

UNPACKING RESERVATIONS IN INDIA: THEORY, PRACTICE, AND BEYOND

India's experiment with affirmative action, in the form of quota-based reservation policies, has often been faced with questions revolving around equality, non-discrimination, and dignity. The Indian Constitution affirmatively enshrines preferences to disadvantaged groups like women, children and marginalized castes, and since its inception, reservations have been the dominant framework for operationalizing these preferences. While the reservation policies have not been free of contestation, they have survived and expanded their reach over the years, and are now entrenched in Indian constitutional law and politics. However, debates over India's reservation model of affirmative action have now again come to the forefront of the sites of constitutional contestation - given the recent introduction of the Constitution (One Hundred and Third Amendment) Act, 2019, the rising instances of demands for quota by politically powerful communities, and the use of reservations for domicile-based protections, among other things.

The XIII NLSIR-Samvād: Partners Symposium seeks to address some critical gaps in this conversation and generate a platform for structured discussion on this pertinent issue. The Symposium is divided into three Sessions. In Session I, titled '*Reservations: Rethinking Roots in Constitutionalism*', we seek to achieve a re-imagination of the constitutional understandings of substantive equality, dignity and opportunity, informed by recent political and jurisprudential thought. Session II, titled '*Mapping the Reservations Landscape: Policies and Precedents*', would use the normative constitutional framework constructed in Session I to assess the recent practice of reservations in India - both by the legislature and the judiciary. Lastly, Session III, titled '*Deepening and Widening Affirmative Justice: The Way Forward*', seeks to initiate a policy discussion on the possible routes that could take affirmative action in India forward, from the place it is in, at this point in Indian constitutional politics.

SESSION I – RESERVATIONS: RETHINKING ROOTS IN CONSTITUTIONALISM

Recent scholarship has focused on understanding the theoretical underpinnings of the promise of substantive equality contained in the reservation framework within the Indian Constitution. This framework is primarily supported by Articles 15, 16, 29 and 335 of the Indian Constitution, with provisions like Article 243D furthering the equalising action to the grassroots. The judicial reading of these provisions through text, structure, doctrine and history is now increasingly

supplemented by more interdisciplinary lenses for equality and non-discrimination, informed by concepts such as constitutional morality, demosprudence and transformative constitutionalism. This Session seeks to discuss these theoretical perspectives, and explore fresh aspects to take this conversation forward. By doing this, it seeks to lay strong theoretical foundations for a radical rethinking of Indian constitutionalism and the constitutional guarantees of equality and dignity - as informed by new understandings gleaned from caste/race/feminist scholarship, political and sociological thought.

This Session would first attempt to grapple with the primary criticisms levelled against reservations. These include ideas of efficiency, merit and the problems with the framing of reservations in the equality framework, which some scholars perceive to be insufficient as it looks at the absence of discrimination and difference, unlike a social justice framework which involves rethinking of the underlying values as well. Towards this end, the Session seeks to deconstruct placeholder concepts like ‘merit’ and ‘efficiency’, through various schools of thought. This could include lessons from, *inter alia*, contemporary utilitarian understandings of efficiency and diversity, sociological theories delving into the criticality of intergenerational privilege to success and merit, and critical race theories’ insights into the question of how reservations extend to different groups of people. The Session would be careful to locate these arguments within a matrix informed by intersectionality in terms of gender, caste, class, religion, language, *etc.*

Reflecting on motifs in political philosophy which provide the basis for reservations and affirmative action could also deeply enrich the discourse on these issues. The model in India is premised on equality through opportunity and decision making in institutional settings by way of equal representation. However, there is a need to reconcile this with alternative analyses of power which view social and political structures as being systemically loaded against the ‘have-nots’ - thereby perpetuating inequalities and differences, and making equality of opportunity attached to offices meaningless. These conflicting views of power present an interesting line of inquiry for theoretical thought on reservations, particularly its adequacy, or lack thereof, as a tool to achieve substantive equality - and are sought to be addressed in the Session.

While relying on political and jurisprudential thought from all over the world, the Session remains conscious of the need to keep the particularities of the post-colonial Indian state in mind, to achieve any meaningful engagement in the Indian context. Over the years, India’s capitalist economy has recast group life into new emergent relationships which, if probed further, may require a relook at caste as a category within the reservations framework and our

foundational conceptions of Indian society, in light of the changes in political economy. The pressure of urbanization, the creation of groups defined in terms of class and occupational structure, and a host of other development factors, have necessitated the creation of the nebulous Other Backward Classes ('OBC') category to accommodate new groups of people who have been disproportionately affected by the socio-economic realities post-independence, yet do not fall within the traditional caste hierarchies. An evaluation of these factors which contribute to the continuous proliferation of more disadvantaged groups could perhaps also explain the differential reception and success of the reservation model in different parts of India. This Session seeks to aid this exercise in explanation.

Yet, such a relook cannot ignore the reality that even today, a closer look at India's poverty reveals the discrimination inherent in the allocation of jobs, land, basic resources and amenities, and physical security - revealing that the worst affected are the lowest in the caste order. This indicates that there is a need to reconcile the complexity of the caste system in its various iterations cutting across religious lines, the existence of compound classes with intersectional disadvantages within those recognised as socially and educationally backward ('SEBC'), the demographic composition of the country complicated by economic realities and altered identities - with a reservation policy which currently functions on a group subordination model without any internal hierarchy of groups based on relative inequalities. The Session, in its discussions, must also explore the way the conceptualization of development by the post-colonial capitalist state and its emphasis on productivity at the macroeconomic level, constructs unique understandings of terms like "merit", "efficiency", and "socially and educationally backward".

This Session is, thus, tasked with searching for fresh theoretical frameworks and justifications that hopefully would not just inform the theoretical grounding of reservations but would also creatively re-imagine the understanding of substantive equality and dignity in Indian constitutionalism by looking beyond representation and opportunity to facets like public reasoning, hierarchies among various disadvantaged castes, and reconstitution of institutional power relations. Any theoretical takeaways from comparative contexts and existing scholarship in this Session require a careful reconciliation and analysis of these issues peculiar to India, for it to appropriately serve to inform our constitutionalism and jurisprudence on reservations and affirmative action.

SESSION II – MAPPING THE RESERVATIONS LANDSCAPE: POLICIES AND PRECEDENTS

Session I set the stage for a radical re-imagination of the constitutional guarantees of equality, dignity and opportunity, in line with newer theoretical understandings gained from political and jurisprudential thought. It is against this background that Session II seeks to develop on that imagination and utilize those normative frameworks to assess India's reservation policies as well as the associated Supreme Court jurisprudence.

Articles 15, 16, 29 and 335 of the Indian Constitution form the bulwark of the provisions pulled into play by reservations, but other provisions such as Article 243D are also important to extend the equalising action to the grassroots. These provisions have been significantly supplemented by the Indian Supreme Court, which has consistently re-interpreted them to shape governmental policies on reservations. Beginning with *Champakam Dorairajan's* rejection of caste-quotas as a mode of reservations, to defining an upper limit of 50 percent for reservations in *MR Balaji*; and from rejecting mere economic backwardness as a criterion for reservations in *Indira Sawhney*, to allowing reservations in promotions without any 'demonstrable' backwardness in *Jarnail Singh* - the Supreme Court has played a key role in defining reservation policies as they exist today. With the pending constitutional challenge to reservations for the Economically Weaker Sections ('EWS') of the population, and the principled approval to the application of 'creamy layer' to SC/ST reservations in *Jarnail Singh*, the Supreme Court is again at the helm of affairs in shaping reservations for the future. As a result, one of the key themes that this session explores is the Supreme Court's jurisprudence on reservations, an assessment of its place in the normative frameworks informing the Constitution (as gleaned in Session I), and thus, a sense of the direction the Court must take in upcoming litigation.

While the contribution of Supreme Court jurisprudence towards India's reservation policies is immense, the genesis of most of these policies has been through governmental commissions. Thus, another theme that this Session must address is the rationale employed by such commissions to carve out categories of beneficiaries in the reservation policies and the respective percentages reserved for them. Varying metrics such as historical discrimination, social backwardness or factors such as bargaining power of the groups demanding benefits, socio-political scenario of the country, *etc.* have informed the commissions' decisions. Developments such as the Constitution (One Hundred and Third Amendment) Act, 2019, state legislations such as the Andhra Pradesh Employment of Local Candidates in the Industries/Factories Act, 2019, and judicial decisions such as the Bombay High Court's reliance on economic backwardness as an indicator of social backwardness to uphold reservation for Marathas, and its insistence on an

element of *class backwardness* as opposed to solely caste - deserve attention in this regard. At the same time, it is relevant to explore the reasoning behind the categorisation of inequalities based on gender/disability and caste/backwardness into *horizontal* and *vertical* reservations respectively within the scheme of Article 16, in regards the distinctions between the two as well as the possibility of an interplay between these categories to address the question of intersectional disadvantage.

A discussion on the underlying rationales also raises questions regarding the methodology employed in conferring the benefit of reservations. Currently, states can extend such benefits to any community if they are able to justify this on the basis of *quantifiable data*. However, considering the over-reliance of courts on the empirical data submitted by the state and the requirement of efficiency under the Constitution, this Session seeks to bring to fore the need to revisit the methodological approach.

Another factor that has recently started shaping the reservation policy in India is the exponential increase in peoples' movements, which has led to several state legislatures succumbing to the growing demands from dominant communities for quotas in government employment and educational institutions. Therefore, the final theme that this Session explores is the impact of peoples' movements on the reservations landscape in India. These political movements have forced the states to exceed the 50 percent reservation limit set out in *Indra Sawhney*, which has the potential to create a heterogeneous scheme of protection which may disproportionately benefit a particular caste or class to the exclusion of the genuinely disadvantaged. In light of the ensuing political scenario, there is a need to examine whether such heterogeneity is beneficial for India's reservation landscape, and whether the constitutional logic of the 50 percent limit furthers the goal of substantive equality enshrined in the Constitution. This discussion would also necessarily bring within its fold the role of co-operative federalism in the enactment of these policies. The strong central oversight in the differential categorization of backward classes by state governments presents an interesting nuance to be considered. Additionally, in light of the Constitution (One Hundred and Third Amendment) Act, 2019, which provides for exclusive central control over designation of SEBC, the prerogative of states to carve out SEBC as a separate and distinct class from the OBCs must be examined as well.

SESSION III - DEEPENING AND WIDENING AFFIRMATIVE JUSTICE: THE WAY FORWARD

The operationalization of the reservation model in India has been the subject of much litigation and disagreement. These disputes have largely focused on caste and reservation - the model's effectiveness in addressing India's caste question, and various distortions emerging from its implementation in a society steeped in caste structures. This Session seeks to address some of these distortions, examine ways to both *deepen* and *widen* the reach of India's affirmative action policies, and explore potential supplements (or perhaps, alternatives) to quota-based guarantees of substantive equality.

The Supreme Court has now repeatedly held that reservations in promotions are constitutionally permissible, but not mandatory even where entry-level reservations exist. This Session seeks to re-examine the constitutional justifications for this differential treatment - and explore the glass-ceiling distortions and reproduction of caste hierarchies within government structures incentivized through this. Similarly, the Central Educational Institutions (Reservation in Teachers' Cadre) Bill, 2019, in making the institution - instead of the department - as the unit of reservation, poses some interesting questions that may be addressed. While possibly increasing the number of reserved slots, the potential implications of the Bill for the 'ghettoization' of reserved seats in specific departments, are worthy of discussion. This clustering of reserved posts also manifests in the increased concentration of filled reserved seats in classes C and D government jobs, as opposed to the higher-skilled classes A and B jobs. This raises critical questions for the ideals of integration and dignity in a society informed by notions of purity-driven insulation, which must be addressed.

The Session also explores ways to *deepen* the promise of substantive equality made by affirmative action frameworks. In particular, Richard Sander's 'mismatch theory' poses some important challenges to the effectiveness of entry-level affirmative action. It is important to look at qualitative measures that could address these challenges by supplementing India's reservation policy in achieving better substantive outcomes of equality and post-entry (in jobs/educational institutions) integration. Additionally, recent recommendations to sub-categorize the OBC categories further on the basis of relative benefits availed, as opposed to relative backwardness, also put forth interesting questions for the efforts to deepen the impact of reservation policies. Lastly, in post-1991 India, 'backdoor de-reservation' due to the narrowing down of the public sector makes it imperative to consider the viability and/or desirability of reservations in the private sector - another theme that merits discussion.

This Session also seeks to create a conversation on the desirability of *widening* reservation policies to include new markers of discrimination, and the suitability of the current reservation framework to deal with important questions of intersectional disadvantage cutting across identities. These will include, but not be limited to, a consideration of reservations for women and sexual minorities. Further, the Session examines the idea of inter-generational poverty as a systematic disadvantage, explore the constitutionality and viability of addressing class as a marker of discrimination through reservation frameworks, and formulate a defensible policy outcome for it, if desirable.

Finally, this Session seeks to draw from comparative affirmative action policies and dives into the ultimately critical, but oft-sidelined question - whether the current quota-based system of affirmative action is the ideal framework for addressing the distortions and shortfalls that have plagued it; and if not, what would be an alternative reconceptualization of the way India does affirmative action, that would satisfactorily address its caste question, private sector discrimination, and new markers of disadvantage.