



2020

## Transcript - XIII NLSIR Symposium - Session 2

Kiruba Munuswamy

Shyam Babu

Anup Surendarnath

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

### Recommended Citation

Munuswamy, Kiruba; Babu, Shyam; and Surendarnath, Anup (2020) "Transcript - XIII NLSIR Symposium - Session 2," *National Law School of India Review*. Vol. 32: Iss. 2, Article 10.

Available at: <https://repository.nls.ac.in/nlsir/vol32/iss2/10>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in National Law School of India Review by an authorized editor of Scholarship Repository. For more information, please contact [library@nls.ac.in](mailto:library@nls.ac.in).

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

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

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

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

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

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

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

<sup>10</sup> Social activist and advocate, Supreme Court of India.

<sup>11</sup> Senior Fellow, Centre for Policy Research, Delhi.

<sup>12</sup> Executive Director, Project 39A and Assistant Professor, National Law University, Delhi.

with the American civil rights movement, and stated that in India, while we accomplished something with the freedom movement, we did not fully achieve freedom.

He then drew focus towards Part 16 of the Constitution. Our framers borrowed what they thought was right from other constitutions. When they could not get a template, they had to invent it. Part 16 is one such example of a *sui generis* invention, made by Indians. He focused specifically on two aspects: Article 335 (in the context of job reservations and the debate around creamy layer) and Article 338. Reservations in jobs and legislature are only mentioned in this Part for SCs and STs. Article 335 requires that reservation should be consistent with administrative efficiency. According to him, creamy layer would only increase the number of SCs and STs in service, and not decrease it. Thus, creamy layer is a must and should not be removed, if Article 335 is seen as one unit. Just claims of SCs and STs must be satisfied and administrative efficiency must be maintained. He further argued that merit is a matter of generational change. Numbers are not important, signaling effect is what is important. According to him, caste problem will not be solved by public employment reservation. It is a signal to the community and the society.

He then turned to Article 340 of the Constitution and stated that under Article 340, the government is mandated to appoint a commission to check backwardness and take necessary measures. According to him, with the 123<sup>rd</sup> constitutional amendment, Article 340 has been subverted and the equation of OBCs, SCs and STs has been made incorrect. He argued that National commissions for SCs and STs are required and it is necessary to inquire into the grievances of these communities. According to him, the inclusion of the OBCs will result in absurdities like National Commission for Backward Classes or a legislation for atrocities against OBCs. He stated that the equation of backwardness of OBCs, SCs and STs is an absurdity which gets further stretched with the economic quota.

Following Mr Babu, **Dr Anup Surendranath** commenced his arguments by contextualizing that the purpose of the discussion was to compare and contrast normative difficulty between constitutional provisions and the court judgments. He specifically enumerated the following Articles of the Indian Constitution to be relevant to the discussion: Articles 15(4), 15(5), 15(6) and 16(6), 334, 335, 243D and 243T.

In legislature, panchayats and municipalities, it is a proportionate representation. Interesting intersectionality with one-third representation of women at panchayat level.

Standards:

Proportionality (Legislative Sphere) v. Adequacy (Employment) v. No metric (Art 15)

Framework:

<b>Sites</b>	<b>Groups</b>	<b>Rationales/Justifications</b>
Education	Women	Equality of Opportunity
- Primary	SCs	Historical Compensation
- University	STs	Resolving Structural Exclusion
Employment	OBCs	Diversity
- Entry	Muslims	Presence Simpliciter
- Promotion	Poverty	Signaling
Legislative	Weaker Sections	Redistribution
	Disadvantaged Groups	Sharing power

According to him, if we start mixing and matching sites, groups and rationales, it leads to great normative disparities. Each site has differing rationales, as does each group. This leads to normative confusion. Supreme Court decisions are the most common example of not resolving these issues.

He then discussed Article 335 and stated that it raises concerns of efficiency only with reference to SCs and STs and not all backward classes of citizens. According to him, the drafting history of Article 335 is the problem. It was a provision meant to acknowledge the claims of all minorities. The Constitutional Assembly debates took a break during the partition violence and then the original phrasing was dropped. This, as per him, is at the base of the lack of normative coherence.

He then turned his discussion towards the decision in the *Indra Sawhney* case<sup>13</sup> and the notion that reservation as a facet of equality, as a means of furthering equality. He raised a few questions such as: What is the justification for the 50% cap on reservations if reservation is in furtherance of equality? Why is there a limitation on equality? According to him, the message then becomes that a cost is being paid due to reservations and hence, the 50% rule. He further raised the question as to why there are no reservations in the promotion if the justification of reservation is that reservation is the facet of equality? He highlighted that super-specialty courses and defence organizations, such as the Defence Research and Development Organisation, seem to have emerged as areas where we should not have reservations. He questioned the justification to exclude them. According to him, the language of these judgments indicates that there is a social cost to reservation. It belies an unresolved constitutional tension.

<sup>13</sup> *Indra Sawhney v. Union of India* AIR 1993 SC 477.

He then turned his discussion towards the concept of creamy layer in the context of the decisions in *Nagaraj*<sup>14</sup> and *Jarnail Singh*<sup>15</sup> cases. He stated that the proposition that creamy layer should not apply to SCs and STs is *obiter dictum*. It is not a binding position. He raised fundamental questions on creamy layer for SCs and STs. If the argument is that SCs and STs should have creamy layer because OBCs have creamy layer, then there is great confusion on the justification for reservations for these groups. He reiterated the normative disparities caused due to the mixing of sites, groups, and justifications in the above framework. Social discrimination faced by the SCs and STs is radically different from that faced by the OBCs. Creamy layer is based on the economic criteria; that, as per him, being applied to a social discrimination construct of SCs and STs does not make sense.

He then turned to the argument of linking reservations with poverty in light of the recent constitutional amendment. He stated that it is a very curious and untenable amendment. He argued that inadequacy of representation does not have to be shown. There exists great incoherence between various articles of the Indian Constitution. He raised certain questions such as whether it is a basic feature of the Constitution that reservation in India is group based? If it is answered in the affirmative, then if the poor are a group, can there be reservation for them?

He then turned to the issue of sub-classification for the purposes of reservation. He argued that the courts struggle with the fiction of homogeneity within Dalits, SCs and STs. However, this homogeneity does not really exist. The courts rely on the creation of this constitutional fiction of homogeneity. When viewed externally, there seems to be homogeneity. However, when viewed from the inside, there is obvious heterogeneity. This dichotomy has to be resolved. He argued that a balance has to be achieved and an intersectionality-based-model should be devised.

He then contrasted the stance taken by the Andhra Pradesh High Court and the Bombay High Court on the questions of Muslim reservation and Maratha reservation respectively. The Bombay High Court looked at the Gaikwad Commission on an empirical basis in relation to the Maratha reservation. In its judgment, it accepted Gaikwad Commission's recommendations, on the basis of proportionality on basis of population. The court applied the test of proportionality, not adequacy. There was no conversation on the social discrimination angle. He contrasted this with the decision of the Andhra Pradesh High Court with respect to Muslim reservation, where there is a great demand for empirical basis, without resolving or addressing normative coherence with respect to social discrimination.

---

<sup>14</sup> *M. Nagaraj & Others v. Union of India* 2006 8 SCC 212.

<sup>15</sup> *Jarnail Singh & Others v. Lachmi Narain Gupta* (2018) 10 SCC 396.

The last panelist for the session, **Ms Kiruba Munusamy** began her discussion by pointing out that in Tamil Nadu, there was reservation for non-Brahmins and Dalits from the 1800s till 1920s. It was on the basis of proportionality. After that, a communal government order gave reservations on the same basis for all the groups. Champakam Dorairajan filed a case preemptively. The Madras High Court decided that due to the communal government order, she had lost her claim to the seat in the medical college.<sup>16</sup> Another case of Sreenivasan<sup>17</sup> was in relation to an engineering college. Here, the communal government order was found to be against the Constitution, due to violation of equality. After this, Champakam and Sreenivasan were given admission. Champakam had not even applied.

Ms Munusamy then turned to the *MR Balaji* case.<sup>18</sup> Here, a similar proportional reservation system was present in Mysore. 68% seats were reserved for non-Brahmins. It was struck down since there was no basis for decision on the number of percentages. The Supreme Court also laid down a 50% limit to the reservation.

Ms Munusamy then discussed several case laws dealing with the judicial treatment of reservations. She first discussed the *T Devadasan* case<sup>19</sup> where the carry forward rule was considered. She then discussed the *Chitralekhacase*<sup>20</sup> which held that identification/classification without reference to caste is permissible. Ms Munusamy then addressed the *P Rajendran* case<sup>21</sup> which held that social and educational backwardness can be decided just on the basis of the caste of the group. A similar view was taken in the *Trilokinath* judgment.<sup>22</sup> She then mentioned the *NM Thomas* case<sup>23</sup> which held that merit includes good governance.

Ms Munusamy also elaborated on the decision in the *KC Vasanthkumar* case.<sup>24</sup> According to her, the approach of the judges does not seem to have really changed from the view that reservation is for the non-meritorious. Social backwardness can be identified with reference to a person's caste. Poverty is not a disparate element. Similarly, when discussing the *Indra Sawhney* case,<sup>25</sup> Ms Munusamy argued that though this judgment discussed the plight of SCs, STs and OBCs over history, it was still conservative in the sense that it limited the scope of reservation. According to her, it seemed that the judges still

<sup>16</sup> *Srimathi Champakam Dorairajan and anr v The State of Madras* AIR 1951 Mad 120.

<sup>17</sup> *Ibid.*

<sup>18</sup> *M. R. Balaji and Others v. State of Mysore* AIR 1963 SC 649.

<sup>19</sup> *T. Devadasan v Union of India* AIR 1964 SC 179.

<sup>20</sup> *R. Chitralekha v. State of Mysore* AIR 1964 SC 1823.

<sup>21</sup> *P. Rajendran v. State of Madras* AIR 1968 SC 1012.

<sup>22</sup> *Triloki Nath Tika v. State of Jammu & Kashmir* AIR 1969 SC 1.

<sup>23</sup> *State of Kerela v. N. M. Thomas* AIR 1976 SC 490.

<sup>24</sup> *K. C. Vasant Kumar v. State of Karnataka* AIR 1985 SC 1495.

<sup>25</sup> *Indran* (13).

seemed to think that reservation was against merit. The last case that she discussed was the recent decision in *Pavitra's* case.<sup>26</sup> In this context, she argued that merit is nothing but a myth. Making an assumption of lack of merit without even allowing a person to take up a position and discharge responsibilities, is another form of caste prejudice.

Ms Munusamy then brought up the issue of suicides by the students belonging to the SC and ST categories, and highlighted the structural problems faced by them at educational institutions and the stigma associated with availing reservation. According to her, STs should be provided reservation in the elite schools located in the hilly tribal areas.

She then addressed the efficiency argument and stated that reservation is not given to random candidates. Minimum requirements have to be fulfilled. The merit argument, thus, is an argument of prejudice.

In the end, Ms Munusamy discussed the point of reservation for classes which have not been represented so far. According to her, the communal government order in Tamil Nadu which provided proportional allocation for everyone and every class is the best format to go ahead with which no one would have a problem.

This was followed by a panel discussion amongst the panellists. Mr Babu posed 2 sets of questions. First, he referred to the recent Maratha reservation controversy, and the citing of farmer suicides as a justification. He sought the views of the panellists regarding proportional representation in the scenario that now that more than 70% of the population can claim the 50% reserved quota. He sought the panellists' thoughts on questions such as: What if the pattern of reservation is reversed? What about region based reservation?

The second set of questions that he raised was, according to him, relating to something that we all have experienced at some time. He cited his own experience at the Andhra University, where the SC candidates were marked lower to prevent them from being eligible for faculty positions. He observed that SC/ST candidates tend to do better in objective, anonymous evaluation rather than subjective ones, and posed a question as to whether this can be fixed.

Dr Surendranath addressed the question that why can we not mirror proportional representation across all spheres. He stated that he would be open to the idea that this might work in some spheres. But, according to him, there is the complication that as to how micro will such representation be. What about gender and sub-castes? He further stated that proportional representation also limits opportunities, due to which he was not in complete agreement with it.

---

<sup>26</sup> *B. K. Pavitra v. Union of India* (2019) 16 SCC 129.

Furthermore, he questioned that if reservation is an equalizing project, should the burden on the government be more and more to justify reservations in public employment? As of now, the burden on the government is same with respect to education and employment. According to him, burden on the government should be differential to justify its actions.

Ms Munusamy then stated that one anti-reservation argument is that even in the SC category, the dominant castes take up most of the reservation. In that regard, she agreed with proportional reservation, that reserved quota should be divided among communities on this basis.

Dr Surendranath then came to the question of how the quota should be divided, and argued that the answer depended on the reason for need of reservation. If it is a distributive reason, then we should go with the proportional reservation option. But, if it is about signalling, then it does not matter which person from the SC gets it. He, however, was indecisive as to what the reason is.

Mr Babu then gave the example of Maharashtra. Artisan and farming communities think that education is a waste of time and do not send their children to school. Even with the same access to facilities, he asked, what explains the disparity in educational attainment such as in the Malas and the Madigas? Where is the agency in this decision to not send children to school?

On this thoughtful note, the discussion was then opened up for questions from the audience.

Prof Sukumar added his observations to the discussion. According to him, when one peruses judgments pertaining to reservation, earlier judgments become references for future ones. The language looks progressive but that is a farce. The problem is in the judgments. The carry forward position is also taken from the judgments. Even advertisements for Indian Institutes of Technology are rolling advertisements and no number of positions is mentioned. All this is done to scuttle reservation. According to him, it is disturbing that 95% of campus suicides are of SCs and STs students, which according to him are institutional murders. He stated that he had collected hundreds of samples from 10 universities and according to his data, discrimination in vivas and marking exists and such discrimination pushes such students to this step. It is important to look at these concerns.

A question was put forth by Dr Baudh in the context of one of the fruits of reservation, *i.e.*, to look at the accomplishments of the members of those communities who have availed reservation. What does that achieve? Is there any trickle down effect? This critical question must be asked when mapping reservations, as to what reservation achieves. He then added a clarification on the



50% rule in context of the *Indira Sawhney* case.<sup>27</sup> According to him, if reservation exceeds 50%, the exception would overrule the rule. He found the *obiter* to also be confusing because the mandate of the court was expanded by the reference.

The next question brought into attention was the recent controversial issue in Karnataka concerning demand for internal reservation. It was asked whether reservation should reflect population changes. As per Mr Babu, reservation quotas are revised as per population changes. He argued that the signalling effect cannot be dismissed and quoted the effect of Ambedkar, and stated that to that extent reservations have succeeded, to tell the community that they are not equal/inferior does not make sense.

As per Dr Surendranath, regarding what reservation is capable of achieving, reservation is an unsuitable tool for ensuring economic inequality, because of shrinking public employment. He concurred with Mr Babu that as to what reservation has achieved is actually the signalling effect, that all these public positions are the legitimate right of marginalised communities. Accordingly, very often, we expect more from reservation than it can deliver. Politically, it is seen to be enough. Egalitarianism is reduced to reservation.

Dr Baudhargued that reservation in public employment is not representation. A public employee is not representing anybody. Dr Surendranath contended that public employment can alternatively be seen as a share of the state power. It is a signalling function. Mr Babu added that through such reservation, the reserved communities also bring in their own experience to public functions. When public institutions reflect social diversity, they are more robust and egalitarian. Prof Sukumar argued that reservation is not just about employment, it is about the representation when you are appointed on the basis of your community. It has also achieved a sense of dignity and assertion, and this is the context one needs to understand.

A question was put forth by an audience member regarding internal distribution of reservation: should it just depend on caste, or should class or gender also be brought in? Ms Munusamy highlighted that there has been a proposal of internal reservation in Tamil Nadu which is pending. Regarding the language of judgments, Ms Munusamy said that the discourse sounds promising but it is not. Justice UU Lalit's bench, for instance, was the same bench which alleged that SCs and STs are misusing the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('Atrocities Act') delivered by non-Dalit judges, but after one judgment, he turned progressive overnight. She pointed out that we should also not forget that these judgments are being delivered by a court which has had very few Dalit and women judges.

---

<sup>27</sup> *Indran* (13).

Dr Surendranath responded by taking the example of the *Sabrimala* case,<sup>28</sup> and raised the question as to why more women are needed in the Supreme Court. The only woman on the bench dissented, and the same position exists in the review. He wondered whether it is because we expect a more feminist decision or is that not the purpose? What are asking for? Is it a mere representation? He believes that there is a complexity in implementing reservation, what it has achieved and how far reserved candidates actually understand the plight of fellow Dalits.

The panel then took four questions from audience members collectively and addressed them together. The *first* question was about proportionality: states like Tamil Nadu have upto 85% of their population as SCs and STs, then why should they have to settle for 50% of the quota? The *second* question was as to what is the alternative to the 'creamy layer' model. Are reservations better characterised as group rights or individual rights? The *third* question was regarding reservations being considered as a one stop solution. It was highlighted that we have seen a number of commissions being set up to look at alternative methods of social justice. In that light, what options are available there? The *fourth* question was whether the panel thought that reservation itself is promoting discrimination? The Pallar community in Tamil Nadu was cited as an example as it wants to remove the SC tag, saying that it is promoting discrimination.

Dr Surendranath addressed the questions first. On the question of proportionality, he argued that proportionality can be used as a metric for legislative representation, but he was unsure of any justification to use it for employment or education. On the question of individual based versus group-based reservations, he argued that reservations are definitely group based. According to him, making it individual based would say that group membership would not be enough and additional individual proof of discrimination would be required. About alternatives to creamy layer, he stated that he would recast it as a question of internal distribution of the SC and ST quota. He further elaborated that the creamy layer goes back to the fundamental tension of reservation being seen as anti-equality, while reservation is, in fact, a facet of equality. The prevailing idea is that society should be ordered according to individual merit and any movement from that has to be justified.

Ms Munusamy pointed out that 69% reservation was introduced in Tamil Nadu to ensure some kind of access to public institutions. She justified her proposition of proportional representation by arguing that it is to ensure a fair share. Regarding the Pallar community, she argued that their choice of renouncing discrimination is purely political. Rather, she argued, they benefited the most from reservation when it was introduced.

---

<sup>28</sup> *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1.

Mr Babu pointed out that there is a cynical view about the trade-off as to why converts are not given reservation. He highlighted that caste Hindus wanted Dalits to stay within the religion. Ambedkar did not anticipate the expansion of reservation today. According to him, equality is the principle and exception should not overrule the rule, so a balance is needed.

Prof Sukumar then added that there is no data till date on reservation and still we argue without proper statistics. He pointed out that even the government does not have such data. Mr Babu added that the judgment of the Supreme Court from the last year on the Atrocities Act was, as per him, scandalous. He elaborated that it was based on assumptions; the court did not even ask the National Crime Records Bureau about the number of false cases. According to him, the right parties, such as the Home Ministry and the National Commission for Scheduled Castes, were not consulted. Ms Munusamy added that this was because this is what the bench wanted to believe. She pointed out that no Dalit senior counsel was involved in the matter to represent the community and no *amicus curiae* was appointed from the community. The judges were non-Dalit as well.

Dr Gurpreet Mahajan then pointed out that we do have some data, although little and unreliable, that there is a visible impact of reservation in India. She then cited B R Ambedkar who argued that prejudice works in a way that even institutions for justice will not deliver unless represented. According to her, reservation is representation.

Dr Amitabh Kundu (a panellist for Session III) further added to the discussion by stating that the caste data in India is bad, there is no compatibility. He highlighted that there is data showing equal backwardness of Marathas to other communities. However, he pointed out that there is also political resistance. According to him, some affirmative action outside reservation is needed. He stated that the Sachar Committee seriously considered whether reservation would be enough in an economy opening up to privatisation and globalisation. He further added that he once reviewed a journal paper which found that at entry points of gateway institutions like IITs, the share of SCs, ST and Muslims was much less than stipulated, and in addition, such share was from the urban areas only. Thus, there is a rural-urban divide as well. According to him, some other intervention in the education system is needed to have a desired impact. Mr Babu then stated after the Sachar Commission, they did a huge survey in Uttar Pradesh about lifestyle changes in Dalits, in the household and villages. They asked questions such as who lifts dead animals, and the response was that now a days, it is mostly Muslims, while earlier it used to be the Dalits.

A final question was put forth before the panel as to whether reservation is a part of basic structure. Dr Surendranath answered by stating that Article

335 is a badly drafted constitutional provision. Courts now use it as a basic structure test, though that is not what was intended when it was drafted. The efficiency consideration in Article 225 is being used to test constitutional amendments, which, according to him, is mind boggling. According to him, the 103<sup>rd</sup> constitutional amendment would pass basic structure, unless the court agrees with the argument that group based reservation is the only affirmative action as per the Constitution and that poverty is not a group in itself.

### **III. SESSION III – DEEPENING AND WIDENING AFFIRMATIVE JUSTICE: THE WAY FORWARD**

#### **A. Dr Amitabh Kandu**

The third session was moderated by Dr. Ajay Gudavarthy and was titled ‘Deepening and Widening Affirmative Justice: The Way Forward’.

The first panellist for the session was Dr. Amitabh Kundu, Distinguished Fellow at the Research and Information System for Developing Countries, and former Dean of the School of Social Sciences at Jawaharlal Nehru University. He began by discussing the two commissions that were created with an inclusivity mandate. The first was the Equal Opportunity Commission, which was chaired by NR Madhava Menon. The mandate of this Commission was to deal with any form of discrimination on campus. The second commission was the Diversity Index Commission, which was chaired by Dr. Kundu himself. Dr. Kundu said that the mandate of the Commission was to look at the deficiency in representation for different deprived socio-economic sections, such as the Scheduled Tribe (ST), Scheduled Caste (SC), Women, and Muslims. Thus, the framework of this Commission was much broader than that of the Sachar Committee or the Equal Opportunity Commission. Their job was to build a deprivation index, which could be used at the micro level by private institutions, corporate sector, educational institutions, public health programs etc. It would be set up at the Central and the State level. It would be responsible for rating departments and institutes, including the private sector. The idea was to identify, for example, which company or institute had high or low diversity index.

The Commission headed by Dr. Kundu was appointed under the UPA government, during their last 3 months. Hence, he hurried over this time frame to submit some sort of preliminary report. He stated that the UPA government was impressed by his Commission’s report. But when he asked them as to when the report would be implemented, they simply said that they’ll see what to do with it. It was evident that the UPA would not be coming back. However, the Commission’s term was extended by 6 months, wherein they worked under the NDA government. However, the Commission’s report has not yet been implemented.