

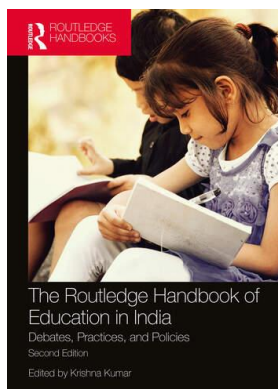
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# Caste quotas and formal inclusion in Indian higher education<sup>1</sup>

*Satish Deshpande*

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Both Dr Ambedkar's famous question and his succinct description of the Indian society that precedes it remain as relevant today as they were 64 years ago.<sup>2</sup> No one was more aware of the irony that the egalitarian Constitution he had helped draft was itself the cornerstone of the 'life of contradiction'. By superimposing formal equality on a highly unequal society – while guaranteeing property rights and refusing positive constraints on social capital – the Constitution actually empowered the rich and socially dominant 'haves'. But it also offered the 'have-nots' something: one egalitarian principle of universal adult franchise; one established precedent of protective discrimination otherwise known as reservations; and many good intentions of a progressive kind. In essence, the history of post-Independence India is the story of the intertwined efforts to cash in on these constitutional legacies, each constrained by the other, albeit in unequal and asymmetrical ways.

This situation, where deep inequalities persist under a thin veneer of formal equality decorated with progressive rhetoric, has also been described as a 'passive revolution'. As is well known, the Gramscian term refers to an incomplete or truncated revolution, a 'revolution from above', and it fits the Indian context very well because Independence was essentially a 'transfer of power' from a foreign to a local elite. It is because Independence was indeed something of a revolution that the Constitution of our 'sovereign socialist secular democratic republic' promises to secure for all its citizens 'justice social economic and political' as well as 'equality of status and of opportunity'. But because the revolution was passive and partial, these promises are endlessly deferred, being redeemed only in slow and grudging instalments. Madhav Prasad captures the essence of the matter when he writes that 'there is no militant class backing the Constitution with its iron will', so that '[w]hen we rue the absence of the will to change, we are merely acknowledging the fact that we have the letter of the law, in the form of the Constitution, without the spirit' (Prasad 2011: 45).

The story of reservations is part of this larger saga of the interplay between formal good intentions and substantive change. But because they are a major balancing item in the account between the haves and the have-nots, they become the focus of attention for both sides. Indeed, so great is the emphasis on reservations that the policy acts like a giant magnet dragging virtually all discussion about social justice and equality of opportunity into its force field. The excessive emphasis on reservations raises the risk of a metonymic slide that ends up equating reservations

with social justice. Whereas reservations, especially in higher education, can only provide protected entry or formal inclusion – they cannot deliver social justice. While formal access is obviously an essential precondition, it is still a long way from ensuring that inclusion is ‘full’ or substantive, which is what social justice requires. Moreover, reservations policy urgently needs to adapt to recent changes such as the restructuring of higher education; the deepening differentiations within the groups eligible for reservations; and the shifts in the stances and capabilities of the state.<sup>3</sup> Whether and to what extent it is able to do so will depend, once again, on the political legacy of the Constitution and the ongoing tussles between the haves and the have-nots.

This chapter provides an overview of the conceptual, historical, and policy dimensions of the reservations policy in Indian higher education. The first section looks at the policy perspectives on equality of access in higher education. The second provides a summary of the history of modalities and justificatory frameworks. The third outlines the major changes that have transformed higher education in the past two decades and speculates on the possible directions that reservations policy could take in their wake.

### Higher education and equality of access: policy perspectives

The specific features that make higher education a particularly challenging field for the theory and practice of social justice policy may be quickly summarised.<sup>4</sup> First, higher education is ‘naturally elitist’ in the sense that it is a downstream field that presupposes prior qualifications, which have a filtering effect on aspirants so that relatively few reach it. This filtering may be due to ‘merit discrimination’ based on the need for high levels of skill or competence, and/or ‘resource discrimination’ due to the unequal distribution of the material and non-material resources required to acquire skills. This leaves room for ‘social discrimination’ (based on prejudices related to race, caste, gender, etc.) to disguise itself as, or to work through, the other kinds of discrimination. The need for merit discrimination in particular may be ideologically exaggerated by the claim that higher education (or at least part of it) is engaged in knowledge production and must therefore cultivate ‘excellence’ to the exclusion of all other objectives (such as those of equity), or even that it must be exempted from such social responsibilities. The key point here is that the road to higher education passes through many kinds of ‘discrimination’ where very different types of distinctions are being made for a variety of different reasons backed by divergent moral or social values.

Second, the nature and force of the right to higher education is a contextual matter rather than a self-evident and universal axiom, such as the fundamental right to basic education or medical care. Third, higher education is also a highly desirable asset because it offers the possibility of social mobility and generally carries the promise of high material and non-material rewards. For this reason, the demand for higher education usually exceeds its supply, which means that yet another form of ‘discrimination’ must be practised due to sheer scarcity and the consequent need for rationing. Finally, higher education is usually a strongly contested field because, generally speaking, it is the most legitimate means for sustaining or justifying the existing social order as well as for changing or overthrowing it. Consequently, higher education is a field where equal access is hard to define, and policies for equalising access are always controversial.

Of course, higher education has been elitist not only ‘naturally’ (because it necessarily presupposes high levels of prior competences), but primarily socially or ‘traditionally’ (because of customs or norms that systematically include and exclude particular social groups). The important point here is that the major burden of excluding ‘unsuitable’ candidates is shifted to the upstream levels of the educational system, i.e. to schooling. As Bourdieu and Passeron (1990)<sup>5</sup>

have shown in their classic work, the ‘differential educational mortality rate of the different social classes’ (p. 154) that is responsible for filtering the candidate pool ensures that ‘social advantages and disadvantages are progressively retranslated, through successive selections, into educational advantages or disadvantages’ (p. 160). The overall effect from the point of view of higher education is that

the combination of the educational chances of the different classes and the chances of subsequent success attached to the different sections and types of schools constitutes a mechanism of deferred selection which transmutes a social inequality into a specifically educational inequality, i.e. an inequality of ‘level’ or success, concealing and academically consecrating an inequality of chances of access to the highest levels of education.

(p. 158)

Bourdieu and Passeron have also argued that the social filtering of the candidate pool as it advances up the education ladder is achieved more through induced self-exclusion rather than explicit elimination through failure in examinations. They even claim that the social purpose of the examination in this context has been misunderstood or exaggerated:

The opposition between the ‘passed’ and the ‘failed’ is the source of a false perspective on the educational system as a selecting agency ... this opposition between the two sub-sets separated by selection in the examination from within the set of candidates hides the relation between this set and its complement (i.e., the set of non-candidates), thereby ruling out any inquiry into the hidden criteria of the election of those from whom the examination ostensibly makes its selection.

(pp. 153–154)

This perspective fits the Indian case fairly well as a broad overview. It is well known, for example, that dropout rates in school are inversely related to class and caste status. The most recent official figures on dropout rates and examination pass rates are shown in Table 16.1. The data are shown separately for ‘All’ and for the Scheduled Castes (SC) and Scheduled Tribes (ST). The dropout rates are cohort-specific, that is, the three columns show the cumulative percentage of dropouts from the cohort that began at Class I. By the time this cohort reaches Class V, about 26 per cent of all students have dropped out, but the figure for SCs is about 33 per cent and that for STs close to 40 per cent. By the time Class X is reached the respective dropout rates are (in round figures) 62 per cent, 71 per cent, and 79 per cent. These figures show that the gap between dropout rates for ‘All’ and for the SCs and STs dips slightly (by one percentage point) at the Class VIII level relative to the Class V level, but rises by two percentage points between the Class

Table 16.1 Dropout rates and pass percentages in school, 2005–06

Social groups	Dropout rates			Pass percentages	
	I–V	I–VIII	I–X	X class	XII class
All	25.7	48.8	61.6	67.9	72.7
SC	32.9	55.2	70.6	60.4	65.6
ST	39.8	62.9	78.5	53.0	59.6

Source: Selected Educational Statistics 2005–06, MHRD.

VIII and Class X levels. This suggests that more SC and ST students dropout between Class VIII and Class X than those from other caste groups. Considered as an absolute difference in percentages, the gap in the pass rate for the board examinations in Classes X and XII is slightly less than the gap in dropout rates in Class X. This suggests that although SC/ST students are less likely than others to reach Class X, once they reach this stage they 'catch up' slightly with others in terms of the pass percentage. Thus, while the data are much too fragile to bear much interpretive weight, they do seem to lend some plausibility to Bourdieu and Passeron's contention that

previous performances being equal, pupils of working-class origin are more likely to 'eliminate themselves' from secondary education by declining to enter it than to eliminate themselves once they have entered, and a fortiori more likely not to enter than to be eliminated from it by the explicit sanction of examination failure.

(Bourdieu and Passeron 1990: 153)

But the major problem with the data in Table 16.1 is that they seriously understate inter-caste differences for two reasons. First, because the 'All' category includes the SC and ST categories, it obviously understates the difference between these categories and the upper castes. Second, the data, like most official datasets, are silent about the Other Backwards Classes (OBCs); even if the All category had excluded the SC and ST groups, it would still lump together the OBCs and the upper castes into one group, thus understating the differences between them. These limitations seem severe enough to create doubt as to whether they support the contention noted above, namely that it is not the examination but 'unexamined exclusion' which accounts for the underrepresentation of lower classes and (by extension) castes as we go up the educational ladder.

The major dataset that offers disaggregation by caste groups is based on the National Sample Survey Organisation's (NSSO) regular surveys, especially the big sample quinquennial ones. A number of studies (Basant and Sen 2010; Desai and Kulkarni 2008; Deshpande 2006; Sundaram 2006) use these data to look at educational inequalities across social groups, and they offer a much more sophisticated view of the problem of equality of access. In my own earlier work, I have compared shares in the population of graduate degree holders across castes to argue for the presence of significant inequalities of access, and hence for strong protective discrimination policies in higher education. Table 16.2 is based on unit-level data from the 55th Round of the NSSO of 1999–2000 for urban India. It makes the simple but important point that the thick horizontal line that separates the Hindu OBC and all the rows above it from those below is the major faultline in Indian society. Above the line are the lower-caste groups (except Dalit Sikhs and Dalit Christians) and Muslims, whose shares in the population of graduates of various disciplines are less than their shares in the total urban population (shown in the last column). The opposite is the case with the upper-caste groups below the line, whose shares of graduates are significantly higher than their share in the urban population. These disparities build a *prima facie* case for reservations (or similar interventions) to boost the presence of students from lower castes and the Muslim community in higher education.

However, other scholars have argued that over- or underrepresentation of social groups in higher education must be evaluated with reference to not their share in the total population, but rather to their share in the population of the higher education-eligible population, i.e. the population that has successfully completed the Class XII examination. Table 16.3 is excerpted from one such study, that by K. Sundaram (2006) based on the 55th Round data. These data are restricted to the 17–25 age group, and are further divided into the 'poor' (defined as households below the official poverty line) and the residual 'non-poor' apart from the 'all' category that is a superset of

Table 16.2 Graduate degree-holders by caste and community, urban India, 1999–2000

Castes and communities	Share of graduates in various disciplines				Caste/community share of total urban population
	Agriculture	Engineering	Medicine	Other subjects	
Hindu ST	2.4	1.3	1.8	1.3	2.6
Hindu SC	3.8	2.2	1.8	3.6	12.9
All Muslim	9.4	5.0	10.0	5.7	17.0
Hindu OBC	10.0	14.9	10.4	13.7	24.2
Hindu UC	62.1	66.8	65.3	65.9	36.9
All Christian	8.4	5.2	6.6	4.0	2.8
All Sikh	1.7	2.2	2.1	2.4	1.6
All others	2.4	2.4	1.9	3.3	2.0
Total	100.0	100.0	100.0	100.0	100.0

Source: computed by the author from NSSO unit-level data on CD.

Note

Includes persons with postgraduate degrees. Cells show rounded proportions, and columns may not add up to 100 due to rounding.

Table 16.3 Group shares in school graduates and those currently enrolled in higher education: age group 17–25, urban India, 1999–2000

Social groups	Percentage shares of the population				
	Total urban population	Passed Class XII	Currently enrolled in college		
			Technical subjects	Other subjects	All subjects
ST	3.7	2.7	3.4	2.5	2.7
SC	14.6	8.6	7.2	8.5	8.3
OBC	32.1	26.5	22.6	25.9	25.2
Others	49.7	62.2	66.9	63.2	63.9
All	100.0	100.0	100.0	100.0	100.0

Source: adapted from Sundaram 2006, table 6.

Note

Data shown here are for all economic levels, i.e. for the urban population in general.

both the previous categories. In each of these three divisions, Sundaram looks at the caste-wise shares of the total population, the population that has passed the Class XII exam, and the one currently enrolled in higher education, distinguishing between technical-professional fields and others. His main contention is that once the reference group is the eligible population, then the underrepresentation of groups like the OBCs is negligible. From this perspective, and based on the above data, Sundaram argues that there is no case for reservations for OBCs in higher education because their share in the population enrolled in higher education is not significantly different from their share in the urban population (in the 17–25 age group). Moreover, according to him, if the argument is that the share in higher education of the OBCs is to be increased, then this is desirable for all groups, given the low level of overall enrolment ratios. However, it is difficult to see how the wide inter-group differences in current attainment can be ignored when making an argument for interventions that will raise enrolment rates in higher education.<sup>6</sup>

In a detailed econometric study focusing on ‘transitions’, Sonalde Desai and Veena Kulkarni (2008) have used the same NSSO data but from the period between 1983 and 1999–2000. Because the statistical separation of OBCs only began with the 55th Round of 1999–2000, the social groups they work with are SC, ST, Muslim, and a residual category of Others (which includes both upper castes and OBCs, as well as the minority religions like Christians, Sikhs, etc.). The study asks two main questions. First, how do caste–class differences matter in the transition points all along the educational spectrum, from entering primary schooling to successfully completing an undergraduate degree? Second, have there been any changes in the inter-group inequalities over this 17-year period? They find that relative to the ‘Others’, all the disadvantaged groups – SC, ST, and Muslim – have a significantly lower probability of crossing each of the educational thresholds, but that the differences are highest at either end of the spectrum. Thus, it is in entering school education in the primary stage, and in completion rates in undergraduate degrees, that social differences are at their maximum. As for changes over time, Desai and Kulkarni find that although all groups have seen rising probabilities of educational success, along with some narrowing in differences, this is not true for Muslims. Moreover, they also find that college completion rates continue to be lower for Dalits, and that these are not affected by income level. In other words, higher socio-economic status does not significantly increase the chances of Dalits acquiring undergraduate degrees.<sup>7</sup>

In what is probably the most recent study of social justice initiatives in higher education, Basant and Sen (2010) use NSSO data from the 61st Round of 2004–05. They disaggregate participation in higher education in terms of different age groups in the population. The ‘all generations stock’ represents those who have a higher education degree above the age of 20; the ‘current generation stock’ represents those with degrees in the 22–35 age group; and a ‘current generation flow’ in the 17–29 or 18–25 age groups. They look at these three measures (two stock and one flow) in both the total population as well as the restricted set of the population eligible for higher education. Their econometric analysis yields roughly the same conclusion as Sundaram – namely, that ‘deficits’ in higher education participation narrow considerably when we move from all-generation to current-generation stock and especially to current generation flow. The effect is even stronger when the higher education-eligible population is considered (rather than the total population). Thus, Basant and Sen endorse the view that school is the crucial threshold; after crossing it, underprivileged social groups do not seem to be much behind privileged groups in accessing higher education, and are even doing better in some contexts. However, they also offer the significant insight that the strong motivation for accessing higher education may itself be driven by the incentive of reservations, both in higher education itself as well as in state sector employment.

If these recent studies all point to the critical nature of the school–college transition, this is not exactly a new discovery. Indeed, it has been one of the long-time staples of the sociology of education in post-colonial India that although school education began as a common state system shared by all castes and classes, it was rapidly segregated along class lines. Since the upper end of the class spectrum was at that time occupied exclusively by the upper castes, this also meant caste segregation in the sense that only the upper castes were found in expensive private English-medium schools, although not all upper castes could afford them. This obviated the need for strong overt forms of social selection at the college level, because entrance into college was mediated by the mass examination. More than a quarter-century ago, sociologist of education Krishna Kumar described this as the combination of ‘early selection’ and ‘mass examination’:

By maintaining a separate system of schooling on the basis of early selection, the urban elite pre-empted the development of a truly mass education system. The system of holding mass

examinations did act as a symbolic corrective to a certain extent, but it could not prove sufficiently effective in upholding the myth of open competition and equal opportunity. Early selection impeded the erosion of ascription-based differentiation and also the emergence of an achievement-based differentiation in school and society.

*(Kumar 1985: 1282)*

Over time, the system of social selection has been adapted into a new arrangement based on the distinction between ‘exit’ and ‘entrance’ examinations.<sup>8</sup> Exit examinations, like the school leaving examination, are supposed to be generalised indicators of a certain standard minimum competence, and do not confer any specific entitlements. Entrance exams, on the other hand, are gate-keeping devices regulating entry into sought-after courses and institutions. Their ideological function is to act as competitive measures of merit, while their logistical function is to ration a scarce resource in a socially acceptable manner. In India, political pressures and administrative expedience have forced ‘exit’ examinations to become ‘softer’, while entrance examinations have become progressively ‘harder’ as competition increases.<sup>9</sup> Given that entrance examinations privilege incremental differences in relative marks over absolute levels of competence or aptitude, they serve as devices of social selection that (unduly) favour those with a better school education.<sup>10</sup>

Finally, before concluding this section on evidence-based policy perspectives, it is necessary to point to some critical shortcomings of aggregate data. Such data will tend to understate the case for active intervention on behalf of equalising access for at least two reasons. First, they don’t take into account the specific manner in which entry into higher education is regulated, i.e. through rank or marks obtained in an examination. In the absence of reservation or similar preferential devices, this mode of selection will ensure that disadvantaged groups will be forever disadvantaged because merely acquiring a high school certificate will be insufficient – they will have to ‘perform better’ than the advantaged groups in order to gain entry into higher education. Second, aggregate data hide the enormous variations in the quality of higher educational institutions (on which more below). The rationale for reservations also includes the fair distribution of access to high-quality institutions, and this cannot be decided by aggregate data. While they are important long-run indicators of equality of access and representation, aggregate data need to be interpreted with care.

## Reservations in higher education: modalities and justifications

The previous section discussed the general aspects of the question of equalising access in higher education. This section moves to the specifics of how protective discrimination policies actually work (modalities) and the implicit or explicit rationale (justifications) behind these interventions. Thus, modalities have to do with the specific manner of implementing programmes, while justificatory frameworks work at different levels to defend such programmes.

### *The modalities of caste quotas in higher education*

Although positive interventions in favour of the ‘weaker sections’ take many forms, the most visible and consequential one has been the caste quota.<sup>11</sup> This basically ‘reserves’ or sets aside a specific number of ‘seats’ or places – usually expressed as a proportion of the total available – for eligible members of particular caste-groups legally recognised as legitimate claimants. In higher education, this takes the form of reserved seats for the SC, ST, and OBCs (and other groups such as the disabled or some other region-specific categories of entitlement) in educational



institutions. Quotas have been heavily criticised recently, partly due to the strong reaction to the 93rd Amendment and the institution of OBC quotas in elite higher educational institutions, and partly to the influence of US affirmative action discourse. One can distinguish objections in principle – that is, to the very idea or form of quotas – from objections of a consequential kind – that is, those based on the practical failures of quotas.

The strongest and most common objections on principle have to do with the modality itself. Quotas are rigid and inflexible – they discourage or preempt more nuanced and graded responses to the problem of inequality. Being fixed before the fact, quotas may act as a disincentive to effort, at least until intra-group competition reaches the level where admission is no longer assured. Because they are very visible, quotas provoke strong reactions and impose a heavy social cost on beneficiaries in the form of the permanent stigma associated with them. This can insulate popular (upper caste) prejudices from scrutiny and can turn prejudice into a sort of self-fulfilling prophecy that will eventually produce the truth of the very ‘facts’ that were initially falsehoods. When applied to groups that are internally differentiated, quotas have the potential to turn into the very opposite of what they are supposed to be. Because they can be monopolised by the stronger or relatively privileged sections within the larger group designated as the beneficiary, quotas can help to deepen intra-group inequalities. Their visibility and application to specific social groups makes quotas vulnerable to ‘tokenism’, or what in India is referred to as ‘vote bank politics’. Governments and political parties find it much easier to announce a quota than to undertake the difficult and long gestation programmes that will actually produce lasting results. Thus, quotas encourage tacit collusion between ruling parties and the leaders and privileged sub-groups within beneficiary categories, and become a favourite option for pre-election announcements. Finally, quotas tend to become self-perpetuating in a pathological rather than healthy fashion due to the vested interests they may cultivate as well as the real or imagined political costs associated with ending them.

Although they often tend to be used in bad faith by opponents, each of these arguments against quotas has some truth to it. But the problem is that there are no perfect alternatives – every programme has its inevitable weaknesses and it is a question of balancing these with their strengths. For instance, the contrasts between US-style affirmative action which shuns quotas and Indian-style reservations are often exaggerated and the similarities understated.<sup>12</sup> The strengths of quotas are often underestimated. They have the important practical virtues of being ‘transparent, inexpensive to implement and monitor and therefore easily enforceable’, as Jayati Ghosh points out (Ghosh 2006: 2431). It is because they are a relatively simple, robust, and tamper-proof administrative modality that quotas have been the mainstay of Indian programmes for social redress. By rendering explicit the specific identities of the beneficiaries, quotas discourage dissimulation via the use of more anonymous categories based on the presumptions of formal equality.<sup>13</sup> Their political visibility generates useful debate and activity, and engenders a form of accountability whose long-term value outweighs its short-term drawbacks.

Perhaps the most valuable function of quotas is that, by their invocation of the idea of ‘shares’ and proportions, they serve as a much-needed reminder of the social contract on which our republic is founded. It is hardly surprising, therefore, that dominant common sense conspires to suppress this crucial aspect, and presents quotas as special favours bestowed on electorally important groups by venal politicians. In fact, an interesting symptomatic feature of mainstream discourse on quotas is that it had, until recently, successfully repressed the implications of ‘electoral importance’. In curious contrast to the ‘fear of small numbers’, the upper-caste mindset had so firmly internalised its own normative stature that it ‘forgot’ that the groups entitled to reservations accounted for at least two-thirds of the national population.<sup>14</sup> It is only in the post-Mandal era, effectively since the latter half of the 1990s, that the upper caste national elite have had to

explicitly confront the fact that they are a tiny minority, and that even with their lower-class caste-fellows they will at best be between one-fifth and one-fourth of the population. Of course, number alone does not, and should not, always guarantee moral or political precedence. But reminders in this regard are surely welcome, if only because the dominant ideology is long-accustomed to conflating the national or 'general' interest with the interests of vocal minorities. This is revealed, for example, in terms like 'general category', which is the preferred antonym for 'reserved category' in everyday language, even though it is arguably the latter which serves the wider cause while the former is more of a sectional or particularistic interest.

Consequential or practical objections attack the performance of quotas rather than the principles behind them. They argue that quotas just don't work, i.e. they fail to produce the results that they are supposed to. In the context of higher education, for example, this could take the form of the argument that quotas set up beneficiaries for failure by forcibly placing them in classes or courses that they are not really prepared for. This leads to high dropout rates, low self-esteem, and the reinforcement of the prejudices of opponents. Once again, there is some truth to these complaints, but they may as well be taken as proof of the fact that quotas alone are insufficient to achieve the ends they are supposed to serve. In a sense, therefore, the manner of their implementation – without the additional supportive components that they require – dooms them to eventual failure. So, rather than doing away with quotas, these shortcomings demonstrate the need to do more with and for quotas.

This brings us back to the initial characterisation of the 'passive revolution'. Laws and the programmes that they mandate are by themselves never enough if the apparatus for their implementation has no stake in their success. In the Indian context, it is fair to say that, outside the affected groups themselves, the well-wishers of social justice programmes tend to be themselves part of the elite or at least the upper echelons of society. Thus, it is only at the highest levels of the bureaucracy and the leadership of political parties where one may reasonably expect to find some 'disinterested' supporters, while opponents are to be found at all levels. In such a context, the active sabotage or passive neglect of social justice programmes is an unsurprising outcome.

### *Justificatory frameworks*

Given that social justice initiatives in higher education have received sustained scholarly attention, it is not surprising that the justificatory frameworks involved are only just beginning to be re-examined. The law is the most convenient site where the shaping of these frameworks can be observed. It is the space where the legislative intentions of the polity are challenged by the interests that they affect. To understand the part that the courts have played in mediating the impact of social justice legislation it is necessary to begin with the pre-Independence roots of these policies.

As is well known, the basic principle of special protection for the political, social, and economic interests of the 'depressed classes' emerged from the so-called 'Poona Pact' of 1932. Gandhi won the standoff with Ambedkar on the issue of separate electorates for the depressed classes by going on his first ever fast unto death, which brought unbearable pressure to bear on the latter. In return for giving up the demand for separate electorates and agreeing to let the Congress represent them, the depressed classes were assured of protection. This assurance took shape in the Government of India Act of 1935 which drew up the Schedules listing the castes and tribes that were to be given special protection. These schedules were incorporated into the Constitution with hardly any changes (other than the addition of four Dalit castes among the Sikhs) in 1950. While there was some discussion in the Constituent Assembly about protections for the 'backward classes' as well, this was inconclusive. What emerged at the time of the

adoption of the Constitution was thus the legislative and job reservations, along with the general commitment to the amelioration of the social and educational backwardness of all groups considered to be part of the 'weaker sections'.

As Rochana Bajpai's recent work on the conceptual basis of the political language used in the Constituent Assembly debates shows, the initial framework adopted for special treatment of lower castes, tribes, and weaker sections was that of the 'minority'. However, given the hegemonic dominance of ideas of national unity and the consequent reluctance to create group rights, an exception had to be made for the SCs and STs, and at a different and vaguer level for the OBCs.<sup>15</sup> Following from this, the eventual consensus on reservations was worked out in consequentialist terms – 'as a means of moving collectively towards desired national goals, rather than as a matter of rights of individuals or groups' (Bajpai 2011: 133). These national goals included social justice, or the effort to move towards a more just social order in the future. But the most common argument was in terms of national unity and development – ameliorating the 'backwardness' of various social groups would help the developmental effort by 'uplifting' the sections of society that were a drag on the nation.

Translated into the terms of the three main justificatory 'themes' identified by Marc Galanter in his monumental work *Competing Equalities* (1984), this implies the dominance of the 'general welfare' over the 'non-discrimination' and 'reparations' themes.<sup>16</sup> The general welfare justification is a group-based argument; it does not take individual deserts into account, but rather argues consequentially in terms of the beneficial effects to society that preferential treatment brings about. Thus preferential treatment could be intended to 'reduce group disparities, afford representation, encourage the development of talent and so on' (1984: 553). The main point is that the modes of selection chosen here 'might diverge from that which would be dictated merely by ... individual performance on the job, because it defines the job to include the symbolic, representational, and educational aspects' (1984: 554).

The text of the Constitution in its pristine incarnation therefore saw reservations and other such group-based measures as a limited exception to what was otherwise taken to be the legitimate default norm, namely individual merit. The larger justificatory framework for social justice initiatives worked out before Independence implicitly advocated the 'mixing' of these social objectives with merit, and this is what the Constitution reflected, if somewhat ambiguously. However, the courts did not share this view initially, leading to what then appeared as a clash of wills between the legislature and the judiciary of the new republic.

Barely six months after the Constitution of the Republic of India was formally adopted, the Madras High Court upheld in July 1950 the plea of two Brahmin petitioners claiming that their fundamental rights to equality and non-discrimination guaranteed by the Constitution were being violated by social justice legislation.<sup>17</sup> Although the specific order being challenged predated Constitutional reservations, these petitions also impacted the new legislation. The unanimous verdict of the Full Bench of three judges striking down the order known as the Communal G.O. sent shockwaves through Parliament, which saw its much publicised social justice initiative nipped in the bud when the Supreme Court concurred with the High Court in April 1951. The Law Ministry (then headed by B.R. Ambedkar) and the government (headed by Pt Jawaharlal Nehru) responded swiftly with the First Amendment to the Constitution protecting reservations in higher education with the same special provision already included for job reservations. The First Amendment was passed in June 1951, less than two months after the Supreme Court verdict, but it was not able to prevent a defensive cast to subsequent efforts to pursue the social justice agenda.<sup>18</sup>

The *Dorairajan case* that provoked the First Amendment involved three articles of the new Constitution, 15(1), 29(2), and 46.<sup>19</sup> The state's case was that Article 46 enjoined it to take special

measures on behalf of the 'weaker sections', and that this meant that the equality guaranteed in Articles 15 and 29 would have to be limited somewhat in contexts such as that of preferential admissions. This limitation on equality was not due 'only' to caste, but involved other considerations; moreover, the state was not prohibiting all members of a particular caste, but only wished to take into account its responsibilities towards the weaker sections. The courts disagreed vehemently, asserting that the fundamental rights were supreme since the Directive Principles (of which Article 46 is a part) were non-justiciable; and because merit ought to be the sole criterion for admissions, especially since no enabling clause had been added to Articles 15 or 29 as it had been for Article 16 on job reservations.

With the addition of this clause to Article 15 by the First Amendment,<sup>20</sup> the state's powers appeared to be restored, but it took about a decade for the courts to come around to the point of view of the framers of the Constitution. Ruling in favour of the petitioners in *Dorairajan*, Justice Vishwanatha Sastri of the Madras High Court explicitly noted that 'fortuitous' advantages accruing to any group 'by reason of their caste discipline, habits and mode of life' are not taken away by Article 15(1), and went on to declare that

It would be strange if, in this land of equality and liberty, a class of citizens should be constrained to wear the badge of inferiority because, forsooth, they have a greater aptitude for certain types of education than other classes.

*(Madras High Court 1950)*

Using this rationale to argue that the Brahmin petitioners had been denied admission solely due to their caste (because they were not admitted to seats reserved for other castes), the Madras High Court struck down the Communal G.O. A decade later, however, the courts had come round to accepting the state's view. Ruling against petitioners<sup>21</sup> whose case was quite similar to *Dorairajan*, Justices Pai and Hussain of the Karnataka (then Mysore) High Court offered what could well be seen as an admirably clear rebuttal of Justice Sastri's arguments 11 years earlier:

If ... a group of persons clearly identifiable by their caste is really backward socially and educationally, and is on that basis given the benefit of certain reservations, the ineligibility of a person belonging to another caste to secure those reservations is clearly not based on the ground of caste but is a consequence of the reservation properly made in favour of a backward class.

*(Karnataka High Court 1961)*

Having ceded ground on the legitimacy of quotas, the court shifted its scrutiny to the reasonableness of the criteria used to determine 'backwardness', and the scope of the preferential advantage given to the designated beneficiaries. These principles were established by the Supreme Court judgment in *Balaji v. State of Mysore*:

Reservations under Arts. 15 (4) and 16 (4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. Speaking generally and in a broad way, a special provision should be less than 50 per cent.

*(Supreme Court 1962)*

*Balaji* and its precursor cases were the first instance where the courts evinced an interest in the details of the criteria used to determine 'social and educational backwardness'. This was

followed up in the next major event to impact reservations, the Government of India's belated decision (in 1990) to implement the Mandal Commission Report of 1980.<sup>22</sup>

Although not directly concerned with higher education, the series of cases beginning with the 'Mandal Case' of 1992 (*Indira Sawhney & Others v. Union of India*), and what are referred to as 'Indira Sawhney-1' (1996) and 'Indira Sawhney-2' (1999), are important because they contain the Supreme Court's insistence that in order to be valid, reservations for the OBCs must exclude the 'creamy layer', or the relatively advanced section to be determined by tests of 'income, property or status'. The court also reiterated the *Balaji* suggestion, but this time as an order, that reservations should not exceed 50 per cent of the available seats.<sup>23</sup>

Reservations in higher education were responsible for the First Amendment in 1951, and for the 93rd Amendment of 2006, which extends OBC reservations to elite state-funded institutions that were previously exempt, and opens the door to reservation in private and unaided institutions. This is effectively the end of the road for reservations in public higher education as all institutions are now covered. The only step that remains to be taken is the extension of reservations to private unaided educational institutions, but it is likely that this move will either follow or accompany the extension of job reservations. As for the legal challenges to reservations in higher education, the last major case is *Ashok Kumar Thakur v. Union of India* and its derivatives, which were settled in August 2011. Despite being one of the less coherent judgments of the court, *Thakur* established that the 93rd Amendment was lawful, although it left open the question of whether the state was entitled to extend reservations to the private sector (Krishnaswamy and Khosla 2008).

Against this background, it is difficult to dispute Marc Galanter's overall assessment that the courts have acted more 'as a brake and a baffle, rather than as stimulant and energiser of the compensatory discrimination policy' (1984: 537–538). Despite some ups and downs, the basic doctrine has been stable – preferential policies can be permitted as a limited and closely monitored abridgement of the fundamental right to non-discrimination; the Directive Principles are relevant and they do place a responsibility on the state, but they cannot override the Fundamental Rights. It is noteworthy that throughout this eventful history, it is the 'backward classes' and the determination of their backwardness that has been the chief source of anxiety for the courts. The case for special treatment of SCs and STs is, after the initial hiccup of *Dorairajan*, quickly conceded. But the question of OBC reservations is constantly challenged by litigants and kept on a tight leash by the courts. This is understandable, given their numerical weight, and also given the fact that the relatively better-off sections of this group are much closer rivals for the upper castes than the scheduled groups. However, despite the insistence on the exclusion of the 'creamy layer', it is significant that the courts have endorsed the use of caste as one of the criteria for determining backwardness as long as it is one among many, and not the sole criterion.

One of the more disappointing features of the case law in this area is the relative lack of interest in details of implementation, or an inexplicably uneven distribution of such interest.<sup>24</sup> As Galanter points out,

The courts have not equipped themselves with any doctrine by which they might reach the 'affirmative' problems of compensatory discrimination policy that is, by which they might assure that the deserving are included among the beneficiaries, that preferences are of sufficient scope and amount, that they are implemented in a timely and effective fashion, etc. (Galanter 1984: 537)

This raises, yet again, the question of what is possible or likely – and impossible or unlikely – in the context of a limited, largely 'top-down' process of social change.

## Higher education and the future of equal access: critical contexts

Indian higher education has been changing so much and so fast lately that it makes the past an unreliable guide to the future. Since this is also, and perhaps especially, true for questions of equal access, there is no option but to review the recent changes even if we are unable, as yet, to estimate the nature or size of their impact.

### *Recent changes and possible impact*

It is best to begin by noting that, though it may be both necessary and inevitable, the shorthand term ‘Indian higher education’ needs to be used with care because it aggregates a vast and vastly differentiated field.<sup>25</sup> There are two main axes of differentiation: (1) fields and disciplines, especially the division between the technical-professional and other streams; and (2) institutional types, beginning with the private-public distinction and overlapping with the hierarchies of reputation and perceived worth that rank the entire spectrum from elite ‘institutions of national importance’ to the most subaltern sub-regional institutions. Elite Indian institutions in the fields of engineering, medicine, and management have long enjoyed a reputation for excellence amplified by the global visibility of high-profile alumni in technology, business, and science. However, these institutions are exceptional in the strict sense, as are the high stakes in this segment. The vast majority of institutions in Indian higher education are playing for stakes of a rather different order, though these may be just as important for the players involved.

Decisive changes in the first decade of the twenty-first century have transformed the field and cemented its integration into global circuits. The most visible change is in size. Between 2001 and 2010, higher education more than doubled its institutions (from 254 to 544) and raised enrolment by 62 per cent (from 9 million to 14.6 million), which works out to an astonishing growth rate of more than one new university *per fortnight*, and a more modest but still impressive increase of about 1,500 students *every day*.<sup>26</sup> This growth is fuelled from the demand side by the ‘demographic bulge’ in the age structure; by expanded access to schooling; and by larger numbers being able to afford higher education.<sup>27</sup> On the supply side, higher education has grown mainly through the expansion of the private sector. What used to be a virtual state monopoly by default has changed during the last two decades with the swift growth of technical-professional education as a lucrative site for private investment. Overall, the private sector now accounts for a majority of both institutions (63.2 per cent) and total enrolment (51.5 per cent), but it really dominates the technical-professional fields where credentials command high to astronomical premiums.<sup>28</sup> At the other end of the spectrum, preliminary estimates suggest that absolute levels (and not just shares) of enrolment may be falling in some of the basic sciences.<sup>29</sup>

Ongoing processes of ‘globalisation’ have been consolidated during this period in three main ways: (1) the explicit recognition (visible in vigorous marketing efforts) now granted to India as one of the top ‘customers’ of global-Western higher education; (2) recognition as a site for investment in the form of franchises or local branches of foreign higher education providers (though not much has happened on this front so far); and (3) through the intensification and expansion of academic networks linking Indian institutions and individuals to foreign ones.

These changes are yet to be analysed in detail. Moreover, they have already outpaced the statistical database, which has to evolve procedures to catch up. Nevertheless, what can be said by way of a preliminary assessment of their impact on questions of access and equity?

As discussed above, it is largely undisputed that most of the recent expansion in higher education has been within the private unaided sector, which in turn is heavily concentrated in vocational and technical-professional fields. There are, broadly speaking, two kinds of partially

conflicting equity effects at work in response to the privatised expansion of higher education. There is first the easing of the supply bottleneck as more capacity is created in the sector to help meet the pent up demand for higher education. The more affluent and privileged sections of all groups – including the lower castes and discriminated communities – benefit from this expansion. Because they already had the social and economic capital required to convert credentials into mobility, these sections were being hurt by the stagnation of the state sector and its inability to expand the supply of higher education. This might be termed the ‘crowding-in’ effect of the easing of supply constraints in a situation of considerable excess demand. In other words, the top echelons of the underprivileged communities are ‘crowded-into’ higher education along with the much larger upper caste and privileged communities. But there is also a countervailing ‘crowding-out’ effect at work: the less affluent sections of underprivileged communities that are dependent on the subsidised state sector are now crowded out of higher education because only private sector sources are available. The exclusion of the underprivileged occurs both through the straightforward pricing-out of the poor (of all communities, but among whom the lower castes and Muslims are over-represented), and through the absence or non-implementation of reservation and related policies.

The net effect on equity is hard to assess. One could argue that since the affluent sections of underprivileged groups are much thinner than the much thicker layer of affluence in privileged communities, any outcome that benefits only the affluent will, overall, harm the interests of the underprivileged. But it is important not to be imprisoned within the logic of shares and proportions – absolute numbers also matter, particularly in a gigantic country like India. It is arguable that significant synergies may be released when a critical mass of educated members is created within the underprivileged communities. Moreover, the state has also embarked on an ambitious programme of expansion in higher education, with an outlay in the 11th Five-Year Plan that is nine times higher than in the past. While the concrete results of this expansion are too close for analysis, there is no doubt that it will substantially increase the supply of reservation seats.

It has also been suggested that globalisation and the expanded possibilities for seeking foreign education and employment may have acted as a kind of ‘safety valve’ in the Indian context.<sup>30</sup> The departure of those who can afford, and are able to access, foreign higher educational options may seem to create more space in local educational markets. But whether this will help lower castes and other underprivileged groups is still an open question that can only be settled empirically. This needs to be done independently of other considerations like the reinforcement or expansion of hierarchies that rank various kinds of credentials (including foreign and domestic ones) by their perceived worth.

Finally, past patterns in the inter-generational trajectories of mobility among classes and communities suggest that the most safe and lucrative options in higher education are accessed first by upwardly mobile communities. While this needs to be contextualised in terms of the inevitably localised tradeoffs among the probability of securing employment, the probable size of earnings, and the investment required, one could hazard a guess that the current preponderance of professional-technical courses favours this pattern. Indeed, it is itself a consequence of such patterned preferences. Depending on the resources they can command, underprivileged groups will tend to access the best technical-professional training first and liberal arts-based credentials last. As they gain in relative prosperity and acquire greater generational depth in higher education, along with the confidence that these bring, these groups will move across the educational spectrum more or less like their predecessors have done. But for the present, the relevant fact is that the supply of higher educational opportunities seems to be increasing in the very areas that are likely to be the first choices of the underprivileged communities.

### *The possible futures of quotas in higher education*

What do these trends portend for the future of quotas in particular? At a general level, it is clear that, regardless of the transformations that higher education has gone through, the modality of the quota is not in any immediate danger. It is also safe to assume that the size of the quota (i.e. the sum total of all seats available under various schemes for reservation) will increase along with higher education as a whole, though probably not in the same proportion. But while its existence may not be in danger, the quota will certainly have to adapt and change according to the particular pressures and problems it is already facing or is likely to encounter. Some of the more important of these issues are outlined below.

### **Intra-group disparities and the ‘creamy layer’**

Among the more intriguing and consequential anomalies in the interpretation of social justice legislation is the simultaneous insistence of the courts on the decisive importance of internal disparities within the ‘backward classes’ and their irrelevance among the SCs and STs. In the form of the ‘creamy layer’ argument put into play by the Mandal judgment of the Supreme Court in 1992, internal disparities have acquired a critical legal status for the OBCs since they are grounds for excluding the economically better-off sections from the benefits available to this category.

But in the very different context of internal disparities among the SCs, the courts have held that the Constitution does not permit the state to make distinctions within the overall category, which must be treated as a single homogeneous collectivity. So they have struck down attempts by state governments to create sub-quotas reserved for sub-groups that have remained severely underrepresented in government employment. The most advanced case of this sort emerges from Andhra Pradesh, where the state tried to create a sub-quota within the larger SC quota for the left-behind segments of SC communities such as the Madigas and Rellis, etc. Since the sub-quotas would exclude relatively privileged SC sub-groups like Malas in exactly the same manner as the reservation quotas themselves exclude all non-SCs, the Malas went to court with merit-based arguments identical to those commonly used by the upper castes against reservations.<sup>31</sup> There are several other states where internal disparities within the SC or ST categories have crossed the point of no return in terms of political visibility. Given that this is happening in big and electorally important states like Maharashtra, Uttar Pradesh, and Rajasthan (where Mahars, Jatavs or Chamars, and Meenas among the STs are the respective dominant groups), it is unlikely that the problem will simply go away. In one form or another, sub-quotas are bound to appear on the political horizon very soon.

When it comes to the ‘creamy layer’ (where the courts are enforcers rather than impediments), the main issue of concern is the context-blindness of the injunction to exclude. In higher education, for example, it is mostly the ‘creamy layer’ of every social group that dominates, and for reasons that are quite transparent. In such a context, on what grounds would it be justified to prohibit the creamy layer of one group and permit that of another just because the former is availing of reservations? Put differently, what precise aspect or principle of the general legal argument for reservations would support the position that availing them requires the sacrifice of the (relative) economic advantages that a person or group may possess? If reservation policy is intended to address social, educational, and other kinds of ‘backwardness’ – including but not limited to poverty or economic backwardness – then the absence of (severe) economic disadvantage cannot be turned into a disqualification in an axiomatic, context-independent manner.



For example, it would be understandable if creamy layer exclusion occurred in the context of, say, a fee waiver or a textbook grant or some other clearly economic component of a broader reservation programme in higher education. But to deny admission to the programme itself suggests that OBC reservation is only about economic disadvantage and not about social disadvantage or discrimination. Otherwise we are left to defend the claim that social discrimination or disadvantage only operates below a certain economic threshold, a claim that would seem to empty the term 'social' of almost all its content.<sup>32</sup> This is quite apart from the possible pragmatic objections to the principle of creamy layer exclusion, such as the argument that, in contexts like higher education, this eliminates precisely the best prepared and most likely to succeed segment of the entitled group.<sup>33</sup>

Though they represent very different problems and contexts, the creamy layer OBCs and the relatively advanced sub-castes or tribes within the SCs and STs point to the difficulties of working exclusively with caste as a criterion when designing social policy. It is reasonable to expect some innovation in this direction in the near future, even if there are difficult conceptual and practical puzzles to be solved.<sup>34</sup>

### The mismeasurement and misrecognition of merit

As the first line of offence and defence adopted by opponents since the time that reservations were first introduced, notions of 'merit' have always been central to the working of compensatory discrimination policies. There is also a growing literature on this link, so the basic arguments can be quickly summarised. In most higher education contexts, and especially in India, ideas of merit are plagued by two related problems. The first is the conflation of *rationing* and *selection*, and the second is the slide from *eligibility* into *excellence*. Rationing refers to the entirely non-academic imperative for restricting entry that is created by the shortage of higher education places relative to demand, while selection refers to the academic process of choosing from a candidate pool according to standards and indices of merit. Eligibility represents the minimum levels of academic competence or skill required for undertaking a course of study, whereas excellence refers to the highest levels of skill or competence associated with a field or discipline.

Whether it is unconscious or deliberate, shifting from one of these paired concepts to the other generally aids the anti-reservation cause and adds to avoidable confusion. Because of the ideological need to present rationing as selection, extravagant claims are made on behalf of devices like the competitive examination and the rank ordering it can be forced to yield. The way forward here would be to recognise the rationing component and introduce transparent methods of dealing with it, such as a lottery. However, this can only be done within a group that is recognised to be of broadly equal 'merit', measured in whatever way. To identify such a group – that is, to carry out genuine selection – requires two things: first, the definition of an honest and academically defensible standard of eligibility; and second, strenuous efforts to prevent this discrete threshold of eligibility from being converted into a continuous scale that claims to measure excellence.

The key step in the procedure outlined above is the definition of an honest eligibility threshold. This should be such that candidates below it will not profit from the given course of study because they are simply not prepared for it. That is why it is crucial that this be an honest standard, because the typical tendency in elite Indian institutions is to cheat by setting much higher standards than are reasonable simply because the huge demand for the course will ensure that enough candidates will meet them.<sup>35</sup> This allows the institution to 'free ride' on its highly selective entrance exam because the candidates selected will require little or no support from the

institution to pass the exit examinations. As the reverse of the ‘garbage in, garbage out’ principle, this kind of free-riding can be addictive because there is hardly any auditing of the actual value added by elite institutions in India (Mehta 2006; Mohanty 2006).

However, even if an epidemic of honest eligibility standards were to somehow infect all our institutions overnight, it is still possible that we would be left with a sizeable problem of unequal access to higher education across social groups. But this would be a real problem, shorn of the artificial complications added by active sabotage or passive apathy. And our attempts to tackle a real problem would always take us forward, even if progress were slow and painful. A concrete example might help, and here is one thrown up by the litigation around the 93rd Amendment mandating 27 per cent OBC reservations in centrally funded educational institutions. The Jawaharlal Nehru University (JNU) decided to interpret the somewhat ambiguous term ‘cut-off mark’ (for OBC candidates admitted under the new quota) in the *Ashok Kumar Thakur* judgment to mean 10 per cent less than the marks scored (in the JNU entrance examination, for which the pass mark was 40 per cent) by the last general category candidate to be admitted. Although the students’ union and other student groups contested this interpretation, the JNU administration stuck to it, resulting in 54, 88, and 277 OBC quota seats remaining unfilled in 2008–09, 2009–10, and 2010–11 respectively.<sup>36</sup> Since alternative (equally or more plausible) interpretations were being used in other institutions, and since the JNU administration had made no secret of its antipathy to this quota, it is fair to say that the choice was probably influenced by the fact that this interpretation would be more restrictive than others.

The main issue here is the nature of the ‘cut-off mark’ which controls access to this elite institution. This cut-off has *no intellectual or academic content whatsoever* because it is determined solely by the number of seats available, which in turn is determined by administrative, financial, and logistical considerations.<sup>37</sup> In other words, a cut-off determined in this manner belongs to the realm of *rationing* rather than academic selection. On the other hand, the pass mark in the entrance exam does have academic and intellectual content, because the exam will presumably be designed in a way that *makes* the score of 40 per cent a meaningful threshold. This threshold will not change in response to extraneous factors like the number of seats available, and it has the added virtue of being a pre-declared benchmark known to all candidates before the examination.<sup>38</sup> But the decisive reason for the academic validity of the pass mark is still the first one relating to exam design. By comparison, it is impossible, even absurd, to think of designing an exam in such a way that the ‘last qualifying candidate’ will have a particular score.

The Supreme Court eventually did what it had to do and clarified that the cut-off mark means a pre-announced eligibility threshold, but it also fixed the cut-off mark for OBC candidates as 10 per cent less than the level for the general category (Supreme Court 2011). This last move illustrates once again the lack of clarity about eligibility thresholds. An honestly determined eligibility threshold should be at or near the minimum level of ‘teachability’ for a course of study. It does not make sense to move this goalpost for any group no matter how disadvantaged it may be. Problems of access at this level must be dealt with by raising capabilities, not by lowering thresholds. But in a situation where bad faith abounds, stakes are high and key concepts muddled, outcomes depend on the contingent balance of power rather than institutional logic.

### The challenges of agency

By far the most difficult of the many challenges facing quotas is that of cultivating agency among the entitled. For it is true, as critics have long insisted, that the quota often takes away more than it gives. All the more so in a hostile environment, which is what quotas and their incumbents invariably face. But what makes agency the most challenging of challenges is that it is *not* a

matter of 'policy'. This is despite the fact that policy matters (such as the quotas themselves, and their design and manner of implementation) are quite relevant to the development of agency. Though they might be close to each other on other planes, an immeasurable distance separates a policy-object – a 'target group' – from a political subject on the plane of agency. Even the law, which is supposed to bridge this gap, is only able to do so rarely because it is itself the product of a specific political compromise negotiated in a specific historical context.

As some insightful scholars with long involvement in social justice issues have suggested, the emergence of agency can be best facilitated by a 'return to politics' in the discourse on reservations (Tharu *et al.* 2007). But this is precisely the most difficult direction to take today when reservations discourse is dominated by perspectives that presuppose their own 'ownership' of the nation, and see quotas as generous concessions that they, the 'general category', are gifting to the 'reserved categories' representing narrow particularistic interests. This discourse is unable to conceive of the 'reserved categories' as possessing an equal or stronger claim to being the 'owners' of the nation. But the real difficulty is not of *replacing* the policy or legal perspective with a 'political' perspective, but of enabling a minimal collegiality between the two. The momentum necessary to leap from object to subject – some gaps cannot be bridged, they can only be jumped – can be generated only if both policy and the law make room for a new and unfamiliar political sensibility.

The irony is that, in the final analysis, despite its many layers of complexity, the case for quotas in higher education is simple and strong. Jayati Ghosh puts it well:

[W]e still need reservations for different groups in higher education – not because they are the perfect instruments to rectify long-standing discrimination, but because they are still the most workable method to move in this direction. And most of all, because the nature of Indian society ensures that without such measures, social discrimination and exclusion will only persist and be strengthened.

(Ghosh 2006: 2432)

## Notes

- 1 An earlier version of the chapter entitled 'Social Justice and Higher Education in India Today: Markets, Ideologies, and Inequalities in a Fluid Context' appeared in Zoya Hasan and Martha Nussbaum (eds), *Equalising Access: Affirmative Action in Higher Education in India, United States, and South Africa* (New Delhi: Oxford University Press, 2012), pp. 212–238. I would like to thank an anonymous reviewer for suggestions and comments that have helped to clarify and strengthen the argument of this chapter. The responsibility for the errors and weaknesses that remain is mine.
- 2 This was Ambedkar's last speech to the Constituent Assembly before the final version of the Constitution prepared by the Drafting Committee (of which he was the Chairman) was passed the next day, on 26 November 1949. The Constitution was formally adopted by Parliament on 26 January 1950.
- 3 For example, if the state encourages the privatisation of higher education, then the equity impact of this policy shift will depend on the relative efficiency of the state as a regulator of private enterprise compared to its earlier role as direct provider of 'merit goods' like education. Arguments for privatisation are often predicated on the assumption that the state is a better regulator than provider. Such assumptions need to be explicitly investigated rather than taken for granted.
- 4 A longer earlier version of the following argument is found in Deshpande (2009a, pp. 127–147 ff.).
- 5 Subsequent page references are to this work unless indicated otherwise.
- 6 It should also be noted that Sundaram's category of 'Others' includes Muslims, whose enrolment ratios are very different from the other groups (Hindu upper castes as a residual, and other minority religious groups like Christians, Sikhs, etc., in so far as these groups are not part of the SC or ST categories).

This would tend to understate the difference between the 'forward' groups like the latter and the rest of society.

- 7 Desai and Kulkarni treat this as evidence against the popular prejudice among the upper castes that relatively well-off lower castes are gaining places in higher education at their expense.
- 8 A more detailed discussion of the social functions of 'exit' and 'entrance' examinations is available in Deshpande (2010); see specially the respective subsections on these types of examination, pp. 26ff.
- 9 In other words, pass percentages in 'exit' exams have been rising steadily, whereas they have been falling in 'entrance' examinations (where 'pass' actually means 'selection' or being above the 'cut-off').
- 10 Or those who can afford the effective but extremely expensive 'coaching' targeted at precisely these entrance examinations. These issues will be discussed further in the last section.
- 11 Other forms of preferential policies could include scholarships, remission of fees, relaxation of age limits, or other eligibility conditions, special hostels or institutions, and in some cases state-subsidised orientation or coaching programmes.
- 12 This is particularly true in the context of the fact that reservations in India have to cater to the majority of the population, whereas in the USA affirmative action is a minority issue. For a balanced and pains takingly researched perspective on this particular comparison, see Thomas Weisskopf (2004); for an overview on quotas in the Indian context, see K.S. Chalam (2007).
- 13 One of the curious aspects of popular opinion (as reflected in the media) is that the occasional instance of quota fraud (when persons who do not belong to the entitled groups falsely claim that they do) are seen as proving the axiom that 'quotas are bad' rather than the more logical conclusion that 'fraud is bad'.
- 14 Arjun Appadurai's (2006) argument is about the anxieties of majorities that feel irrationally threatened by small (often *very* small) minorities. See also Deshpande (2009b) for more on this theme.

15

In nationalist arguments, the case for special treatment of Untouchables was constantly distinguished from that of religious minorities through an emphasis on their poverty and 'backwardness'. What separated these groups from the majority was not so much religio-cultural difference, but socio-economic inequality, it was argued. Group representation aimed not at the recognition of group difference, but the rectification of 'backwardness'.

(Bajpai 2011: 125).

- 16 According to the non-discrimination argument, the main intent of compensatory preferences is to 'counter the residues of discrimination and to overcome structural arrangements which perpetuate the effects of past selections in which invidious discrimination was a major determinant'. This argument is linked to the notion of deserts and the unit of analysis here is the individual, even though group membership is used to identify those individuals who may be suffering from the resilient forms of discrimination mentioned above. The reparations argument is like the non-discrimination one in basing itself on fairness; but unlike the latter, it sees the group rather than the individual as the appropriate unit; and the timeframe it employs is different from both of the other principles in that it seeks to redress a past wrong in the present (Galanter 1984: 553).
- 17 Though it was named for its first petitioner, the *Champakam Dorairajan v. State of Madras* case actually rested on the second petitioner, C.R. Srinivasan, who (unlike Dorairajan) had actually applied for admission to the government engineering college in Guindy and been turned down because the Brahmin quota was already filled by candidates with higher marks. Srinivasan's case was that he had scored higher marks than many of those who had been admitted under the quotas for other communities (such as the non-Brahmins, backward Hindus, Muslims, Indian Christians, etc.), and that therefore he had been discriminated against solely because of his caste, since he would have been admitted on merit criteria. See Supreme Court of India 1951.
- 18 As Marc Galanter has noted, in spite of the government's swift response through the First Amendment, 'the *status quo ante* was not restored; the post-amendment State policies were more constricted than those that prevailed earlier.' (1984: 527).
- 19 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 29.(2) – 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. Article 46. – The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the

- Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
- 20 Article 15, Clause (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.’
  - 21 In *S.A. Partha v. State of Mysore*, one of the cases responsible for the more famous *M.R. Balaji & Others v. State of Mysore* judgment of the Supreme Court in 1962.
  - 22 To go directly to Mandal is to ignore a major intervening case, *N.M. Thomas v. State of Kerala*, decided by the Supreme Court in September 1975. *Thomas* is important because its seven-judge bench proposed a major change in doctrine through a five–two majority. It argued that Articles 15(4) and 16(4) were of equal status to Articles 15(1) and 16(1). In other words, the court saw preferential treatment for SCs and STs as a sort of fundamental right in itself. However, I am skipping this case because (1) it had little to do with education; and (2) the doctrinal change it proposed, though extremely significant, may have been an aberration provoked by the Emergency and seems to have been shortlived. See Galanter (1984: 382–395).
  - 23 This is how the government arrived at the 27 per cent figure for OBC reservations – added to the existing 22.5 per cent for the SCs and STs, it makes for a total of 49.5 per cent, which is in compliance with the court’s rule of ‘below 50 per cent’.
  - 24 This is especially noticeable, for example, in the contrast between the blind acceptance of ‘merit’ arguments that take examination marks and ranks at face value, and the insistent scrutiny of measures of backwardness. It is not that the latter is unnecessary, but that the former also deserves comparable application of mind.
  - 25 The following paragraphs are borrowed from Deshpande (2011).
  - 26 Figures for 2010 are from MHRD (2011: 86), and for 2001 from MHRD (2008: Statement 1, C–1). Remarkable though they are, these growth rates are still insufficient, at least in aggregate terms. At 12.4 per cent, India’s gross enrolment ratio (GER) for higher education in 2006 was well below the average for the world (23.2 per cent) or for Asia (22 per cent), and far behind the average for developed countries (54.6 per cent). Sources: figures in brackets: Planning Commission (2008: 22); figure for India: MHRD (2010: 27).
  - 27 Both in the narrow sense of being able to pay fees as well as the broader sense of being able to defer entry into paid employment.
  - 28 Figures in brackets are for 2006 and taken from Planning Commission (2008: 23). Powar and Bhalla (2004) estimate the share of private institutions in engineering, medicine, management, and teacher training as 78, 76, 64, and 67 per cent respectively.
  - 29 This is suggested by the time series data in the *Selected Educational Statistics* of the MHRD, but some definitional issues need clarification before firm claims can be made.
  - 30 See the study by Devesh Kapur (2010).
  - 31 The Supreme Court found in favour of the Malas on the grounds that schemes addressing intra-SC inequalities (even though they did not change the schedules in any way) amounted to ‘disturbing’ the constitutionally decreed list of SCs, something which only the President was authorised to do on the advice of Parliament. For a lucid critique of this particular decision and an insightful discussion of the larger issues involved, see Balagopal (2005).
  - 32 This argument may be misunderstood because we intuitively expect that (taking caste as an instance of social status) very poor people of a higher caste will find it difficult to discriminate against very rich people of a lower caste. This may or may not be true empirically, but even if it is, this does not rule out the equally intuitive probability that higher caste people of similar or higher economic standing would have no trouble at all in discriminating against our hypothetical very-rich-but-low-caste person.
  - 33 This is argued in detail in Deshpande (2015). See also Mohanty (2006) and Ghosh (2006).
  - 34 It may be relevant here to mention one such attempt to suggest more composite modes of addressing disadvantage and discrimination with which I am associated, and the criticisms that it has attracted (Deshpande and Yadav 2006). Speaking only for myself and without implicating my co-author, I am convinced that the modalities we proposed then need more careful specification, including empirical simulations, before they can hope to serve as models for concrete programmes. However, I am not able to share Mrityunjay Mohanty’s conviction that social and economic disabilities should and more importantly can always be kept separate (2006: 3788). Even policies that do not ‘conflate’ the two will surely have to respond to the fact that each impacts the other *in its own domain*, i.e. for real people in real-life situations, poverty exacerbates the disabilities of low caste status and vice versa. Both creamy

- layer and intra-Dalit disparities are cases in point. The data deficits that Ghosh (2006: 2431) mentions are problems of a different order and their impact may perhaps be clarified through realistic simulations.
- 35 There is anecdotal evidence that political pressure forces many (non-elite) institutions to do the opposite, i.e. set standards that are unreasonably low. In my view this is just as dishonest as a too-high standard.
- 36 I thank Tapas Saha of the All India Students' Association (AISA) for this information.
- 37 One could argue that the mark obtained by the last admitted non-reservation candidate is an academically *relevant* number in the sense that, along with other numbers showing the performance of the reserved categories, it would offer one measure of the 'academic range' of the admitted cohort. But note that this relevance comes *after* reservation candidates have been admitted by some other criteria. It is very difficult to defend it in a gate-keeping role with academic or intellectual pretensions.
- 38 This is the argument that seems to have swayed the court: 'A factor which is neither known nor ascertained at the time of declaring the admission programme cannot be used to disentitle a candidate to admission, who is otherwise entitled for admission.' (Supreme Court 2011).

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