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Who Are the Other Backward Classes

Nirupama Pillai

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In the context of the controversy on the Central Educational Institutions (Reservation in Admission) Act, 2006, this paper attempts to examine who constitute the Other Backward Classes and how the Supreme Court has appraised this vexing issue. In this regard, a study of the history of compensatory discrimination in India and a comparison with affirmative action in the United States has been undertaken. In the light of Ashoka Thakur v. Union of India in which the Central Government has been asked to formulate a new list of the Other Backward Classes, understanding the complexities involved in this issue is essential. Various indicators have been applied by the Supreme Court and Backward Classes Commissions through the years, no consensus has yet been reached on the issue and no resolution to this divisive issue seems to be in sight.

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I. INTRODUCTION

Every democracy is challenged by the complex task of providing social justice to sections of society that have been traditionally discriminated against; while ensuring that such affirmative action does not hinder the opportunities offered to the rest of the population. The caste system being deeply embedded in Indian society has resulted in widespread discrimination on the basis of descent and birth. Successive governments have sought to redress this inequity through a policy of affirmative action.

Affirmative action refers to policies that are formulated with a view to increasing opportunities for minorities or other disadvantaged classes.[1] This principle was evolved in the United States of America and is commonly referred to in India as 'compensatory discrimination[2]'. India's policy of affirmative action comprises a wide range of schemes designed for the progress of the historically disadvantaged classes[3]. These welfare measures are not confined to those disadvantaged classes within the caste system or those disadvantaged classes recognized by the Constitution–the Scheduled Castes and the Scheduled Tribes.[4]

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[1] In the United States, affirmative action is defined as a system of preferential treatment for minorities and women which attempts to compensate them for being denied opportunities of advancement due to past and present discrimination.. M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV. 101 (1992). Policies of positive discrimination are oriented towards an 'identity group' – a group that is defined in terms of characteristics over which it has no choice, are determined at birth and rarely alterable such as race, caste, gender etc. THOMAS E. WEISSKOPF, AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA 4 (2004).

[2] S. Laxman Rao, *Positive Discrimination as a Constitutional Right: Emerging Patterns and New Challenges*, INDIAN J. HUM. RTS. 110 (2001). The author explains that in India, academic writing uses various terms such as compensatory discrimination. in place of 'affirmative action'.

[3] The schemes under compensatory discrimination in India may be described under three divisions. First, through reservations, access to valued resources such as seats in legislative bodies, higher education and employment may be facilitated. Secondly, policies extending services such as scholarships, health care, legal aid etc are allotted to a beneficiary group on a larger scale than allotted to others. Thirdly, special protection to protect backward classes against exploitation such as legislations against bonded labour. The third category, though strictly not within the scope of 'compensatory discrimination', may be considered as such as it is a special effort to remedy the position of disadvantaged classes. MARC GALANTER, COMPETING EQUALITIES – LAW AND THE BACKWARD CLASSES IN INDIA 43-45 (1984).

[4] The benefits of compensatory discrimination extend to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes. Preferences are extended mostly on a communal basis. MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 186 (1989).

The Constitution has also endeavoured to rectify discrimination against a group of people who are known, for the lack of a better term, as the Other Backward Classes through Articles 15, 16, 335 and 340 of the Constitution.[5] The Other Backward Classes comprise those socially and educationally backward sections of the population other than the Scheduled Castes and Scheduled Tribes including Christians and Muslims. Since this definition is extremely ambiguous, the challenge lies in the development of a method to identify them and determine who exactly comprise the Other Backward Classes.

The vexatious issue of which groups are OBCs has persisted in India since the Constitution came into force of and has perplexed the Indian judicial system since 1950. This is an issue that has become increasingly politicised over the years; and the problem inflamed India in the early 1990s with the contentions of 'reverse discrimination' being raised. This issue has once again been brought to the forefront with the Central Educational Institutions (Reservation in Admission) Act, 2006, to incorporate reservation for the Other Backward Classes in centrally funded educational institutions of excellence across the country.

This article focuses on the issue of identification and analysing leading decisions of the Supreme Court in this regard, argues that the lack of development of uniformly accepted criteria for the identification of the Other Backward Classes and the absence of accepted statistics on the Other Backward Classes have resulted in a situation where there is no clarity about who falls within the amorphous category of OBC; and that this is a primary factor for the opposition that arises to the grant of reservation to OBC candidates in higher educational institutions.

II. FROM 'DEPRESSED CLASSES' TO 'BACKWARD CLASSES'

The term 'Other Backward Classes' has not been defined in the Constitution;[6] instead, the term   'Socially and Economically Backward Classes' is used. The ambit of the term 'Backward Classes' excludes the Scheduled Castes and the Scheduled Tribes and the Other Backward Classes[7] Undoubtedly, the ambiguous

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[5]   M. P. JAIN, INDIAN CONSTITUTIONAL LAW 1410 (2003).

[6]   The term 'Other Backward Classes was perhaps first used in 1928 when the Government of Bombay established a Committee to identify backward classes and recommend special provisions for their advancement. The report of the Committee, headed by Mr. O. H. B Starte classified backward classes into three categories – depressed classes, aboriginal and hill tribes and other backward classes.

[7]   The National Commission for Backward Classes Act, 1993 defines "backward classes" to mean such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central Government in the lists.

nature of the term 'Other Backward Classes' has a correlation to the lack of a uniform criterion in the initial scheduling of communities by the Union and State governments.[8]

Historically, these terms were evolved in South India. Previous to the enactment of the Constitution, the backward classes were known as 'Depressed Classes'. This term had its origin in the princely state of Mysore in 1895 where all communities to the exclusion of Brahmins were defined as backward communities.[9] The State of Mysore introduced the system of reservations for employment as early as 1874.[10] In the Madras Presidency, the system of communal reservations which was introduced in 1921 continued until 1951.[11] In 1937, Travancore started identifying socially and economically backward classes as 'Backward Communities'.[12]

Hence, in South India, there was a strong movement for affirmative action in the form of reservations for the backward classes which was absent in North India.[13] Perhaps, the term, 'Depressed Classes' was not used across India on a uniform scale The first attempt to address the welfare of depressed classes was made with the Montague Chelmsford Reforms in 1919 – separate representation for members of these classes in public bodies was made. The Census of 1931 replaced this term with 'exterior castes' which applied only to 'untouchables'. The absence of a uniform definition can be taken as a precursor to future developments in this issue. The term 'Other Backward Classes' is essentially a post-independence development; since a separate class had not emerged prior to independence.[14] The fact that they are divided at a regional rather than at a national level as the Scheduled Castes and Tribes and the lack of an effective leader such as

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[8] S. M. Dahiwale, *Identifying 'Backwardness' in Maharashtra*, 35 ECON. & POL. WKLY. 3293 (2000).

[9] JITENDRA MISHRA, EQUALITY VERSUS JUSTICE- THE PROBLEMS OF RESERVATIONS FOR BACKWARD CLASSES 7 (1996).

[10] The scheme was to reserve 20% of the lower and middle level posts in the police department being reserved for Brahmins and the remaining 80% for non Brahmins, Muslims and Christians. This was an attempt by the princely state to reduce the stranglehold of the Brahmins regarding job opportunities. *Supra* note 1, at 111.

[11] *Supra* note 9, at 9.

[12] Marc Galanter, *Who are the Other Backward Classes? An Introduction to a Constitutional Puzzle*, 13 ECON. & POL. WKLY. 1816 (1978).

[13] One view with regard to the absence of a strong social movement in North India is that in North India, the 'modern sector', presumably including non agricultural areas was monopolized not only by Brahmins as in the South, but was shared by diverse groups. M.N. Srinivas, *The Mandal Formula—Backwardness: Caste v. Individuals*, 18 INDIAN BAR REV. 404 (1991).

[14] *Supra* note 2, at 114.

Dr. B. R. Ambedkar would have prevented them from raising their concerns in an effective manner.

III. Introducing 'Backward Classes' in the Constitution

During the Constituent Assembly Sessions, there was wide spread bewilderment among the members of the Assembly regarding the meaning of the term 'Backward Classes' in what eventually became Article 16(4) of the Constitution. It remained vaguely defined even as the Draft Constitution makers added the words 'backward classes' in the Draft Constitution.[15]

Dr. B. R. Ambedkar felt that there was no ambiguity and stated that the Draft Constitution clearly gave rise to the interpretation that a backward community was a community which was backward in the eyes of the local government.[16] On this basis, he suggested reservation for those classes identified by each state. This approach may have been a significant cause for the uncertainty with regard to identification of backward classes. With different states using distinct approaches to define diverse groups of people as backward and the absence of a strict rule to designate these classes, it suggests that the definition of Other Backward Classes will fluctuate from region to region and it is not surprising that a lack of clarity remains. Other Backward Classes

The debate in the Constituent Assembly regarding identification of backward classes centred on certain issues, which, ironically, continue to be the subject of judicial proceedings. Firstly, the question raised was whether caste should be used as the indicator. This raised doubts about the classification of Scheduled Castes and Scheduled Tribes. Secondly, the question was raised as to whether economic or educational status would be a factor in determining backwardness. The third issue which was raised dealt with the sensitive issue of whether such protective discrimination ought to persist or should be limited. The final issue was regarding the question of when a caste was socially, educationally and culturally backward, but its members were economically advanced, whether they should be given protection.[17]

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[15] VII Constituent Assembly Debates 689-692 *et seq.* (3rd reprint 1999) (1950).

[16] *Supra* note 13, at 404.

[17] *Supra* note 15, at 691.

IV. Is Caste an Appropriate Criterion? The Eternal Conundrum

A perennial controversy rages over whether caste should be the primary indicator to identify Other Backward Classes. In *Venkataramana v. State of Madras*[18], a Government Order specified appointments on the basis of caste, religion and communities. The Government Order was struck down by the Supreme Court which held that though the concept of reservations in favour of backward classes was not antithetical to the spirit of the Constitution, the criteria specified by the impugned Order was contrary to the tenets of Article 16(1) and 16(2). Nevertheless, the Court supported the concept of affirmative action for the Other Backward Classes. It was the identification on the basis of religion which was deemed to be unconstitutional by the Court, clearly signifying that another method to identify the Other Backward Classes had to be evolved.

The debate on Articles 16(1) and (2) and its alleged violation as per this Government Order centres on the issue of equality of opportunity. Any provision which sought to create a wedge between citizens on the grounds laid down in Article 16(2) would be struck down due to its inherently discriminatory nature and its potential for reverse discrimination. This would imply that any measure to protect and advance the Other Backward Classes would have to be carried out purely on the basis of their social and educational backwardness. The question is, how can social and educational backwardness be computed using an objective criterion?

Following this was the landmark decision in *Balaji v. State of Mysore*.[19] Here, the petitioners contended that the method used to identify the socially and economically backward classes was irrational and outside the scope of Article 15(4). The State, on the other hand, contended that the charge that the order was a colourable exercise of State power and amounted to a fraud on the Constitution was unfounded as the State had the power to institute affirmative action programs under Article15(4) of the Constitution. The Order observed that for the purposes

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[18] A.I.R. 1951 S.C. 229. In this case, the petitioner was eligible for a certain post but was not appointed to it as he was a Brahmin.

[19] A.I.R. 1963 S.C. 649. Since 1958, the State of Mysore had been enacting various orders in order to enable the advancement of the socially and economically backward classes which had always been set aside by the courts. This particular case dealt with the order passed by the State of Mysore on July 31, 1962. The petitioners contended that it was due to the said order that they were unable to obtain admission in the college of their choice while others, who were less qualified did. The result of the Order was that 68% of the seats in Engineering and Medical colleges were reserved for backward communities and only 32% of the seats could be obtained on open merit.

of identification of the backward classes, caste should be the overriding consideration. Low social status and economic condition were held to be an offshoot of caste. The State also contended that Article 15(4) did not place any limitation on extent of reservation.

Gajendragadkar, J on behalf of the Court rejected the Order owing to the following reasons. Caste need not be the only consideration for determining backwardness and considering it to be so would amount to a violation of Article 15(4). In communities where caste was not a factor in determining backwardness, the benefits of reservation would be denied to backward classes in those communities.[20] The further classification into 'backward classes' and 'more backward classes' violated the tenets of Article 15(4).[21] However, the most important pronouncement of the Court was stating that not more than 50% of the seats could not be placed in the reserved category. The Court stated that in providing for special protection, care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities.[22]

It can be rightly said that the court foresaw the danger of using caste as the only criterion for measuring backwardness. It also stated that economic backwardness was a more important criterion in measuring social backwardness. Through this exemplary judgement, the Supreme Court set a precedent and a warning to States to desist from violating the tenets of the Constitution while applying principles of affirmative action.

Nevertheless, the application of economic indicators must also be carried out carefully as *R. Chitralekha and Another v. State of Mysore*[23] demonstrated. It was held that an identification of backward classes based on economic considerations was valid and did not violate the tenets of Article 15(4). Here, though the classification, though ostensibly on economic terms was based on

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[20] *Balaji*, A.I.R. 1963 S.C. 649, para 37.

[21] *Balaji*, A.I.R. 1963 S.C. 649, para 31.

[22] *Balaji*, A.I.R. 1963 S.C. 649, para 36.

[23] A.I.R. 1964 S.C. 1823. Similar to *Balaji*, the case was filed by students who had failed to gain admission to professional colleges. They filed petitions among other issues, urging the quashing of the order of the Government regarding reservation of seats for the backward classes. The order stated that a family whose income was Rs. 1,200 per annum or less and those persons or classes engaged in the occupations of agriculture, petty business, inferior services and other occupations involving manual labour were, generally, socially economically and educationally backward. The Order did not take caste into consideration. The Supreme Court expressed reservations and said that the classification was not perfect.

certain generalizations.[24] Therefore, even though, the classification used economic criteria which should, in ordinary course, do away with the problem of the 'creamy layer', it would have to be disregarded as the basis of classification was flawed.

Economic indicators were also applied in *K.C. Vasanth Kumar and Anr. v. State of Karnataka*[25] to determine the backwardness of a class. Firstly, it was deemed that the Other Backward Classes had to be comparable to the Scheduled Castes and the Scheduled Tribes in terms of their backwardness and secondly, they should satisfy the 'means' test as laid down by the respective State Government. Desai, J. was of the opinion that the problem of identification of Other Backward Classes was the fact that the term 'backward classes' was not defined in the Constitution and, moreover, that economic backwardness was the true measure of backwardness. This would serve the dual purpose of rooting out the caste menace and gradual elimination of poverty. Even though this test lays down economic indicators, this may be taken as yet another example of the decentralisation of the identification of Other Backward Classes. Considering the ambiguous nature of the terms in the Constitution, the lack of development of a uniform criterion in the scheduling of communities by the Union and State governments would invariably imply further confusion.[26]

Educational backwardness by itself has not been recognised by courts as a valid criterion in determining backwardness. Nevertheless, it has been recognised that educational backwardness is seen along with other indicators of backwardness. For example, in *Vasanth Kumar*, the court referred to similarity in condition to the Scheduled Castes and Scheduled Tribes and educational backwardness could be among the indicators which the court meant to be used in order to determine backwardness.

Other indicators that have been applied over the years include place of residence such as was contested in *State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors.*[27] The contention of the State was that the reservations were

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[24] These included certain generalizations such as considering all those engaged in agricultural practices to be economically weak. The Government desisted from the use of a scientific, empirical formula and, instead, arrived at a conclusion that did not, in actuality, protect the economically weak.

[25] A.I.R. 1985 S.C. 1495.

[26] *Supra* note 8, at 3293.

[27] A.I.R. 1975 S.C. 563. Candidates from hilly areas, rural areas and Uttarkhand were granted reservations for admission in medical colleges in Uttar Pradesh. The State contended that these areas lacked educational facilities. The economic condition of the people living there was unsatisfactory. The income level was low and poverty was rampant. Modes of communication and transportation were backward. These areas had, in fact, always been neglected. Due to these reasons, the people living in there were socially backward.

valid on territorial and geographical grounds. The Court held that it would be constitutionally valid in theory to offer protection to residents of Uttarakhand as they did, in actuality, suffer from a disability owing to their residence, though the present Government was invalid for violating the 50 % rule.

In decisions such as *Chitralekha* and *K.C. Vasanth Kumar*, the occupation cum income factor has been upheld. This could potentially be a useful criterion as it does not include a communal angle. However, these decisions seem to imply the impracticality of the economic test for determining backwardness. Application of economic indicators would prevent privileged sections of the population - in popular parlance known as the 'creamy layer' from usurping the benefits meant for the weaker sections. Economic backwardness invariably leads to social and economic backwardness and economic indicators should serve as the measure of backwardness but a uniform methodology applicable to the entire country should be identified, perhaps by delineating a particular income level as being eligible for reservation. Otherwise if the 'means test' were to be laid down by different State Governments, it might lead to further controversy and ambiguity. Political manipulations make the prospect of such an indicator being accepted unlikely.

V. Is Caste to be Equated with Class?

The controversy on reservation for Other Backward Classes in Central educational institutions hinges on two issues. First, is the 1931 Census a reliable means for determining who constitute the Other Backward Classes? Second, is it possible to equate 'caste' to 'class'?. The creamy layer controversy may be resolved only by answering this.

The dilemma with respect to the usage of caste as the primary indicator, in addition to reiterating the caste system, is that Other Backward Classes are treated as homogenous groups which suffer uniformly from the same level of deprivation.[28] This fallacy of this may be gleaned from the report of any of the Backward Classes Commissions. There is a range of difference in the economic, social and educational standards within those classified as Other Backward Classes.[29]

This issue has been examined by the Supreme Court on a number of occasions. In *Chitralekha*, the Court stated that 'caste' could not be equated to 'class'. This hinges on the reasoning that preferential treatment could not be

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[28] Pradipta Chaudhary, *The 'Creamy Layer': Political Economy of Reservations*, 39 Econ. & Pol. Wkly. 1989 (2004). Also, Article 15(4) refers to socially and economically backward classes while Article 16(4) refers to 'any backward class of citizens'.

[29] Pai Panandikar, The Politics of Backwardness 69 (1997).

obtained merely by virtue of being a member of a group which was traditionally considered to be backward, but actual need for the same would have to be demonstrated. Therefore, the Court made it clear that the use of caste was not an imperative factor in determining backwardness, and if any other test was possible, it would also be valid. The reasoning that caste was not equivalent to class was also used by Subba Rao, J in *Balaji*. He applied the logic that it may result in the exclusion of certain sections of the population and the subsequent frustration of Constitutional objectives.

A few later decisions held that in case caste could be equated to class as all those in a particular caste were backward, then caste could be used as a criterion for identification of Other Backward Classes and special provisions could be made for them under Article 15(4).[30] This fails to take into consideration, the argument in *Chitralekha* for why caste could not be equated to class. It is not enough that a caste may be considered to be socially and educationally backward. What is important is whether the members of that group as a whole may be considered to be backward based on these parameters and this may be determined only through empirical studies. Considering that the most recent Census based on caste was conducted in 1931, it would seem that the caste- class debate cannot be stilled based on any relevant empirical data.

In *State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors*, Ray, CJ stated that by broadly interpreting the tenets of the Constitution, neither caste nor class nor religion could be made the basis for identification of the backward classes and would entail the stultification of Article 15(4). He stated that when a classification uses caste as a criterion, the expression "classes" violated the rule of *expressio unius est exclusio alterius*. He was of the opinion that the socially and educationally backward classes of citizens were groups exclusive of groups based on caste. 'Classes' of people signified those who were grouped together due to certain homogeneity – in this case, social and economic backwardness. Other judgments have also based their reasoning on the terms used in the Constitution.[31]

Therefore, the Supreme Court has interpreted 'classes' to imply that it refers to a a homogeneous section of the people grouped together because of certain

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[30] Minor P. Rajendran v. State of Madras, A.I.R. 1968 S.C. 1012. The petitioners challenged the order of the State of Madras which would provide reservation for the socially and economically backward classes which had been defined according to the Madras Educational Rules. The challenge was that identification was done on the basis of caste. This trend was also observed in Balram v. State of Andhra Pradesh, A.I.R. 1972 S.C. 1375.

[31] K.S. Jayasree v. State of Kerala, A.I.R. 1976 S.C. 2381. Here, an order which excluded reservation benefits to candidates whose annual income was greater than Rs. 10,000 was challenged.

common traits and who were identifiable by some common attributes such as status, rank, occupation, residence in a locality, race or religion. Caste could not be wholly excluded from the terminology of 'class' while determining the same, but caste could not, in any case, be used as the sole indicator for the same.[32]

VI. The First Backward Classes Commission: No Consensus on Caste

There has been considerable judicial vacillation over the most appropriate method to identify the Other Backward Classes. While the Supreme Court was engaged in a number of cases dealing with the identification of the Other Backward Classes, the first Backward Classes Commission, for the purpose of conducting inquiries with regard to the condition of socially and educationally backward classes headed by Kaka Kalelkar, which came to be known as the Kaka Kalelkar Commission was appointed in January, 1953 by the President.[33]

Developing a method for the identification of the Other Backward Classes was a primary task before the Commission. In its report submitted in 1955, there was considerable divergence among the members of the Commission concerning the criteria that had to be adopted in the furtherance of this objective.[34] Nevertheless, the majority opinion was that caste should be the primary indicator to determine backwardness.[35] The Commission found a correlation between the social backwardness of a community to its low position in the social hierarchy of Hindu society.

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[32] P. Sagar v. State of Andhra Pradesh, A.I.R. 1968 S.C. 1379.

[33] Under Article 340(1) of the Constitution, the President can appoint a Commission for the purpose of conducting inquiries with regard to the condition of socially and educationally backward classes.

[34] Five of the members of the Commission recorded minutes of dissent. Dr. Anup Singh, Shri Arunangshu De and Shri P.G. Shah opposed linking caste to backwardness and reservation of posts on the basis of caste. Shri. S.D.S Chaurasia, on the other hand, advocated the acceptance of caste as a criterion for backwardness in his 67 page minute of dissent. Shri. T. Mariappa objected to the inclusion of certain castes within the Other Backward Classes. *See* B.P. MANDAL ET AL., REPORT OF THE II BACKWARD CLASSES COMMISSION (1980).

[35] The Commission had issued a questionnaire comprising 182 questions for determining the views of the State Governments and the general public on various aspects of its enquiry. Field research was also carried out. A list of 2399 backward castes or communities for the entire country was prepared and of these, 837 castes were classified as most backward. The assistance of the Registrar General and the Census Commissioner of India was used to make population projections of 930 backward castes or communities.

The Commission also suggested other means of identification, such as the existence of low education levels, inadequate representation in the field of trade and commerce and inadequate or no representation in government services etc.[36] It recommended that the census of 1961 be undertaken on the basis of caste. This was not carried out. By not accepting the suggestion to conduct a census on the basis of caste has meant that even today, the Other Backward Classes are identified through the census undertaken in 1931 and this is an issue that has created considerable conflict in the present Act.

The findings of the Commission were not accepted. In addition to the fact that the predominant use of caste as an indicator met with the disapproval of the government, a principal reason for the rejection of the findings of the Kaka Kalelkar Commission was a result of conflict within the Commission which lessened the authority and legitimacy of the Report.[37]

These recommendations were rejected by the Government as they disapproved of the usage of caste as the criteria, stating that this would increase the dependence on the caste system, the importance of which was sought to be negated. In addition to this, a problem with identifying backward classes based on caste as suggested by the Commission is the introduction of a communal tinge to the process of identification. Using the caste system would imply that non Hindus would be denied benefits. Further, the methodology adopted by the Commission was decried for its lack of objectivity.

With regard to the other recommendations as to the criteria for identification, they were deemed to be too vague to be of any significance. Moreover, if the recommendations were taken into consideration, the result would be that the majority of the population would benefit from reservation which was not practical economically. For instance, the Commission recommended reservation of 70% seats in all technical and professional institutions for qualified students belonging to the backward class.[38] The Central Government stated that further investigation was necessary into this matter. Until that was completed, those classes with infirmities arising due to reasons of occupation or environment and those classes which could be reasonably construed to be backward were to be given special protection.

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[36] A. Ramaiah, *Identifying the Other Backward Classes*, 27 Econ. & Pol. Wkly. 1203 (1992).

[37] The Chairman of the Backward Classes Commission was also in disagreement with the conclusions and findings and refused to endorse the findings of the Commission. Though he did not record a formal minute of dissent as the other members had done, in his forwarding letter to the President, he expressed his disagreement with the use of caste as the basis for determining backwardness.

[38] *Supra* note 36, at 1203.

The method suggested by the Government was not in any way an improvement on the suggestions of the Kalelkar Commission. If the recommendation of the Commission that low education levels were to be construed as a sign of backwardness was deemed to be vague, compensatory discrimination for those 'reasonably construed to be backward' was no less vague and in no way could bring clarity to the murky issue of identification. Merely indicating certain factors such as occupation and environment without defining a mechanism to ensure the same was followed is not a method of identification with any legitimacy.

The attempt made by the Central Government following the debacle of the Kaka Kalelkar Commission to identify some criteria other than caste was not successful.[39] Ultimately, in 1961, the Central Government laid down that no national list of backward classes could be made and this task was to be left to the State Governments which were to develop their own criteria for this.[40] Subsequently, a number of State Governments set up Commissions to define criteria for backwardness.[41]

VII. The Second Backward Classes Commission – Igniting the Nation

The Mandal Commission, as the Second Backward Classes Commission headed by B. P. Mandal had, among its objectives, the task of evolving a lucid method of identifying the socially and economically backward classes. The report was submitted by the Commission on 31st December, 1980.[42]

The indicators suggested by the Commission for determining backwardness were caste based for the Hindu population. Economic and educational criteria were evolved for the identification of Other Backward Classes belonging to other religions. On the basis of their survey, the population of Other Backward Classes in India was estimated to be 52% of the total population of India. This was in addition to the Scheduled Castes and Tribes. This estimate has been deemed to be faulty.[43] In addition, accepting the recommendations of the Commission would

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[39] The Deputy Registrar General was requested to conduct a survey as to whether backwardness could be linked to occupational communities rather than caste. Though this survey was undertaken, it failed to yield any tangible result.

[40] B.P. Mandal et al., Report of the II Backward Classes Commission 2 (1980).

[41] *Ibid.*, at 5.

[42] Nevertheless, it was implemented by the Janatha Government only in 1989. Sukdev Khanna, Reservation and its Implications 57 (1994).

[43] *Supra* note 13, at 409.

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have meant that over 70% of the population would be entitled to benefits – this is not economically feasible for any government to carry out. The Kaka Kalelkar Commission had also come out with a similar recommendation.

This finding of the Commission was not translated into a recommendation as it violated the law laid down by the Supreme Court in *Balaji* that no more than 50% of seats could be reserved. Hence, the Commission evolved the figure of 27% as a recommended reservation for the Other Backward Classes in addition to the reservation already in place for the Scheduled Castes and Scheduled Tribes.[44]As is well documented, the Mandal Commission unleashed a wave of fury in the nation – the ruling in *Indra Sawhney* was an offshoot of this.

VIII. *INDRA SAWHNEY*: CLARITY OR CONFUSION?

Indira Sawhney v. Union of India[45], popularly known as the 'Mandal case' examined the findings of the Mandal Commission and the Constitutional validity of the same. The ruling in *Indra Sawnhey* sought to consolidate the various rulings on the identification of Other Backward Classes.

Attempting to explain the term "backward classes" in Article 16(4), the Court stated that while determining a backward class, the emphasis would be on social backwardness while finding an integral connection between poverty, caste, occupation and social backwardness. Admitting that it was virtually impossible to eliminate the use of caste as a criterion for determining backwardness, the Court nevertheless stated that it could not be used as a criterion for identification of the Other Backward Classes without it being established that the caste as a whole was a backward class. Further, the court pointed out that among non Hindus for whom the caste system was not applicable, there were groups that could qualify as backward classes of citizens and they had to be accommodated as well. Therefore, in order to identify backward classes under Article 16(4), a limitation cannot be placed such that they have to be socially and educationally backward such as in 15(4) or by the mere use of economic criteria.

The Court therefore, chose to apply caste as a criterion though not the only one. The Court directed the Government to identify the 'creamy layer' by evolving a method themselves. The task of identifying the backward classes was left by the court to the Backward Classes Commission that was to be formed. It was suggested that it be set up to address the concerns of the Other Backward Classes. This body would also be responsible for periodic revision of the list of Other Backward Classes.

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[44] The reservation for the Scheduled Castes is 15% and for the Scheduled Tribes is 7.5%.

[45] 1992 Supp. (3) S.C.C. 217.

Recently, in *Nair Service Society v. State of Kerala*[46] , the Supreme Court dismissed the report of the Narendran Commission which was set up in the light of the recommendations in *Indra Sawhney*. The Commission suggested that the persons excluded as creamy layer could still claim the benefit being a descendent of a person who was a member of the backward class and had a hereditary occupation such as a black smith or gold smith. The Court held that it was 'trite' that those, who have reached the status of general category, could not be permitted to defeat the purport and object of the concept of the 'creamy layer'.

IX. AFFIRMATIVE ACTION AND THE AMERICAN EXPERIENCE

The Equal Protection Clause of the Fourteenth Amendment in the United States Constitution was created with the intention of securing and upholding rights that had been given to the newly freed black slaves and prevented the states from discriminating against blacks. However, the states had no obligation to improve their status.[47] In response to the Civil Rights movement, and based on the Equal Protection Clause, the Civil Rights Act of 1964 was passed. Essentially, this was no more than a crisis management tactic employed by John. F. Kennedy to stave off the impending racial crisis.[48] In its original form, Titles IV and VII of the Act provided the legal authority for affirmative action and banned discrimination on the basis of race, colour, religion, sex or national origin in federally assisted activities and employment. This was contested on grounds of reverse discrimination.[49]

In order to make the Act effective, Executive Order No. 11246 was issued by President Johnson which clearly showed that the beneficiaries of affirmative action were to be determined on the basis of colour and not the other indicators.[50]

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[46] MANU/SC/1126/2007.

[47] *See* Chandola, *supra* note 1, at 106.

[48] Priya Sridharan, *Representations Of Disadvantage: Evolving Definitions Of Disadvantage In India's Reservation Policy And United States Affirmative Action Policy*, 6 ASIAN L.J. 113 (1999).

[49] Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court validated the adverse impact theory of discrimination, holding that Congress' goal in crafting Title VII 'was to achieve equality of employment opportunities and remove barriers that have operated in the past to favour an identifiable group of white employees over other employees.'

[50] Executive Order No. 11246 directed government contractors to actively seek out black candidates for jobs, and called for colleges and universities to recruit more Black students and faculty members *"without treating them differently when making actual decisions."*

The Blacks were the initial beneficiaries of affirmative action and since then, Hispanic Americans and Indian Americans have also been the beneficiaries. Hence, race is the means to identify recipients of affirmative action. Certificate of individual beneficiary status depends on self identification.[51] This is a clear departure from the practice in India where beneficiaries are determined by the Government.

Since the early 1970s, policies of affirmative action have been increasingly challenged in U.S courts with the result that the quota system has been ruled out in employment and other forms of preferences are permissible only to offset discriminatory practices by the same organization.[52] Since affirmative action has no basis in the US Constitution, courts may adjudicate on the legality of affirmative action itself as opposed to India, with Constitutional sanction to affirmative action where the courts may debate the legality of positive discrimination policies such as the criteria to determine beneficiaries.

The U.S. judiciary has progressively limited the use of affirmative action by acknowledging only a very limited definition of disadvantage and nor acknowledging any presumption of a disadvantage from race discrimination.[53] The Court subjects the use of race as an identifying factor to the strictest judicial scrutiny - the purpose being to 'smoke out' any illegal intentions of the legislature. This is similar to how the Supreme Court from *Balaji* has decried the use of caste as an indicator of backwardness.

X. Current Implications

The Central Education Institutions (Reservation in Admissions) Act, 2006 which has raised widespread furore in the country has chosen to define Other Backward Classes as the class or classes of citizens who are socially and educationally backward and are determined to be so by the Central Government.[54] This is an extremely problematic definition as the identification of the Other Backward Classes has not been carried out at the national level in the recent past and the 1931 census is the most recent one based on caste. It has been reiterated time and again by the Supreme Court that each state must implement their list of Other Backward Classes and that Other Backward Classes by definition can only be

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[51] *See* Chandola, *supra* note 1, at 108.

[52] In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Court held that under the Equal Protection clause of the Fourteenth Amendment, societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.

[53] *See* Chandola, *supra* note 1, at 109.

[54] § 2(g) of the Central Education Institutions (Reservation in Admissions) Act, 2006.

defined at the state level.[55] Many states such as Tamil Nadu have done so. Incorporation of factors such as place of residence may be difficult to envisage at the national stage.

In *M. Nagaraja and Others v. Union of India and Others*[56], regarding the proposed reservation for Other Backward Classes in Central institutions of excellence, a Constitution Bench of the Supreme Court has decried the practice of the creamy layer obtaining the benefits of reservation and has reiterated the 'means test' applied in *Indra Sawhney* which would exclude the creamy layer from the benefits of reservation. In *Nagaraja*, the Court has considered *Indra Sawhney* to have incorporated the principle of secularism by bringing in the concept of the creamy layer which seems to be an absurd interpretation. With respect to the criteria to be applied to identify Other Backward Classes, the Court said that it was bound by the ruling in *Indra Sawnhey*. Hence, *Indra Sawhney's* interpretation of the criteria to identify Other Backward Classes which attempts to reduce the importance of caste while acknowledging as inextricably connected to backwardness remains unchanged.

The operation of the Central Education Institutions (Reservation in Admissions) Act, 2006 granting 27% reservation for Other Backward Classes has reached a deadlock been stayed with the judgement in *Ashoka Kumar Thakur v. Union of India and Ors.*[57] The Court stated that the reservation granted to Other Backward Classes as per this Act was arbitrary and *ultra vires* the Constitution as the list of Backward Classes in the Act was computed on the basis of the Census of 1931 which was outdated. Further, since then, no enumeration based on caste was carried out. This required to be revised. The Court ordered the Union of India to determine a comprehensive policy for determination of who the Other Backward Classes were. Strangely, the Court also decried the use of caste alone as the basis of determining socially and educationally backward classes. Presumably, the intention of the Court was that a Census on the basis of caste should be employed as a beginning of identification and other indicators such as economic means should be applied to narrow it down.

XI. Conclusion

Affirmative action, especially for the Other Backward Classes has always been a contentious issue in the history of independent India. Positive

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[55] For example, in *Indra Sawhney*, the Court recommended the establishment of a tribunal at the Central and State level to revise periodically, the list of Other Backward Classes.

[56] MANU/SC/4560/2006.

[57] MANU/SC/1416/2007.

discrimination' as this is known in India is a laudable process in line with the Constitutional goals that India has set out for itself. It is necessary that the Other Backward Classes be identified, in order that they may be eligible for benefits which will enable them to be on par with the rest of the society.

The task of identifying the Other Backward Classes is a complex issue due to the fact that the Constitution has neither defined them nor identified any method of identifying them unlike the Scheduled Castes and Scheduled Tribes. This is a problem that has shown no signs of reaching an amicable solution despite a number of Supreme Court cases dealing with the issue. In the absence of such a method being evolved, resentment among a large section of the population remains as the issue is seen to have been politicized with the interests of the Other Backward Classes being marginalized.

Nevertheless, in most cases, the Supreme Court has shown a great deal of foresight in dealing with this issue. Beginning with the landmark case, *Balaji v. State of Mysore*, the perennial conundrum has been whether caste should be used as the method of identification. The Court has shown to have changed its stance over the years on the issue of whether caste should be the sole criterion in determining backwardness. The Court has considered applying other indicators such as economic condition, place of residence and occupation over the years in various judgments.

From the wealth of judicial opinion gathered on this matter, an appropriate method of identification of Other Backward Classes would be to take into consideration a number of factors contributing to backwardness, of which caste may be one. Though it is true that most of the backwardness is due to position in the social hierarchy, using caste as the only criterion is not without its dangers. Moreover, this would amount to denying benefits to the Other Backward Classes belonging to religions other than Hinduism. To use economic criterion alone would not show the complete picture. Therefore, a combination of these factors with caste as an important indicator may be required for the proper identification of the Other Backward Classes. Other indicators such as place of residence, educational backwardness etc should be taken into consideration at the State level as they may be State specific indicators. Once this has been carried out, the Central Government should evolve economic criteria that will exclude the creamy layer from the benefit of reservation. As was suggested in *Indra Sawhney*, persons belonging to certain occupations and their children could be excluded from the purview of reservation. In this manner, the concerns of the State will be taken into account, the creamy layer will be excluded and the confusion that is rampant at present owing to the differing standards adopted by different states may be avoided.

In light of the **Central Education** Institutions (Reservation in Admissions) Act, 2006 to incorporate reservation for Other Backward Classes in institutions of excellence in **the country, it is** imperative that this vacillation is ended. Immeasurable confusion is bound to be caused by the enactment of an Act for the benefit of a section of the population that has not yet been identified in a scientific manner. The recent judgment in *Ashok Thakur* requires the Government to evolve a national list of Other Backward Classes. Such a move would not be without its difficulties. Nevertheless, it does not seem that in the absence of such a list that the controversy regarding identification of Other Backward Classes will cease.