



2020

Transcript - XIII NLSIR Symposium - Session 1

Sudhir Krishnaswamy

Sukumar N

Sumit Baudh

Follow this and additional works at: <https://repository.nls.ac.in/nlsir>

Recommended Citation

Krishnaswamy, Sudhir; N, Sukumar; and Baudh, Sumit (2020) "Transcript - XIII NLSIR Symposium - Session 1," *National Law School of India Review*. Vol. 32: Iss. 2, Article 9.

Available at: <https://repository.nls.ac.in/nlsir/vol32/iss2/9>

This Article is brought to you for free and open access by the Journals at Scholarship Repository. It has been accepted for inclusion in National Law School of India Review by an authorized editor of Scholarship Repository. For more information, please contact editor@nls.ac.in.



TRANSCRIPT – XIII NLSIR SYMPOSIUM

I. SESSION I – RESERVATIONS: RETHINKING ROOTS IN CONSTITUTIONALISM

The first session sought to achieve a re-imagination of the constitutional understandings of substantive equality, dignity and opportunity, as informed by recent political and jurisprudential thought. The panel for this session consisted of Dr Sudhir Krishnaswamy,¹ Prof N Sukumar² and Dr Sumit Baudh, with Dr Sumit Baudh³ also acting as the moderator for the session.

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

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

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

¹ Vice Chancellor of the National Law School of India University, Bangalore and the co-founder of Centre for Law and Policy Research.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prof Sukumar then talked about the struggle for the roster system. This roster system has not been followed in the Delhi University or in any other public university. He discussed a 2017 judgment of the Allahabad High Court⁵ that the public universities should not follow the 200-point roster. The court held that individual departments instead of the university should be taken as a unit for implementing the roster for the purpose of reservation. The 200-point roster creates many more positions for reservation. The judgment suggested that the 13-point roster be implemented. The universities started the recruitment process almost immediately. He discussed the statistics of 10 central universities, such as those in Rajasthan, Haryana, Banaras, and Tamil Nadu. These universities wanted an almost immediate implementation of the 13-point roster. This was because under the 200-point roster, in universities like Rajasthan central university, 33 positions were advertised, out of which 16 were unreserved, whereas 17 positions were reserved for SC/ST/OBC categories. Under the new 13-point roster, all 17 reserved positions became unreserved. Not a single seat was left under reservation. Similarly, in the Atal Bihari Vajpayee Hindi University, all reserved seats were converted to unreserved under the new 13-point roster system. Such statistics can be seen across the country. In smaller departments, which have less than 14 positions, the 13-point roster cannot be implemented. No reservation in favour of the marginal sections will be seen.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ AIR 1993 SC 477

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷ AIR 1993 SC 477.

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

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

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

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

⁸ Ibid

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

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

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

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

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

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

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

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

The floor was then opened to questions from the attendees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ Social activist and advocate, Supreme Court of India.

¹¹ Senior Fellow, Centre for Policy Research, Delhi.

¹² Executive Director, Project 39A and Assistant Professor, National Law University, Delhi.