes a specific group and looks at the various factors that determine their marginalisation in society. However, applying the intersectionality analysis to a very large group at the outset in order to understand the internal differences is a significantly different exercise. Crenshaw's analysis of Black women is along the axes of race and gender where as the operation of multiple axes has to be considered when the aim is to look at internal differences within a large group based on status, class, gender and further differences within those categories. However, the fallacy of the 'homogenous' approach cannot be fully understood unless we consider the intersectionality that operates within caste. The arguments put forth so far have looked at issues of difference and hierarchies within Dalits on the basis of status in detail and gender briefly. However, before going into either of those grounds, the role of class in this dynamic must be explored. Analysing 'communities of birth' like caste, religion etc, Andre Beteille rightly argues that within every community like caste there are various social classes (as understood in the economic sense related to wealth and income). Identity politics articulates the interests of the middle class within these communities and as a result benefits flow to these classes in an unequal manner,

which according to Beteille follows from the nature of identity politics.[492] Even in the context of Dalits, there is a clear formation of this middle class that has the ability to formulate these demands. It is the voice of the relatively dominant Scheduled Castes that forms a significant part of the Dalit middle class that is heard very often.[493] Moreover, this creation of the Dalit middle class has been a direct result of reservations. Amongst the Dalits, to be part of the middle class forms the aspirational status. Dalits outside of this middle class suffer extreme socio-economic deprivation and the movement into this middle class is the way out. And it is in this attempt to move into middle class that the role of ritual status within Dalits becomes crucial. Status proves to be a barrier to this movement as can be seen from the evidence presented in the second chapter. While it is far from true that a higher ritual status means a higher position in the class hierarchy, a lower status is an additional barrier in the move towards being part of the middle class.[494] Poverty by itself amongst the SCs is a barrier to accessing benefits provided by the State in terms of reservation. However, the marginalisation caused at the intersection of poverty and low ritual status within the SCs is essentially different in nature from the marginalisation suffered by SCs who have a relatively higher ritual status but are poor.

The above distinction caused by the interactions of ritual status and class amongst Dalits is further informed by the role of gender as well. The experience of

[492] Andre Beteille, 'Classes and Communities' (2007) XLII(1) Economic and Political Weekly 945.

[493] Simon Charsley, 'Untouchable: What is in a Name?' (1996) 2(1) The Journal of the Royal Anthropological Institute 1, 19.

[494] Urmi Biswas and Janak Pandey, 'Mobility and Perception of Socioeconomic Status among Tribal and Caste Groups' (1996) 27 Journal of Cross-Cultural Psychology 200.

being a Dalit woman is different from that of a Dalit man in many significant ways that adversely affects the capability to access benefits provided by the State. The experience of physical violence[495] is very different for Dalit women than it is for men. The Dalit woman's experience of rape by an upper caste man cannot be understood exclusively in terms of male violence in a patriarchal society. Caste is integral to understanding such an experience. Similarly it qualitatively differs from the experience of caste violence inflicted on Dalit men by upper caste men. The double disadvantage of being oppressed on the basis of gender and caste cannot be escaped. The tension that the position of a Dalit woman brings to demands for women's solidarity and Dalit solidarity in India is interesting. In the context of feminist peasant movements in Maharashtra the tension between the agendas of the Dalit women and upper caste women has been highlighted. Similarly in the context of Dalit movements, it has been observed that political expressions of Dalit women have very often been subordinated and it is the voice of Dalit men that is often heard.[496] Activists often refer to the 'triple alienation' of Dalit women based on class, patriarchy and caste. Living in extreme poverty, the Dalit woman's labour is exploited at the workplace. At the same time, she suffers severe caste discrimination while performing household chores like accessing water resources (access to wells being a major caste issue). In addition, Dalit women are very often the victims of gang rape and public shaming.[497] Caste, class

[495] For a contemporary empirical analysis of the violence suffered by Dalits as a group, see Sukhadeo Thorat, 'Oppression and Denial: Dalit Discrimination in the 1990s' (2002) XXXVII(6) Economic and Political Weekly 572.

[496] Gopal Guru, 'Dalit Women Talk Differently' (1995) XXX(41-42) Economic and Political Weekly 2548.

[497] Gabriele Dietrich, 'Dalit Movements and Women's Movements' in Anupama Rao (ed), *Gender and Caste* (Zed Books, London 2003) 57, 69-70; Also see Vasanth Kannabiran and Kalpana

and gender violence suffered by a Dalit woman outside her home is not the only site for violence and subordination. She is also the victim of domestic violence and subordination within her own home.[498] This subordination that the Dalit woman faces within her own home draws our attention to the situation of a woman within a Dalit family that enjoys relatively higher ritual status and forms part of the Dalit middle class. Undoubtedly, the access that such a woman will have to the benefits provided by the State will be materially different from that of men in such a family.

Apart from the identity of a Dalit woman having multiple facets, it is also contingent and rarely constant. Change in indicators of status over time lends a certain degree of fluidity to the identity of the Dalit woman.[499] The transition from being a Dalit girl to being married, being a widow or being able to bear children or not, all contribute to the determination of her position. The above discussion clarifies the manner in which gender plays a crucial role in the lived experience of a Dalit. The factors that determine status are different, the facets of oppression and the nature of it is different and therefore the claim that a Dalit woman and Dalit man are in the same position, which is the inevitable outcome of constructing a homogenous Dalit identity, is untenable. Since there are clear differences in the nature and sites of marginalisation, any policy that does not take

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Kannabiran, 'Caste and Gender: Understanding Dynamics of Power and Violence' (1991) XXVI(37) Economic and Political Weekly 2130.

[498] N Sudhakar Rao, 'Dalit Women's Voices in Rural Andhra Pradesh' in Kamal Misra and Janet Lowry (ed), *Recent Studies on Indian Women: Empirical Work of Social Scientists* (Rawat Publications 2007) 78, 82.

[499] Moses Seenarine, *Education and Empowerment among Dalit (Untouchable) Women in India: Voices from the Subaltern* (E. Mellen Press 2004) 115-116.

into consideration these glaring differences is bound to work against women who are more marginalised.[500]

Admittedly the above discussion on Dalit women is far from comprehensive. It is only intended to indicate the complexities involved while understanding Dalit identity. The above discussion on subordination of Dalit women needs to be seen in the context of the analysis that has been provided in the earlier parts of the chapter. Gender status amongst the SCs, economic power and power of organisation are all relevant factors. Applying the framework that intersectionality provides to understand Dalit identity is a complex task and raises several crucial questions which are beyond the scope of this thesis and will be an area for future research.

The next section looks at the application of the substantive equality analysis to the discussion on the internal differences amongst the SCs and maps its implications for the Supreme Court judgment in *Chinnaiah*.

III-A(ii)(a): Substantive Equality and the Decision in *Chinnaiah*

This section addresses the relevance and applicability of the discussion on intersectionality to the constitutional adjudication of the sub-classification issue. In requiring conferral of benefits upon Scheduled Castes without any sub-

[500] For an instance of applying the intersectionality analysis (in the context of gender) to the educational policy for Dalits in Nepal, see Ramu Bishwakarma, Valerie Hunt and Anna Zajicek, 'Educating Dalit Women: Beyond a One-Dimensional Policy Formulation' (2007) 27(1-2) Himalaya: The Journal of the Association for Nepal and Himalayan Studies 27.

classification the Supreme Court has failed to uphold the principle of substantive equality, which has been recognised as part of the right to equality under Article 14.

Undoubtedly the measures taken by central and state governments to provide reservations for SCs in public employment and higher educational institutions are reflective of substantive equality. Substantive equality recognizes that similar treatment can in many situations further discrimination rather than further equality. Dworkin draws our attention to the significant moral difference between a law that classifies to further prejudice suffered by a group and a law that classifies in order to empower marginalised and discriminated sections.[501] It is a recognition of the need to treat people differently in order to make them equal. Reservations are reflective of substantive equality because they do not impose an artificial equality that does not exist and seek to remedy the inequalities that would arise if SCs were treated as equals to the non-SCs while competing for seats in educational institutions and public employment. Measures that provide for reservations in Parliament, in state legislatures, in local bodies of governance, public employment and higher educational institutions – at their very foundation recognise the nature of disadvantage faced by SCs in India and reservations is one of the strategies to cure that. It recognises that structural advantage and disadvantage prevent individuals belonging to certain groups from enjoying equality of opportunity.

[501]Dworkin, *A Matter of Principle* (n 48) 314.

A substantive equality approach 'rejects an abstract view of justice and instead insists that justice is meaningful in its interaction with society'.[502] The question that has been raised in this thesis relates precisely to the extent and nature of this interaction that is required. Does the State satisfy the requirements of substantive equality by making a first level of classification between SCs and non-SCs? What would be a sufficient level of engagement with the marginalisation suffered by SCs? By conferring benefits on SCs as a whole without any distinction is the State committing the same injustice it is seeking to overcome, albeit to a different degree?

The Supreme Court in a range of cases has upheld the understanding that the right to equality under Article 14 of the Constitution encompasses a substantive understanding of equality.[503] Reflecting the discussion above, substantive equality under Article 14 is meant to 'strike at the inequalities arising on account of vast social and economic differentiation and is thus consequently an essential ingredient of social and economic justice'.[504] The Supreme Court has recognised the principle that just as differential treatment of people similarly situated is discrimination, so is the failure of the legislature 'to classify the persons who are dissimilar in separate categories and applying the law, irrespective of the differences…'.[505]However, this discussion needs to be placed in the constitutional

[502] Sandra Fredman, *Discrimination Law* (Oxford University Press 2002) 128.

[503]*Minerva Mills v Union of India* AIR 1980 SC 1789; *Indra Sawhney*(n 274) (Opinion of Pandian J.); *Secretary, H S E B v Suresh & Ors* AIR 1999 SC 1160.

[504]ibid (*H S E B Case*) para 1.

[505]*Venkateshwara Theatre v State of Andhra Pradesh* AIR 1993 SC 1947, para 23.

context of reservations. The issue of whether there is a right to reservations[506] does not really impact the current discussion. Even assuming that the more conservative position that Scheduled Castes do not have a right to reservations is correct[507], given that reservations are in fact provided, the homogenous approach towards SCs is violative of substantive equality. Even if providing reservations is ultimately a discretion that the State has, it is an inevitable conclusion that once the State exercises this discretion it has to conform to constitutional safeguards. In essence, the argument is that the State cannot exercise this discretion to provide reservations, either through executive orders or legislations, in a manner that is violative of the provisions of the Constitution. An example should make this argument very clear. When the State notifies a programme of reservation to ensure participation of SCs in higher educational institutions and public employment, it is not open to the State to have a clause which provides reservations only to the men amongst the SCs. The state cannot do this because it is established law that any action by the State, even if it is in the nature of executive action, when subjected to judicial scrutiny has to pass the test of equality under Article 14.[508] In a significant decision, the Supreme Court in *Atyant Pichhara Barg Chhatra Sangh v Jharkhand State Vaishya Federation & Ors.*held that the order of the Bihar Government to do away with the distinction between Extremely Backward Classes and Backward Classes (in the context of OBCs) was

[506] M.P. Singh, 'Are Articles 15(4) and 16(4) Fundamental Rights?' (1994) 3 Supreme Court Cases (Journal) 33.

[507] Parmanand Singh, 'Fundamental Right to Reservation: A Rejoinder' (1995) 3 Supreme Court Cases (Journal) 6.

[508]*Maneka Gandhi v Union of India* AIR 1978 SC 597, para 14.

unconstitutional as it violated substantive equality.[509] Relying on *Indra Sawhney,*[510] the Supreme Court was of the view that this measure essentially combined two differently situated groups that would have the effect of excluding the more marginalised group. The same approach should apply to SCs. By insisting that the SCs be accorded homogenous treatment the Supreme Court has ensured the exclusion of the more marginalised groups amongst the SCs. The preceding sections of this chapter have established that there is wide disparity amongst the capability of various groups within the SCs to access reservations provided by the State depending on factors like status, class and gender. The fundamental problem with the judgment in *Chinnaiah* is that it does not address this question of internal marginalisation that the Supreme Court has been quite willing to acknowledge in the context of the OBCs. The Court's decision would have been more acceptable if it had considered and rejected the evidence for the argument that marginalisation exists within the SCs. The Court did not engage with such evidence and instead chose to proceed on the basis of the legal fiction surrounding the SC category, which unfortunately is far removed from the realities on the ground.

However there remains one critical question that still needs to be answered. The State could argue that its aim is to ensure the SCs find a presence in higher educational institutions and public employment and therefore need not really concern itself with the profile of the SCs that occupy these benefits. However, the validity of such an argument is in doubt and will be addressed in the

[509]*Atyant Pichhra Barg Chhatra Sangh v Jharkhand State Vaishya Federation* AIR 2006 SC 2814, para 16.

[510]AIR 1993 SC 477.

following section on the standard of review that is required to test actions that confer benefits to groups under Articles 15 and 16.

Applying the intersectionality and anti-essentialism framework the argument for an 'essential' Dalit identity will not stand scrutiny. The Dalit identity is comprised of a Dalit who is a manual scavenger, a Dalit who is an agricultural labourer, the Dalit who does not take food or water from the manual scavenger and plays the role of the priest amongst Dalits, a Dalit pre-pubescent girl, a Dalit mother, a Dalit rape victim – are all different and equally important elements of Dalit identity. The existing 'essentialist' explanation of Dalit identity based on the homogenous experience of untouchability rings hollow.

III-A(iii): Moving Beyond Homogeneity of Backwardness amongst the OBCs: Dalit Muslims, Muslims OBCs and Muslim Women

The constituent groups of OBCs as a category of legal construction are seen as suffering from backwardness of a similar nature. In Chapters Three and Four, I have discussed different facets of Muslims being included in the OBC category. To those discussions, I will add the discussion on the position of Muslim women. I have discussed the extent and nature of marginalisation of Muslims in Parts I-C and I-E of Chapter Three. I established in those parts that the exclusion experienced by Muslims is different in nature from that of Hindu lower caste OBCs. Not only is the extent of marginalisation of Muslims in education and public employment particularly intense, it is the aspect of 'social exclusion' discussed in Part I-E of Chapter Three that adds an extra dimension to the backwardness of

Muslims. The discussions in Parts I-C and I-E would be relevant for all Muslim groups included in the OBC category; the discussion on Dalit Muslims in Part IV-C of Chapter Four adds another dimension to certain Muslim groups. As discussed in Chapter Four, Dalit Muslims are excluded from the list of Scheduled Castes as per the 1950 Presidential Order that lists the various Scheduled Caste groups. It has been seen that conversion to Islam does not entail escape from the experience of untouchability and yet the law treats them as part of the OBC category, similar to all the other groups that comprise that category. In this part, I am using Muslims as a group to demonstrate the lack of homogeneity amongst the OBCs. This lack of homogeneity is along a different axis. While Muslims as a group within the OBCs are quite distinct in terms of the extent of their marginalisation and the nature of discrimination, there are significant differences within the Muslim community as well. The social stratification discussed earlier in the chapter is evidence of that, along with the status of Dalit Muslims. Another indicator of the lack of homogeneity and highlighting the importance of intersectionality is the status of Muslim women.

The concerns of Muslim women hardly receive any attention due to the fact of their concerns being clubbed with those of Muslims or of women generally. Just as Muslims are not a homogenous category, neither are Muslim women with issues of caste, region, class and community informing their lived experience. Zoya Hasan and Ritu Menon conducted the first extensive study of Muslim women in India and arrived at some very important conclusions. They observed that though a lot of data and information had been collected about gender inequality, there was hardly any data was available on women in specific communities. Hasan and

Menon argue that the question of Muslim women in India must be placed in the context of Muslims being a heterogeneous community, which has historically dealt with the tag of the 'other' that has in turn resulted in discrimination in areas like access to health and education. Hasan and Menon conducted the Muslim Women Survey (hereinafter 'MWS') in 2000 with over 9500 Muslim and Hindu women respondents, which sought to collect data on various facets of a Muslim woman's life in contemporary India.[511] The survey revealed very significant social, economic and political disparities informing the lives of all women and Muslim women in particular. It observed that illiteracy was higher amongst Muslim women than Hindu women. It came to the conclusion that there was a strong connection between the low socio-economic status of Muslims and low schooling levels. Hasan and Menon also noted the regional difference in the educational attainments of Muslim women. The very low educational attainments of Muslim men also had a significant impact on Muslim women. Since the dropout rate for Muslim boys was very high, Muslim girls were forced to discontinue their high school because then she would be considered over-qualified and therefore ineligible for marriage. This problem was complicated further by the very low average age for marriage, which was between 13.9 and 15.6 years depending on whether it was rural or urban India. The MWS also found that 75 per cent of all the women surveyed reported that they needed 'permission from their husbands for virtually every activity, including working outside the home.' The MWS also confirmed the widespread existence of domestic violence irrespective of religion,

[511] Zoya Hasan and Ritu Menon, '*Unequal Citizens: A Study of Muslim Women in India*' (Oxford University Press 2006) 3-9.

caste or class.[512] Even though the MWS found no significant difference between Hindu and Muslim women on different parameters, the specific disadvantage suffered by Muslim women is articulated by Hasan and Menon in the following manner:

> She is typically among the poorest, whether she lives in urban or rural India, and is illiterate for most part; if educated, she seldom progresses beyond primary school; she is married by the age of 15 years, usually has three children by the time she is 20 years old, and is plagued by ill-health for most of her life. Low skills and education, as well as seclusion and a severe lack of mobility, limit her chances of paid work outside the home, making for almost complete economic dependency on her husband – who is likely to be poor and disadvantaged himself…….They are disadvantaged thrice over: as members of a minority community, as women, and as poor women. While their lives are similarly positioned at the intersection of gender, class, and community within the dynamic context of Indian society, polity and economy, their minority status qualitatively transforms their experiences in very distinct ways. Gender discrimination coalesces with class inequalities in perpetuating a *structured disempowerment of Muslim women*……..Notwithstanding the differences between Hindu and Muslim women, it is necessary to reiterate that the overall economic backwardness and disadvantage of Muslims in India combines with social and cultural norms regarding the role of women and patriarchal control to entrench the subordination of Muslim women and reinforce their oppression.[513]

It is evident that there exist multiple axes of discrimination and marginalisation even within the Muslim community. There also exists a lack of homogeneity between the experience of backwardness among Muslims and other groups in the OBCs. In the context of such heterogeneity, the imposition of homogeneity by the law or merely creating a 'Most Backward Class' category amongst the OBCs will only result in scuttling the project of substantive equality.

[512]ibid 231-239.

[513]ibid 241-243.

III-B: The Need to Alter the Standard of Scrutiny

This Part argues that in cases where the State has enacted special measures for the benefit of groups mentioned in Articles 15(4) and 16(4), the current standard of review is insufficient to address concerns of intersectionality that arise within marginalised groups. The argument presented is that if measures are provided to groups identified for special measures without addressing issues of marginalised sections within those groups then the measure is essentially unconstitutional on the basis of substantive equality. Within the altered standard of review, the practise oftaking into account relevant difference within the identified groups will not just be constitutionally permissible it will also be constitutionally mandatory.

III-B(i): The Existing Standard of Review: Reasonableness and Arbitrariness

Articles 14, 15(1), 16(1) of the Indian Constitution provide for equality before law, anti-discrimination and equality of opportunity in public employment respectively. A plain reading of the provisions may give the impression that the State is required to treat everyone equally without making any distinctions whatsoever. However, it has been established since the very early days of the Supreme Court that the State is allowed to make classifications and treat persons differently in certain cases. Like many other jurisdictions, the Indian Supreme Court is of the view that not all classifications are invalid and has developed tests to determine invalid classifications.

The test of reasonable classification was established very early on as the basis for testing the constitutionality of a legislation or State action. Drawing upon the decision in *Chiranjit Lal v Union of India*[514], the Supreme Court in *State of Bombay v F.N Balsara*[515] laid down the foundational principle for adjudicating violation of equality claims. The Supreme Court held that classification was permissible under Article 14 and that 'such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis'.[516] This approach was confirmed by a seven judge bench of the Supreme Court in *State of West Bengal v Anwar Ali Sarkar*[517]which held that that whenever the law being challenged applied only to a particular category of people then the Court must satisfy itself that the classification had a reasonable basis keeping in mind the object of the particular law. In *Ram Krishna Dalmia v Justice S.R Tendolkar*[518], a five judge bench of the Supreme Court in 1959, citing a long list of precedents, held that the test of reasonable classification was the established standard of review for violation of the right to equality and comprised two conditions, a) classification based on intelligible differentia, and b) a rational nexus between the differentia and the object of the law.[519] The bench in *Dalmia* also made a few other observations about the relevant principles while

[514]*Chiranjit Lal v Union of India* AIR 1951 SC 41.

[515]*State of Bombay v F N Balsara* AIR 1951 SC 318.

[516]ibid para 38.

[517]*State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75,para 9.

[518]*Ram Krishna Dalmia v Justice S R Tendolkar* AIR 1958 SC 538.

[519]ibid 296.

applying the test of reasonable classification. It noted that that earlier decisions of the Supreme Court concerning the test of reasonable classification had established, among other things, that: a) 'it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds; b) 'the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest'.[520] The doctrine of reasonable classification was also applied by the nine judge bench in *Indra Sawhney v Union of India* to Article 16(1) by arguing that classifications could be made under that provision in the same way as was permissible under Article 14.[521]

In *EP Royappa v State of Tamil Nadu*,[522] a five judge bench of the Supreme Court derived yet another aspect to test equality and is often referred to as the 'new doctrine of equality'. The majority opinion in *Royappa* held that the right of equality in Articles 14 and 16 forms the basis of protection against arbitrary State action.[523] As is evident, in this test there is no requirement of a comparator. It must be noted that the Court was deciding the legality of a transfer order of a senior bureaucrat in *Royappa* and did not involve any legislative action by the State. This doctrine has been criticised for its failure to distinguish between the violation of equality by a law and violation by executive action and the precise

[520]ibid 297.

[521]*Indra Sawhney*(n 279) 540, para 57.

[522]AIR 1974 SC 555.

[523]ibid 584, para 85.

application of this test to legislative and executive action remains unclear in light of judgments before and after it.[524]

III-B(ii): Critical Analysis of New Directions in Judicial Scrutiny of Reservations

The 'reasonable nexus' standard is a very low threshold of scrutiny that has led to a high level deference by the Judiciary.[525]As a result, the level of nexus between the classification and the aim that needs to be demonstrated is never very high. In other jurisdictions, courts have developed higher standards of scrutiny to test certain kinds of State action, including differential treatment resulting from classifications. Before suggesting a higher standard of scrutiny for the Indian context based on concepts developed in the US and Europe, it would be extremely relevant to briefly examine the experience of these jurisdictions in order to understand the benefits and pitfalls.

III-B(ii)(a): Brief Analysis of the US and European Experience

In the United States (U.S.), a higher standard of scrutiny in certain cases was first suggested in the famous footnote four of Justice Stone's opinion in *U.S.v Carolene Products*[526]. The footnote provided for the possibility that when a case concerns

[524]*Seervai* (n 465) 436-442.

[525]Tarunabh Khaitan, 'Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement' (2008) 50(2) Journal of the Indian Law Institute 177, 188 citing MP Jain, *Indian Constitutional Law* (5th edn, LexisNexis Butterworths Wadhwa 2003).

[526]*U.S. v Carolene Products* 304 U.S. 144 (1938), 152: 'It is unnecessary to consider now whether

statutes aimed at religious, national, racial minorities or involves prejudice against 'discrete and insular minorities', courts may be justified in not deferring to the political processes and subjecting such state action to a higher standard of judicial scrutiny. The U.S. Supreme Court in *Korematsu v U.S.* held that invidious racial classifications were automatically suspect due to the Equal Protection Clause.[527] The application of strict scrutiny in the U.S. context is not limited to equal protection cases[528]and also extends to free speech, fundamental rights, freedom of association and religious liberty.[529] For theorists like John Ely the value of tools like strict scrutiny is that its application ensures that minorities whose interests are ignored by the political process are able to participate in the processes of government.[530] Ely argues that when governmental action imposes burdens on groups that are for all practical purposes excluded from the political process then such action is automatically constitutionally suspect.[531] As is evident in the *Carolene Products* footnote, courts have been using this process based

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legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation… Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, ... or national, ... or racial minorities, ...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.'

[527]*Korematsu v US* 323 US 214 (1944), 216.

[528] For the equal protection origins of strict scrutiny, see generally Greg Robinson and Toni Robinson, 'Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny' (2005) 68 Law and Contemporary Problems 29.

[529] Adam Winkler, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts' (2006) 59 Vanderbilt Law Review 793, 833-868.

[530] John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 87.

[531]ibid 135-179.

reasoning as a justification for judicial intervention.[532] In applying strict scrutiny the Court has to first decide whether the right in question or the nature of the right affected triggers strict scrutiny. If the right triggers strict scrutiny, then the State must show a compelling State interest. If such interest is established the State has to show that the measure taken has been narrowly tailored by demonstrating that: a) there exists no other less restrictive means to achieve the government's interest; b) the measure is not under inclusive or over inclusive.

In the European context, the principle of proportionality has been used to test State measures that seemingly violate the non-discrimination provision in Article 14 of the European Convention of Human Rights (ECHR). The European Court of Human Rights (ECt.HR) in the *Belgian Linguistics Case*[533] categorically held that it would lead to absurd consequences if all differences in treatment were held to be discriminatory under the ECHR. In addition to holding that Article 14 would be violated if similarly situated persons were treated differently and differently situated people (in relevant ways) were treated similarly, the ECt.HR also incorporated an objective and reasonable justification test. For these tests to be satisfied the concerned State had to be pursuing a legitimate aim and a reasonable relationship of proportionality needed to exist between the aim and measures taken to achieve it.

[532] For a critique of theorists, as opposed to courts, viewing constitutional law as process perfection, see Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale Law Journal 1063.

[533] *Belgian Linguistic Case (Nos 1&2)* (No1) (1967), Series A, No5 (1979-80) 1 EHRR 241 (No2) (1968), Series A, No6 (1979-80) 1 EHRR 252.

In the specific context of affirmative action in Europe, I have analysed cases from the European Court of Justice decided under the Equal Treatment Directive of the European Union (2006/54/EC). The European Union has seen principles of affirmative action develop around the recognition that real equality for women would require more than non-discrimination clauses and the guarantee of formal equality. Sandra Fredman has argued that the ECJ has viewed the need for special measures for women as derogating from the equality principle rather than an affirmation of substantive equality. While the ECJ has acknowledged the limitations of formal equality, Fredman argues that the derogation approach has resulted in the ECJ invoking notions of merit to limit the measures that can be taken. While embracing a meaningful approach to equality of opportunity by recognizing the need for special measures for women in order to equip them to compete with men, the ECJ has sought to limit the application of affirmative action measures as far as results are concerned. It has resulted in the ECJ taking the position that 'preference policies should not be automatic and unconditional' and that 'meritorious individuals from outside the beneficiary class should have the possibility of individual assessment'[534]. Since the ECJ views affirmative action measures for women as derogating from the equality principle, it is subject to a very intense judicial scrutiny. Applying the proportionality analysis, the State has to demonstrate that the measures being taken are 'necessary' to achieve the stated aims of the State.[535]

[534]Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 241-243.

[535]ibid 272.

Though both strict scrutiny in the U.S. and the proportionality standard in the EU require a higher level of scrutiny than the 'reasonable nexus' test adopted by the Indian Supreme Court, they have faced considerable criticism in their respective jurisdictions. The application of strict scrutiny has often been criticised as being 'strict in theory but fatal in fact'.[536] The U.S. Supreme Court has not been able to develop sufficient levels of consistency in its application leading to uncertainty in terms of identifying the rights that trigger strict scrutiny, the acceptable levels of generality in stating the compelling State interest and the ambiguities in the narrow tailoring requirement.[537] In addition,various Justices in the U.S. Supreme Court have used three different ways of understanding and applying the test.[538] Similarly, there has been no consistency in application of the proportionality analysis in the ECt.HR (though it must be noted that the ECt.HR has not really developed an approach to affirmative action) and that arises from the fact that the Court has been unable to elaborate with sufficient clarity the 'fit' required between the aim and proposed measure. [539]

However, concerns with adopting these tests in the Indian context relates primarily to the manner in which these higher standards of scrutiny have been applied in the context of affirmative action cases in their respective jurisdictions.

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[536] Gerald Gunther, 'The Supreme Court, 1971 Term - Foreword: "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection"' (1972) 86 Harvard Law Review 1, 8; For a counter view arguing that application of strict scrutiny has not been fatal in fact see Adam Winkler, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts' (2006) 59 Vanderbilt Law Review 793.

[537] Richard H. Fallon Jr, 'Strict Judicial Scrutiny' (2007) 54 UCLA Law Review 1267, 1316-1331.

[538]ibid 1302-1316.

[539]Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer Law International 2003) 45-51.

Courts have used these tests to advance a symmetric notion of equality with the result that affirmative action policies have been stuck down. The U.S. Supreme Court has clearly shifted away from its earlier position in cases like *Fullilove v Klutznick*[540] that Congress need not necessarily be colour blind while enacting measures to remedy patterns of discrimination. However, in *Bakke*[541]Justice Powell writing for the plurality held that all kinds of race conscious measures, even if meant to benefit to minorities, must be subject to strict scrutiny. With its decisions in *City of Richmond v J.A. Croson Co.*[542] and *Adarand Constructors Inc. v Pena*,[543] the U.S. Supreme has established that it will apply strict scrutiny to all race based measures irrespective of whether it is for the benefit of minorities or not. However the plurality in both these cases makes it evident that even on application of strict scrutiny race based measures will be constitutional in some cases.[544] In *Grutter v Bollinger*[545],Justice Sandra O'Connor's majority opinion affirmed the position that achieving diversity in the classroom was a compelling State interest.[546] The Court also held that a policy that took race and ethnicity into account among other factors to determine diversity while reviewing applicants individually was narrowly tailored to achieve the compelling State interest[547].

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[540]*Fullilove v Klutznick* 448 U.S. 448 (1980).

[541] *Bakke Case*(n 26).

[542]*Richmond Case* (n 28).

[543]*Adarand Constructors Inc v Pena* 515 U.S. 200 (1998).

[544] Peter J. Rubin, 'Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw' (2000) 149 University of Pennsylvania Law Review 1, 37.

[545]*Grutter Case* (n 15).

[546]ibid 308.

[547]ibid 334.

Therefore, it can be seen that the U.S. Supreme Court adopts the same standard of review for substantive equality measures meant to ameliorate certain groups and for measures that are examples of invidious discrimination. A symmetrical approach to substantive equality and invidious discrimination has been subject to criticism. After the judgment in *Croson*, Yale Law Journal published a 'Constitutional Scholars Statement on Affirmative Action after *City of Richmond v J.A. Croson*'[548]. Thirty leading constitutional law scholars argued that race-conscious remedial measures 'should be seen in their historical context, and for their underlying purpose-not as a return to the *exclusionary* practices of the past but, on the contrary, as an attempt to *include* all Americans as first-class citizens'[549]. The statement argued that members of the U.S. Supreme Court had themselves acknowledged the moral difference between measures meant to remedy historical wrongs and those that reinforced negative stereotypes. The statement also rightly considered race-conscious measures not just as steps to remedy past wrongs but also as a means to ensure meaningful integration and prevent future discrimination[550]. As discussed in Chapter One, affirmative action measures in furtherance of substantive equality cannot receive the same constitutional treatment as race-conscious measures that result in invidious discrimination. Race-conscious measures are used very differently in these two contexts and Dworkin's argues (discussed in Chapter One) that a race-conscious measure in favour of Blacks in the U.S.does not mean that the law considers

[548]Joint Statement, 'Constitutional Scholars' Statement on Affirmative Action after *City of Richmond v J A Croson Co.*' (1988-89) 98 Yale Law Journal 1711.

[549]ibid 1712.

[550]ibid 1712-1713.

Whites to possess an inferior status, which would be the case if race was being used for invidious discrimination.

The European Court of Justice (ECJ) has also struck down affirmative action measures expressed through a tie-break policy in favour of women in public employment. In *Kalanke*,[551] the ECJ held that when male and female candidates have equal merit, a rule that tips the balance in favour of women even in areas where women are under-represented would violate Article 2(4) of the Equal Treatment Directive which provides only for equality of opportunity and not equality of results. In *Marschall v Land Nordrhein Westfalen*[552], the ECJ attempted to make amends by upholding a law that gave priority to women when the men and women were equally qualified. The Court relied on the savings clause in the concerned law, which allowed for the balance to be tilted in favour of the male candidate if there were specific reasons, to distinguish it from *Kalanke.* In *Badeck*[553], the ECJ upheld a women's advancement plan that targeted half the posts to be filled by women. It however did not mean quotas but that a woman would be chosen over a man when they were equally qualified except if there were factors that tilted the balance in favour of the man. *Abrahamsson v Fogelquist*[554] concerned a law that gave preference to women when they were sufficiently qualified but did not require them to be equally qualified as the men. The ECJ found the law could not in any manner be viewed as proportionate to the

[551]*Hansestadt BremenCase* (n 75).

[552]Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363.

[553]Case C-158/97 *ReBadeck* [2000] ECR I-1875.

[554]Case C-407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539.

aim being pursued and could not be upheld because it did not provide for an individual evaluation of applicants. As Fredman has noted, 'the emphasis on individual merit has meant that preference measures can only be legitimate in the narrowly circumscribed situation in which all the candidates are equally qualified" and it seems to be the ECJ's position that 'individual merit should trump the demands of substantive equality'.[555]

III-B(ii)(b): Judicial Confusion over Application of Strict Scrutiny in India

There has been increasing confusion in the higher judiciary in India about the application of 'strict scrutiny' as understood in the U.S. context. The first attempt at doing so was by a two-judge bench of the Supreme Court in *Anuj Garg v Hotel Association of India*[556]. In deciding the constitutional validity of a provision that prohibited the employment of 'any man under 25 years' or 'any woman' in any establishment where liquor or intoxicating drugs were consumed, Justice S.B Sinha in his opinion held that:

> It is to be borne in mind that legislations with pronounced 'protective discrimination' aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means. ……. The test to review such a Protective Discrimination statute would entail a two-pronged scrutiny: (a) the legislative interference (induced by sex

[555] Fredman, *Discrimination Law* (n 534) 244-245.

[556] AIR 2008 SC 663.

> discriminatory legalisation in the instant case) should be justified in principle; (b) the same should be proportionate in measure.[557]

However, Justice Sinha's judgment made no reference to an earlier decision by a five-judge bench (of which he was a part) of the Supreme Court in *Saurabh Chaudri v Union of India*[558], where the application of strict scrutiny as understood in the U.S. was rejected but nonetheless left room for confusion. Chief JusticeV N Khare's opinion held that 'the strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in the Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy.'[559] In *Ashoka Kumar Thakur v Union of India*[560], all five judges rejected the application of strict scrutiny. Chief Justice Balakrishnan held, 'The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of 'suspect legislation' and we have been following the doctrine that every legislation passed by the Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and

[557]ibid para 44-48.

[558](2003) 11 SCC 146.

[559]ibid para 36.

[560](2008) 6 SCC 1.

this Court rejected the same in *Saurabh Chaudri v Union of India*.'[561] By contrast, Justice Sinha has been a keen proponent of the strict scrutiny test and in *Subhash Chandra v Delhi Subordinate Services Selection Board*[562] he took the position that despite the verdicts in *Saurabh Chaudri* and *Ashoka Kumar Thakur* the door was still left open for the application of strict scrutiny. Writing the judgment on behalf of a two-judge bench, Justice Sinha held that:

> Saurabh Chaudri itself, therefore, points out some category of cases where strict scrutiny test would be applicable. Ashok Kumar Thakur solely relies upon Saurabh Chaudri to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard. We are of the opinion that in respect of the following categories of cases, the said test may be applied: 1. Where a statute or an action is patently unreasonable or arbitrary. See Mithuv State of Punjab (1983) 2 SCC 277; 2.Where a statute is contrary to the constitutional scheme. See E.V Chinniah; 3.Where the general presumption as regards the constitutionality of the statute or action cannot be invoked; 4.Where a statute or execution action causes reverse discrimination; 5. Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example Clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof; 6. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right; 7. Where a statute is 'Expropriatory' or 'Confiscatory' in nature; 8.Where a statute prima facie seeks to interfere with sovereignty and integrity of India.
> However, by no means, the list is exhaustive or may be held to be applicable in all situations.[563]

This position taken in *Subhash Chandra* is of critical importance as demonstrated in the AP HC's decision in *Muralidhar Rao*. The majority relies on Justice Sinha's ruling in *Subhash Chandra* to argue for strict scrutiny and then

[561]ibid para 184.

[562](2009) 15 SCC 458.

[563]ibid para 43.

subsequently proceeds to analyse the minute details of the methodology adopted by the State. Justice Sinha's position on the applicability of strict scrutiny is erroneous because it goes against clear precedent on the issue established by benches of higher strength. The concern with the application of strict scrutiny is demonstrated in *Muralidhar Rao*. It provides judges the opportunity to question the methodology adopted by the State in defining backwardness, identifying beneficiaries and establishing 'inadequacy of representation' under Article 16(4). The Indian courts seem to be heading towards the same confusion as the U.S. Supreme Court where special measures for certain groups in the pursuit of substantive equality are tested using the same standards used for invidious discrimination. A heightened scrutiny is being used to place a very high burden of justification on the State and thereby making it far more difficult to design special measures for groups identified in the Constitution. The use of heightened scrutiny to make special measures difficult to implement is even more problematic in the Indian context because the Constitution contains explicit provisions that authorise the use of special measures, including reservations.

III-B(ii)(c): Demand for Data as Scrutiny: New Directions with an Unclear Basis

Two recent decisions, one from the Andhra Pradesh High Court and the other from the Supreme Court, might well radically alter the dynamic between the courts and the State in the context of reservations.

In the judgment delivered in *R. Krishnaiah v Union of India* (May 2012), a Division

Bench of the Andhra Pradesh High Court, comprising Chief Justice Madan Lokur and Justice Sanjay Kumar, struck down the two Office Memorandums of the Government of India (dated 22 December 2011) that carved out a 4.5 per cent sub-quota for minorities from the overall 27 per cent OBC quota in Central Government posts and certain central educational institutions. The Court held that there was no material placed before the Court, in terms of establishing any special backwardness, which justified creating a sub-group of religious minorities within the OBC category. The Court highlighted the fact that the sub-group comprising Muslims, Christians, Sikhs, Buddhists and Parsis was not homogenous in terms of backwardness and this fact indicated to the Court that the sub-quota was purely based on religion. The Court also ruled that the Government of India had an obligation to consult the National Commission for Backward Classes (NCBC) under the Act establishing the Commission and that this obligation existed even though the advice of the NCBC was only 'ordinarily binding' on the Government under s.9(2) of the NCBC Act.

In *U.P Power Corporation v Rajesh Kumar & Ors* (April 2012), a two-judge bench of the Supreme Court (Justices Dipak Misra and Dalveer Bhandari) struck down Rule 8-A of the U.P. Government Servants Seniority Rules that provided for consequential seniority. Rule 8-A was inserted pursuant to the 85th Constitutional Amendment which specifically permitted, through Article 16(4A), consequential seniority in promotions. Reservations in promotions had seen a lot of disagreement between the Supreme Court and the Parliament before the Supreme Court in *M. Nagaraj v Union of India* (2006) upheld the validity of the 77th, 81st and 85th Constitutional Amendment Acts and ruled that Articles 16(4A) and (4B)

were only enabling provisions. As a result, the State can provide for reservations in promotions and attach with it the benefit of 'consequential seniority'. However, in *U.P Power Corporation* the Court has repeated what it held in *Nagaraj,* that Article 16(4A) is merely an enabling provision and it does not lend automatic validity to all provisions of consequential seniority in the various Rules. The conditions laid out in *Nagaraj* about determining backwardness, adequacy of representation and efficiency of service will have to be established.

Both decisions make very important moves as far the burden on the State to present empirical data is concerned. The courts have made it clear that the State cannot rely on general data that was collected for other purposes. The State, they say, must collect very specific data that is aimed at providing empirical support for the specific preferential policy in question. In *Krishnaiah,* the AP High Court held that it was not relevant, for purposes of Articles 15(4) and 16(4), to rely on the Ranganath Mishra Commission Report and a more specific exercise had to be undertaken to demonstrate why the minority groups identified in the memorandums were more backward than other groups in the OBC list. The AP High Court took a similar approach in *T Muralidhar Rao v State of AP* (2010) when it struck down the Andhra Pradesh Government's move to provide a 4.5% quota for OBC Muslims in the State (the Central Government's measure mentioned above is for all minorities and not just Muslims) by holding that the State Government had relied on secondary data and had not produced specific empirical data that demonstrated how the backwardness and lack of representation of Muslim OBCs was different from that of other OBCs. Similarly in *UP Power Corporation*, relying on *M.Nagaraj,* the Supreme Court rejected the claim

that there was enough material that indicated a general inadequacy of representation of Scheduled Castes in promotional posts *per se*. The Court declined to accept this level of generality and said that the relevant unit for determining 'adequacy of representation' is the cadre strength.

Such a move raises very important issues for the relationship between the courts and the State on reservations. The courts are clearly looking to provide an extremely narrow meaning to the phrase 'in the opinion of the State' in Articles 16(4) and 16(4A) when deciding the adequacy of representation. The courts seem to be saying that the State cannot base its decision on data that might generally indicate inadequacy of representation and it is a very pointed exercise, down to the cadre, that is required.

I submit that *M Nagaraj* was wrongly decided, especially in the context of the condition laid down that the State will have to determine backwardness (in very obvious references to the 'creamy layer') while taking measures under Article 16(4A), which deals with promotions for Scheduled Castes and Scheduled Tribes exclusively. However, in *UP Power Corporation* the Supreme Court seems to ignore the condition laid down in *Nagaraj* and to concentrate only on the requirements of demonstrating 'adequacy of representation'. Additionally, these cases raise the inevitable question of the deference that Courts must exhibit towards the 'opinion of the State' under Article 16(4) and I think the courts are setting the bar too high.

III-B(ii)(d): Appropriate Judicial Scrutiny in Reservations Geared Towards Substantive Equality

In regard to the conferral of benefits to SCs and OBCs, the proposal here is for a heightened and more relevant scrutiny in the context of reservations. Drawing upon the proportionality standard applied in the EU, I seek to develop a Modified Proportionality Review to be applied in cases dealing with reservations for SCs and OBCs. Though the Modified Proportionality Review (MPR) will be a higher level of judicial scrutiny than the reasonableness review currently applied by courts in India, it is not designed to question the legitimacy of reservations in favour of Scheduled Castes and OBCs. As will be evident from the details of the MPR below, it is primarily designed to take the project of substantive equality deeper by ensuring that reservations benefit the most marginalised within the beneficiary groups. It is premised on the position that the project of substantive equality in the context of the reservations in the Indian Constitution does not end by just providing reservations and that the terms on which reservations are distributed within the beneficiary groups are just as integral. The aim here is to develop an appropriate level of judicial review to ensure the fairest distribution of reservations within beneficiary groups.

Before providing the details of the MPR, it might be worthwhile to first briefly state the elements of the proportionality review. Proportionality review suggests a four-stage test, which in essence asks the following questions[564]:

[564] Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing 2002) 27, 28.

a. Is the stated aim of the measure in question legitimate?
b. Is the measure adopted suitable for achieving the stated aim?
c. Is the measure adopted necessary for achieving the stated aim?
d. If the aim is legitimate and the measure adopted is suitable and necessary, does the balancing of ends and means appear to be proportionate?

The MPR is a modification of the proportionality review because it would not require the State to demonstrate that reservations are 'necessary', in the sense of being the only method to achieve the aim, or that it is the least restrictive method to achieve the upliftment of SCs and OBCs. The recommended standard as far as 'necessity' is that of reasonableness. The MPR also adopts an internal balancing approach as far as the last question is concerned. Here MPR is not concerned with the balance between furthering the rights of SCs and OBCs as a whole on the one hand and the exclusion of non-beneficiary groups on the other. What will be required to be balanced are the internal demands within a beneficiary group – whether the benefit of reservation can accrue on the same terms to the group as a whole or whether the State is required to undertake a more focused and nuanced approach to distribution of reservations within beneficiary groups. These two aspects, along with MPR's approach to the first two aspects of proportionality review, are further elaborated below.

While applying the MPR, two questions must first be resolved in terms of the constitutional provisions for SCs and OBCs. The constitution specifically permits special measures including reservations for SCs and OBCs through Articles 15 and 16. The State has a clear constitutional mandate for taking such measures and therefore there need not be any concern about Indian courts

striking down such measures.[565] However, it is not my argument that there must be complete judicial deference to the State at these stages, especially at the stage of determining suitability. As Sandra Fredman has argued, 'judicial support for affirmative action that furthers substantive equality should not be confused with deference to governmental decisions. Courts should still require governments to demonstrate that the aim of the measure is indeed to further substantive equality and to justify their means. Justification need not amount to proof that there were no suitable alternatives, nor should the State have to demonstrate that the programme is effective. This preserves the space for innovation ….. But justification does require that the State demonstrate that its measures are not based on assumptions, generalizations, or stereotypes'[566].

As far as the question of 'necessity' is concerned, as stated earlier, it is recommended that the reasonableness standard must be adopted. Justice Moseneke of the South African Constitutional Court in *Minister of Finance v van Heerden*[567]addressed this use by stating that the State need not demonstrate absolute necessity of the measure chosen to achieve the State's objective of protecting and advancing the interests of individuals or groups who have been disadvantaged. All that the State needs to demonstrate is that the measure adopted is 'reasonably capable of attaining the desired outcome'[568]. In addition to the normative force of this argument, this would be the appropriate standard to

[565] Sudhir Krishnaswamy and Madhav Khosla, 'Reading AK Thakur v. Union of India: Legal Effect and Significance' (2008) XLIII(23) Economic and Political Weekly 53, 59.

[566] Fredman, *Discrimination Law* (n 534) 272-273.

[567]*Minister of Finance v van Heerden* 2004 (6) SA 121 (CC).

[568]Fredman, *Discrimination Law* (n 533) 272; ibid para 41.

adopt in the Indian context as well due to the enabling provisions in Articles 15 and 16. In the fourth stage, the question that remains to be answered is whether the State can assert that the aim of providing reservations is to ensure the presence of SCs and OBCs per se in educational institutions and public employment without having to concern itself with which SCs and OBCs find their way into educational institutions and public employment. The State may well argue that the profile of the individuals from SCs and OBCs is not a relevant consideration since it cannot be denied that all individuals that come through reservations will be SCs and OBCs and that satisfies the aim of the State. MPR provides us with the necessary tools to question such an approach. Undoubtedly, the aim of providing reservations to ensure the inclusion of SCs and OBCs in society by guaranteeing their presence in educational institutions and public employment finds strong constitutional approval. However, MPR forces the court to ask the question whether the infringement of rights of the most marginalised groups within the beneficiary groups is permissible to achieve such an aim. The determination of whether there is, in fact, such a restriction is a determination that the Courts have to make in instances where groups per se are identified for benefits under Articles 15 and 16. It has been established in the preceding sections and chapters that a framework that views beneficiary groups as homogenous categories does exclude relatively marginalised sections within the beneficiary groups. A higher standard of review is then required to test whether a homogenous approach is constitutionally permissible when, by its operation, marginalised groups are effectively excluded. It is open to the State to justify why a further classification within the beneficiary groups is not required in particular instances but it would be a necessary step of the MPR for the State to justify the

lack of a substantive equality approach within the beneficiary group. Such step within the MPR ensures the deepening of substantive equality and ensures that the project of substantive equality does not end at the stage of merely providing reservations. The fairest possible distribution of reservations within the beneficiary groups must be a critical concern in the State's attempt to achieve substantive equality and it is only appropriate that the judiciary adopts a standard of review for reservations that facilitates that process.

III-B(ii)(e): Intersectionality and the Modified Proportionality Review

There is another important point that needs to be clarified in light of the intersectionality analysis that was discussed in earlier sections. Does this standard then mean that a reservation policy can be challenged on the basis that every single point of intersection of the various marginalisation axes must be accounted for specifically in the reservation scheme? Is the argument that the reservation scheme provides for different quotas for widowed and married Dalit women with relatively lower status (since after applying intersectionality they would be in different positions of marginalisation) or that quotas for widowed Dalit women with lower status have to be different from that for widowed Dalit women with relatively higher status? If this is the level of micro-management that is involved, the standard would not be judicially maintainable in the context of homogenous treatment of SCs and OBCs. The application of MPR must be used to require the State to apply its mind in designing reservation schemes that take into account these different aspects of marginalisation. It obviously need not be reflected in dividing the available 15% reservations for SCs as a whole amongst

the various points of intersection that are identified. That kind of division would be meaningless and far too inconsequential for any group. The State is at liberty to address intersectionality in a manner it deems fit but that liberty does not extend to ignoring it. It is up to the State to design reservation schemes that are capable of addressing the differences amongst the SCs. At the risk of being repetitive, the only option before the State is not to try and provide for a separate quota for each intersectional experience that it identifies. However, the end result of applying MPR would be that it is not an option to achieve the presence of members of beneficiary groups by excluding the most marginalised sections within those groups. And therefore, the Supreme Court's position in *Indra Sawhney* that sub-classification is merely permissible and not mandatory[569] would not be tenable.

III-C: A Model Based on Priority

This part attempts to provide a brief description of a possible model for reservations of SCs. The Andhra Pradesh legislation discussed in Part-I of this chapter suffered from the same flaw as the homogenous treatment of SCs, albeit to a different degree. When 59 SCs are divided into four groups, the groups have a hierarchy operating within themselves as well. This point was elaborated in Chapter Two and this problem was identified long before the Commission of Enquiry reports provided empirical data.[570] It was also discussed in the earlier section that providing quotas for each intersectional experience is extremely

[569] *Indra Sawhney*(n 279) para 92A.

[570] Uma Ramaswamy, 'Protection and Inequality among Backward Groups' (1986) XXI(9) Economic and Political Weekly 399.

impractical. However, the intersectionality analysis provides us with very significant insights. Any system must have the ability to address the interests of the most marginalised in a continuous manner. A possible model is to import the concept of the 'creamy layer' with slight modifications. The creamy layer test was first adopted in *Indra Sawhney* (only in the context of OBCs) where the Supreme Court directed the government to draw up a list of criteria to exclude those amongst the OBCS who were no longer backward despite belonging to the groups identified as comprising OBCs. The test essentially involves criteria based on the level of public employment, income, land holdings and educational attainments of the family which exclude people that would otherwise be eligible. In the context of the OBCs, individuals that fall within the creamy layer are excluded completely and cannot avail reservations available for the OBCs.

In the context of SCs, a similar test with different effects might be called for in order to ensure the inclusiveness of the marginalised groups within the SCs.[571]Space and scope of this thesis prevents a detailed analysis of the creamy layer criteria used and its relevance for the SCs. It is an issue that requires detailed consideration and research that is to be further taken up. However, assuming a set of criteria similar to that of the creamy layer is arrived at for the SCs, I argue that those that fall within the recommended SC creamy layer should

[571] The existing discussion on creamy layer exclusion for SCs from the Supreme Court is at best vague and inaccurate. In *M. Nagaraj v Union of India* AIR 2007 SC 71, five judges of the Supreme Court seem to have incorrectly suggested that a valid reservation policy for SCs (atleast in matters of promotions) is contingent on the exclusion of the creamy layer (para 122-124). However, the Court upheld the impugned constitutional amendment even though it did not provide for exclusion of the creamy layer amongst the SCs. The general requirement of exclusion of the SC creamy layer suggested by the Court contravenes the decision of a nine judge bench to the contrary in *Indra Sawhney*; In *Ashoka Kumar Thakur*(n 195), Bhandari J. argues that the creamy layer requirement is part of the ratio in *Nagaraj* (para 389) but explicitly leaves the application of creamy layer to SCs as an open question (para 395).

not be completely excluded from enjoying the benefits of the reservations. This is because economic mobility does not necessarily translate into removal of social discrimination. However, the first priority for reservations earmarked for the SCs will go to those outside the creamy layer. An essential feature of the creamy layer test would be that there would be no identity-based criteria. However, it is acknowledged that a poor Dalit with a relatively higher status might be in a better position to utilize the benefits than a poor Dalit with relatively low status. Despite being an inevitable outcome, the system has the advantage of being a constantly evolving one. The composition of those outside the creamy layer will never be constant. In this constant fluidity, this system provides for the very real possibility for the marginalised sections to benefit. The current system based on homogeneity ensures that it is those who have benefited from reservations who repeatedly keep benefiting. The marginalised sections outside this Dalit middle class face significant exclusion on the various axes and the system does not provide means to address that continuous exclusion. The recommended system would clear the MPR because a mechanism is created to constantly re-evaluate who the beneficiaries are and ensures the most deprived move closer to enjoying the benefits. This system also has the benefit of not being open to the criticism that it results in the splintering of the Dalit political movement along the lines of identity. Since this mechanism is equally beneficial to the worse off amongst the Dalits with relatively higher status, the divisions are not along the basis of identity but along the lines of deprivation. However, this system is open to one important criticism as pointed by Professor Surinder Jodhka when I interviewed him at the Jawaharlal Nehru University in Delhi. The system assumes that the most marginalised amongst the Dalits have the capability to utilize the reservations that

are on offer for them. To utilize the reservations in higher educational institutions, individuals require secondary education and to utilize reservations in public employment also requires certain educational requirements. Dr. Jodhka argues that, by default, all the benefits would go to those within the creamy layer. It is a criticism I accept but the solution then is not to require a mechanism that ensures that the marginalised stay marginalised. My recommended scheme opens up the opportunity for the most marginalised sections to achieve a certain degree of mobility. The issue of the capability of individuals to utilize that opportunity is a burden that the State must bear. Reservations cannot be the sole strategy for empowerment of marginalised sections in India. A legal framework for reservations cannot solve capability deprivation on many fronts and the lack of those capabilities undoubtedly affects the potential of reservations as a tool of empowerment. Positive State action in school education, rural and urban infrastructure, public health, nutrition etc is required to permit reservations to make a transformative contribution.

CONCLUSION

The issue of sub-classification amongst SCs and OBCs raises very important questions for India's reservation policies. Both examples in this thesis are fundamentally concerned with the position of the most marginalised sections within each of those beneficiary groups. In terms of the distribution of reservations within these beneficiary groups, it would be in the interests of justice and fairness that reservations must contribute to the empowerment of the most marginalised sections. Currently the most marginalised sections within beneficiary groups benefit the least from reservations. This phenomenon undermines the legitimacy of reservations because reservations are then viewed as benefitting those individuals who need it the least within the beneficiary groups along with repeatedly benefitting such individuals/groups. The internal marginalisation of these groups is multidimensional and any solution to address the distribution of reservations must take that into account. While the issue concerning the fairness of internal distribution provides the opportunity to make the administration of reservations fairer, it also exposes the limitation of reservations as a tool of empowerment.

Much of the inability and unwillingness to address the issue of internal marginalisation amongst beneficiary groups can be attributed to the Supreme Court's failure to develop a clear normative framework. The Court has undoubtedly radically altered the manner in which it views the relationship between reservation and equality. By viewing reservations as a facet of equality it

has failed to provide the necessary nuance to reservations jurisprudence in India. The Court has not developed a normative framework that informs the creation of beneficiary groups and neither has it explored the normative role of reservations in the spheres of higher education and public employment. It has not engaged in the exercising of determining the nature of exclusion and marginalisation that informs the lived realities of the beneficiary groups. The nature of beneficiary groups is different and therefore reservations cannot be seen to perform the same function across all groups. Similarly, reservations in higher education and public employment cannot be seen as having the same functions. Any nuanced normative framework of reservations in India must take into account this interaction between the reasons for creating certain beneficiary groups and the role reservations play in different spheres. This interaction should determine the terms on which reservations are distributed internally within the beneficiary group along with deciding the burden of justification on the State, quantum of reservations, the terms on which we might envisage a sunset clause etc.

The appropriate role of merit and efficiency in the context of higher education and public employment respectively has not been explored either. One of the fallouts of this lack of clarity has been its use in the distribution of benefits within beneficiary groups. The role of merit and efficiency in the distribution of reservations within the beneficiary group has not received any attention whatsoever. It has been assumed to be unproblematic that the paradigms of merit and efficiency must be invoked to decide the individual beneficiaries within the beneficiary groups. While providing reservations for beneficiary groups, it is the

use of merit and efficiency to decide the distribution of benefits that is being sought to be limited. However, it is these very paradigms that are used to decide the beneficiaries within the beneficiary groups. And these paradigms operate in a exclusionary manner, excluding the most marginalised within these groups.

In a system that is governed by group-based reservations, it is tempting to treat beneficiary groups as being internally homogenous. But this assumption of internal homogeneity along with the use of merit and efficiency ensures that the most marginalised are left behind. The appearance of homogeneity when the beneficiary group is observed from an external viewpoint cannot be the guiding principle when deciding distribution of reservations within the group. Be it the groups within the SCs or the Muslims in the OBC category, there is no internal homogeneity as has been demonstrated in the preceding chapters. While the group as a whole does meet a certain minimum threshold as far as backwardness and marginalisation is concerned, the nature and extent of the backwardness within the group varies.

The solution to the problem of internal marginalisation cannot be sub-classification based on a single axis. Therefore, Andhra Pradesh's solution to further sub-classify only on the basis of caste cannot address the problem. It is not an effective solution because the internal marginalisation is now divided into four further sub-groups. Internal hierarchies would operate within those sub-groups as well and we would not get very far in achieving fairer distribution of reservations within beneficiary groups. In understanding marginalisation within beneficiary groups it is important to adopt a framework that permits a more substantial understanding. Within the Scheduled Castes and amongst Muslim

OBCs, marginalisation must be understood using the framework of intersectionality. Gender, religion, class and caste are all relevant factors that are intrinsically linked to the experience of marginalisation within these groups. In order to ensure a fair distribution of reservations, sub-classification must necessarily take these factors into account. I have argued that substantive equality would demand that sub-classification must necessarily be done when we are concerned with providing reservations for beneficiary groups. Towards that I have argued for a standard of judicial review that would require the State to explain reasons for not undertaking the exercise of sub-classification.

Sub-classification as an issue presents India's reservation system a significant opportunity to address the foundations upon which it is built and evaluate the evolving role of reservations in contemporary India, both in terms of its possibilities and limitations. History certainly has its place in this endeavour and must certainly contribute to the understanding the role of reservations. The considerations that influenced the inclusion of reservations for certain groups while excluding it for certain other groups are important components of the contemporary constitutional discussion but they cannot be conclusive of the terms on which these groups access reservations. The exclusion of Muslims from reservations during the Constituent Assembly Debates is a perfect example. That decision of the Constituent Assembly was a clearly a product of the events surrounding the partition of India and it cannot be seen as a conclusive determination of the demand for a sub-quota for Muslim OBCs. It is important that the Supreme Court acknowledges the change in political, social and economic reality of India and its impact on the experience of marginalisation amongst

Scheduled Castes and Muslims. Any attempt to achieve clarity about the importance of reservation for different beneficiary groups must take into consideration the contemporary experience of the groups. The normative framework about the role of reservations must also similarly reflect the various complexities that inform access to higher education and public employment in contemporary India.

The operation of the reservation policy in India currently suffers from the fault that it is over-inclusive and under-inclusive simultaneously. It privileges access to reservation to many groups and individuals who are far ahead than the most marginalised within the beneficiary group with the effect that the most marginalised sections within these groups have not been the main beneficiaries of reservations. This effective exclusion of the most marginalised has severely restricted the ability of reservations to influence social change. It has undoubtedly led to the creation of a middle class within the various beneficiary groups but that has resulted in very little impact in terms of social transformation. Reservations, at least for the Scheduled Castes, has been an issue around which political mobilisation has occurred. But it must be remembered that even this political mobilisation has been surrounding the improper implementation of reservations or the demand for reservations as such. It would be inaccurate to see this as a transformative impact of reservations as a tool of empowerment. Undoubtedly, reservations has democratised the spheres of higher education and public employment by opening it up to members of marginalised groups. But the fundamental question that the Supreme Court has never answered is whether the

role of reservations is to merely ensure the presence of members of identified groups in a certain proportion. That would be a rather thin account of the role of reservations envisaged in the Constitution. If the Supreme Court indeed believes that it is this thin account about the role of reservations that must be adopted, the role of the sub-classification debate is rather limited. It is limited because then it does not matter *which* Scheduled Castes or which OBCs find their way into higher education and public employment. However, I have argued that the Constitution does not envisage such a thin account for the role of reservations. Ensuring the presence of certain groups is certainly one of the aims but the aim of reservations cannot be limited to that. There is certainly an agenda of upliftment and empowerment of individuals attached to the idea of reservations in the Constitution along with furthering group interests. The critical flaw with the Supreme Court's approach to reservations has been that it has proceeded on the assumption that reservations largely exist to ensure presence. The role reservations might play in empowerment and upliftment of individuals belonging to marginalised groups has never really received attention from the Court. However, it is the failure of reservations to adequately address its empowerment function that has led to the crisis of legitimacy for reservations in India. Yet, this crisis has been sought to explained within the framework of its function to ensure presence and has in turn led to a lot of confusion. The demand for sub-classification presents the opportunity to explicitly acknowledge the different functions of reservations like empowerment, upliftment and redistribution. Not only is it an opportunity for acknowledgment, it is also an opportunity to correct the manner in which reservations fulfill these aims. Beyond ensuring presence, the terms on which reservations can be accessed and by whom lie at the very

heart of its different roles. Intersectionality begins to provide such a framework within which the most marginalised sections within the beneficiary groups might be identified more easily.

While that potential exists, the demand for sub-classification also exposes the inherent limitations of reservations as a tool of social change. Just like the contemporary experience of beneficiary groups needs to be engaged with, so does the potential of reservations in contemporary India. As the State continues to increasingly withdraw from the social sector, the reservation pie keeps getting smaller. While this increasing pressure on reservations signals the crucial role of sub-classification, it also highlights the limited impact reservation can have on social transformation. Undoubtedly, reservations have opened up spaces for marginalised groups from which they were previously excluded, but reservations lack the transformative power that is required to go to the very roots of marginalisation. The issue of sub-classification demonstrates why reservations do not have that transformative power in the context of group-based measures. Even by applying the framework of intersectionality, the project of benefits reaching *all* those who are the most marginalised cannot be completed by using reservations. Apart from being limited in their availability, reservations do not address the root cause of marginalisation and exclusion. In many ways, it addresses the consequences of marginalisation without having the ability to attack its root causes. Questions of ownership of land, access to and ownership of capital, stake in the governance structures of different aspects of the economy are all factors that go to the heart of marginalisation of different beneficiary groups. Given the

deep structural issues that have caused the marginalisation, ensuring a certain percentage of places in higher education and public employment through reservations cannot be the main strategy that is employed to combat marginalisation and exclusion. That is not to argue that reservations do not make an important contribution in the effort to combat marginalisation. They send out the message that even the most oppressed and exploited sections of a society have a stake in important opportunities that the State has to offer. But the emphasis on reservations in India as the primary tool to address the concerns of these beneficiary groups is misplaced. Reservations cannot reach the most marginalised sections of beneficiary groups despite adopting a framework that draws on intersectionality. A framework that draws on intersectionality will certainly make the distribution of reservations within beneficiary groups fairer and more just and thereby contribute to its legitimacy. However, what it cannot do is convert reservations into a transformative tool in society.

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