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Transcript - XIII NLSIR Symposium

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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 103rd 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.

According to him, the objective behind the index was that when a case is made for affirmative action, the court would ask for data to determine which community is poorly represented in which institution. The Commission would give 'tags' to different universities and institutes. Thus, low representation would determine eligibility for a particular programme. The index was built in a manner so as to compare the eligible population within the total population. It required some mathematical reworking of existing indices.

Since questions of data had been raised in the earlier sessions, Dr. Kundu attempted to clarify some of those concerns. He said that he concurred with the view of other panellists that reservations for the economically weaker sections would not serve any purpose. Dr. Kundu explained the procedure followed by the Commission. The Commission first found the income data for different socio-economic groups. However, income data was available only for household consumption, which they had from the National Sample Survey Office (NSSO). They had this data for upper-caste Hindus, SCs, STs, the Other Backward Classes (OBCs), Muslim OBCs, and Muslim non-OBCs. Pointing to a graph, he explained that the graph showed the per capita consumption expenditure mapping for different communities in rural and urban areas at two points in time. It showed that the most deprived community, in terms of per capita consumption, in rural areas is the STs, followed by the SCs and Muslims. The Commission found that Muslims are the most deprived community in the urban areas, across Class- I and Class- II urban centres. One reason behind this is that the SCs and the STs in urban areas get the benefits of reservation. In fact, a large number of STs who come to urban areas come through reservations.

Dr. Kundu then pointed out the differences between the two points in time and the improvement in per capita expenditure at constant prices. The expenditure was the lowest for the Muslims and the STs. It applied to both Class-I and Class-II urban centres. But the level of deprivation in the gaps had gone up for the SCs, the STs, and Muslims in comparison to the rest of the population.

Dr. Kundu then moved on to the health dimension. There was a very interesting finding from the Sachar and Post-Sachar Evaluation Committee ('Post-Sachar Committee'). With respect to the health dimension, access to healthcare services for the SCs/STs/Muslims was much lesser than the average. Access to vaccinations and ICBS programmes was also quite low. Interestingly, the Sachar Committee also mentioned that if one looked at health indicators such as life expectancy, one would find that despite lower access to public hospitals for Muslims, their health indicators are better than that of the SCs, the STs, and even the upper-caste Hindu population. A Muslim woman lives longer than the average lifetime of a woman, two and a half years more to be precise. The number of malnourished women and children is also lower. According to Dr. Kundu, the non-vegetarian habits of the Muslims is supposedly a reason behind

this. Even the infant mortality rate for Muslims is lower than that of the other communities. There is discrimination against the girl child even in the Muslim communities, but it is lesser than that prevailing in the upper-caste Hindus. Dr. Kundu used the death rate of female children as an example to prove this point. The Telangana government argued that the health indicators were better for the Muslim community and used it to deny them affirmative action in the healthcare sector. Therefore, the Muslim community's access to healthcare services is lower than the others.

Dr. Kundu then moved on to the data from the educational sector. He said that the literacy rate for Muslims used to be higher than that of the SCs/STs in the period 1950-61. However, the 2011 data shows that the Muslim literacy rate is lesser than that of the SC/ST population. He had not done enough research to figure out the extent to which reservation was responsible for this change. However, according to him, one factor responsible for this could certainly be the migration of the upper-class Muslim population to Pakistan. The data also showed that the disparity in education was going up. The dropout rates for Muslims between the ages 6-14 years, and their dropout rates in higher education, are also greater. The difference in technical education deprivation is also sharp between Muslims and the SCs/STs. However, in some other indicators, Muslims are a little better than the SCs/STs. Given this context, the Diversity Index Commission did not directly affirm the Sachar recommendation of 10% reservation for Muslims. Since they had a larger inclusivity index, they submitted a report. However, this report was not accepted by the UPA government because detailed data was unavailable. However, the Commission clarified that the missing data could be found out with some changes in the questionnaire, .

He stated that private sector institutions can choose to provide or not provide the data. However, if they want a rating on the Diversity Index, like in Europe with the Green Index, they would need to comply with these submissions. This suggestion was not accepted. The Commission was told that its recommendations were under consideration, but it was not taken up further.

Dr. Kundu then spoke about the Post-Sachar recommendations, which were three-fold. *First*, though the Committee focused largely on Muslims, it had a larger, inclusive India mandate. It suggested that the SC/ST quotas that apply to other religious communities must be extended to Muslims too. It should be possible to identify caste groups within the Muslims as well, which was also proved by a study done by the Giri Institute in Lucknow. The *second* recommendation pertained to the OBC reservations, which are often hogged by the more privileged communities, like the Gujjars for instance. Justice Sachar had asked to stay away from the religion, thus, the Committee recommended that quotas be sub-divided based on the worst of the worst-affected minority population. This would automatically improve the share of the SC/ST/Muslims and the lower among the OBCs in reservations. While the NDA government

explicitly rejected the Equal Opportunity Commission's report, the Diversity Index Commission's report is still under consideration, but according to Dr. Kundu, this does not mean much. Thus, in essence, the Committee recommended that instead of providing separate reservations for Muslims, the two categories within the OBC category could be sub-divided. Doing so would indirectly benefit the Muslim community. The *third* recommendation was that the Diversity Index ought to be used. This did not mean that every institution must necessarily have 14% reservation for Muslims/SCs/STs. Instead, the Committee recommended that institutions apprise them of the percentage of reservation they have and the criteria it is based on. The Diversity Index was proposed to incentivise public and private institutes. 70% of the institutes are dependent on some form of government subsidy. Hence, there is always an incentive/disincentive system for these corporates. The Committee only recommended that the institutes must get themselves evaluated every 3 years, and this should be done consistently. If the institute complies with this, additional funds can be released and if the institute performs poorly, then disincentives should also exist.

In Dr. Kundu's opinion, giving reservation to the daughter of a Brahmin woman who is selling tea deserves much more attention than providing reservation to the son/daughter of an SC/ST IAS officer. However, according to him, the 10% Economically Weaker Section (EWS) reservation does not target the poorest of the poor. The criteria for EWS reservation require the family income to be below Rs. 8 lakhs. The residential plot owned by the family must also be less than 200 square yards. This means that 75% of the farmers would qualify. Accordingly, the upper-middle class would also qualify for EWS reservation. It would lead to a scenario where the bottom 10% has no representation. One would have to wait and see what view the Court takes of this.

According to Dr. Kundu, the society's attitude has changed over time. The corporate sector would be willing to make trade-offs for a higher index rating. It allows consumers to know which company is discriminating against which community. It makes it easier for them to buy/boycott products of such companies. Thus, the diversity index must promote a culture of greater inclusivity. He was of the opinion that it is a very important and impactful tool of positive action, provided it is implemented properly.

With reference to a question asked in an earlier session, Dr. Kundu said that it would be impossible to define poverty or creamy layer. However, the National Statistical Commission said that it would be possible to work out a definition, provided there is a political will to do so. The Commission worked out a definition and a methodology and said that there are 150 million people in the country who are in extreme desperation. This method was, however, shot down. Even if one took an estimate with 1 or 2 dollars, 80% of the country's population can still be put below the poverty line. According to Dr.

Kundu, there is a lack of political will to do something about this. Even the NITI Aayog said that poverty is not measurable. Dr. Kundu said that although it is difficult to define poverty and it would be an imperfect measure, at least there would be some starting point. In his opinion, there ought to be some criteria with respect to poverty so that vested interests do not take over. However, this is precisely what has happened. Because the moment you say that there are 20 different ways of defining poverty, there would be nothing specific targeted for the most deprived sections of the population.

A member from the audience had a question for Dr. Kundu. He asked whether it would be better to remove the blanket of reservation for all the communities at this point in time. He wondered if it would be better to make a new policy for the communities as and when the need arises, and revoke the same after the need has been fulfilled.

Another question was asked regarding the data that the Muslim community had not been able to perform as well as the SCs or STs with respect to education. The audience member wondered if it would be possible to trace the reasons for this, and why this situation has not changed for a long time. He also had a question regarding the basis on which the OBC category was further divided into the most backward classes and the other backward classes.

Dr. Kundu answered that the authoritarian rightist regime in India had used this data pertaining to the Muslim community to peddle some half-truths and dangerous myths. They argue that there is severe social discrimination against Muslim women. They say that the literacy rate of Muslims is low because Muslim girls do not go to schools and colleges. They also say that the fertility rate amongst the Muslim community is very high, and that in another 75 or 100 years, the Muslim population will overtake the Hindu population.

However, Dr. Kundu stressed that the data does show that a change is afoot. He said that with respect to attendance in schools and colleges, the boys-girls disparity amongst the Muslim community is very low. The dropout rates for both the girls and the boys in the community are equal. Female literacy of the Muslims is also increasing at a slightly faster rate than the other communities. Thus, they are catching up. Secondly, Muslim women's rate of employment and workforce participation rate has gone up over time. Thirdly, Muslim women's unemployment rate has also gone up. This shows that Muslim women are looking for jobs, although there are none available.

Regarding the fertility rate, Dr. Kundu said that it is true that the fertility rate of the Muslims was higher compared to the SC/ST population. However, he submitted that when one looks at the National Family Health Survey (NFHS) data, one can see that the Muslim community has had the fastest decline in the fertility rate.

Dr. Kundu concluded by saying that the NFHS IV data clearly showed that if good primary education facilities and primary health facilities are given, along with an increase in the enrolment rate, there would be a sharp decline in the fertility rate of Muslim women.

There was another question for Dr. Kundu. It was whether the religion-based reservations would lead to social disruptions.

An audience member had a question as to whether SCs can be desegregated into Sikhs and Buddhists, since SCs are ipso facto Hindus. He also asked Dr. Kundu as to how he had collected the data on the Hindu STs. Dr. Kundu replied that the data on SC and ST Hindus were taken from sample surveys and analysed.

The last question was with respect to Dr. Kundu's statement about having a threshold when the incentives must turn into disincentives on no improvement in performance. Thus, the question was where the line after which the incentives would turn into disincentives be drawn.

B. Mr. Ajay Gudavarthy

Dr. Ajay Gudavarthy, Professor, Centre for Political Studies, Jawaharlal Nehru University, was the second panellist for the session. He decided to make an intervention from a political standpoint, since the discussion had, till then, been framed only in legal and constitutional terms. Much of the legal and numerical discussion that had taken place flowed through the political debate that has historically taken place right from the Constituent Assembly debates to neo-liberalism.

According to Dr. Gudavarthy, one would have to look at the larger questions, considering that caste dynamics and relations have undergone a substantial change in the modern times. This has especially been due to a rightward shift in the economy that has ushered in neo-liberal changes.

Dr. Gudavarthy raised 5 important questions pertaining to caste and anti-caste politics. The question of justice has three dimensions: redistribution, representation, and recognition. Representation is needed to be a part of decision making. Recognition is needed for cultural lifestyles, values, and identity. Redistribution is needed for income and property ownership. Political theory deals with these three questions.

It is important to note that the strategies for one dimension are cancelling out and blocking the other dimension. Hence, according to him, the question of reservation must be phrased in terms of these challenges that we are facing. For example, the question of recognition is blocking the question

of representation. An instance of this is when Dalits convert to Islam and Christianity, they become a numerical minority. This affects their capacity to influence electoral outcomes. Thus, they lose representation. However, any of these dimensions can block the others.

According to Dr. Gudavarthy, Ambedkar was also struggling to get these three dimensions together. One can see this when one reads Ambedkar closely. He proposed reservations, conversion to Buddhism, separate electorates, and the question of fraternity in the citizenship agenda. Thus, the issue arises as to where one could possibly place the question of reservation within these three dimensions.

This would lead to the first question, as to whether reservation as a strategy helps in bringing these three dimensions of justice together. Or, whether reservations block solidarity and pose intricate challenges to anti-caste politics.

The second question is a question of cultural recognition. Much of the Dalit-Bahujan politics in India has moved towards an essentialisation of the Dalit cultural identity. This has happened because they're trying to frame the questions of stigma and mobility in terms of the specificity of Dalit culture. Their objective is to fight the question of stigma through identity. Thus, the politics has moved towards creating an exclusive identity. Therefore, Dalit politics has argued that Ambedkar solely belongs to Dalits. Another claim is that only Dalits can speak on behalf of Dalits, and others speaking on their behalf is not only ethically wrong, but it also has epistemological challenges. Thus, over time Dalit politics has moved into exclusivity and specificity.

Dr. Gudavarthy explained that Richard Rorty, the political philosopher, made an interesting intervention. He argued that till the 1960s in the Civil Rights movement, the focus was not on recognition, but on the elimination of prejudice and stereotypes. The displacement of prejudice to bring in the question of cultural recognition happened because of the influence of the second wave of feminism. Women were the first to raise this question of cultural specificity. They prodded into femininity being different than masculine culture. This emerged in the context where women were marginalised but not stigmatised. This led to the demand for cultural specificity and recognition. This led to the emergence of women's study centres that went into specific women's history, what motherhood and femininity stood for, and other such issues.

Through this, Rorty sought to argue that this kind of discourse has misplaced the question of stigma. Therefore, he argued that anti-racial politics, and by extension, anti-caste politics in India should move back to the elimination of prejudice, rather than arguing for specificity of cultural recognition. One of the questions that has created a historical crack is that of prejudice and stigma. We have been dealing with these indirectly, but there is a need to address them

directly in how they emerge in our daily life. Ambedkar tried to address this by suggesting the idea of inter-marriage and inter-dining. However, that did not work.

Rorty suggested that we must not move towards specificity but towards a universal idea of common humanity. This idea needs to be instilled at the school level itself to fight prejudice. Simply asking for cultural recognition without fighting prejudice is problematic. There is no normative case for why they should recognize your culture, but there is one for why they must not prejudice or discriminate you. Thus, the question arises as to whether one should frame the question of prejudice away from cultural recognition. Despite mobility and representation, the prejudice has not been eliminated. The single biggest failure of anti-caste politics has been fighting caste prejudice in education, employment etc. Accordingly, the question is whether we should reframe the question of reservation in terms of prejudice too.

Dr. Gudavarthy's third question was in terms of the equation between difference and fraternity. He said that Ambedkar was one of the earliest and few political thinkers in India to emphasise on the idea of fraternity along with equality and liberty. In fact, he said that without fraternity one cannot fight caste. Therefore, fraternity would mean certain shared thoughts, common cultural practices, a certain idea of a shared history. It is debatable what its specific form could be. Ambedkar made an interesting point that fraternity is an important principle which cannot be converted to a constitutional right. He noted that equality and liberty could become legal principles and constitutional morality, but fraternity could only become social morality.

Thus, one would have to ask whether Dalit politics has paid adequate attention to this third question. According to Dr. Gudavarthy, part of the reason why we have a resurgence in the conservative and neo-right wing backlash in India is a response to not paying attention to the idea of fraternity. The equation between difference and fraternity comes back to us in various ways. If we drop the question of fraternity and pose the discussion only in terms of difference, it would cause a challenge to anti-caste politics. Dr. Gudavarthy referred to Prof. Sukumar and pointed out that he is called a Dalit intellectual. He said that this is not a stigma but is a dilemma. This is because, there is no clarity in public discourse as to whether invoking the Dalit identity amounts to stigmatisation or an assertion of their identity. This confusion remains unresolved in our public discourse because we haven't combined the question of difference with fraternity.

The idea of difference is actually that of distance. How exclusive I am in being recognized as autonomous? This idea of autonomy in itself is sometimes quite a misplaced idea. Michel Foucault argued that under modernity, autonomy determines how power operates and controls you. Part of this discourse

entered Dalit politics. This exclusive idea of being autonomous of everything has resulted in us dropping the question of larger group solidarity. Thus, the third question is the need to bring back fraternity into social justice discourse.

Dr. Gudavarthy also explained the need to examine the shift in voting patterns of Dalits towards the right-wing regimes. According to him, this shift is partly because of the aspirational mood of the Dalits. He spoke about a survey he conducted with the Dalits working in the Akhil Bharatiya Vidyarthi Parishad (ABVP) Unions in Andhra Pradesh and Telangana. All these organizations are headed by Dalits and Bahujans. He was quite intrigued by the idea of Dalits supporting a neo-conservative right-wing group, and wanted to examine as to why they were so critical of the autonomous Ambedkarite idea. One of the problems with the Ambedkarite articulation is 'wearing your differences on your sleeve'. There is a constant requirement of reasserting their caste identity. In contrast, in right-wing organizations, Dalits are relieved of their caste identity. The caste question is not directly delved into, although it is introduced indirectly, for instance, through meals. In the interviews, the Dalits stated that they would be willing to give up beef eating, if it meant that they would enjoy social mobility. This represents an undying need for fraternity and recognition by groups.

In Dr. Gudavarthy's opinion, the idea of difference has its merits when it comes to delving into intricate questions. According to him, reservations have led to an expansion of the idea of merit. Had there not been reservations and scholarships, our understanding of caste would have been limited. It is only the work of three generation of Dalit scholars that has introduced us to intricate questions of caste. This is merit and this is an expansion of the stream of knowledge. However, this question of difference has missed the larger idea of solidarity.

The fourth question was that of reservation amongst the upper-caste. One can always question the legitimacy of the cap and other such administrative questions. However, Dr. Gudavarthy's larger question is through the lens of social transformation. If reservations are not appropriate for the upper-caste, then one has to look at alternate ways of framing and answering this question.

Reservations are crucial but it has become the only aspect of Dalit politics. According to Dr. Gudavarthy, we need to go back to larger structural forces that cause oppression and must frame appropriate strategies. One must not merely try to use reservation to fight discrimination. Instead, one should also try to go into questions of the common neighbourhood schooling system in order to increase inter-generation mobility. We also have to question the model of neo-liberal growth and figure out as to who is benefitting from it. According to him, this model of distribution in multiple pies will only increase the urge

for greater fraternity, and thus promote the rise of authoritarian right-wing regimes.

The discussion was then opened for questions. Adv. Kiruba Munusamy had a question for Dr. Gudavarthy and Dr. Kundu. The question was in reference to Dr. Gudavarthy and Dr. Kundu's statements about rural children, neighbourhood schools and the tribal students who brought up new ideas, but had no methodology or secondary resources for their research. Her question was whether we are becoming linguistic fascists, especially considering that today vocabulary is considered to be knowledge, and concepts and ideas are disregarded. She questioned whether we are exerting intellectual arrogance by adopting conventional methods.

She also asked Dr. Gudavarthy regarding his opinion about the requirement for fraternity. She asked whether it would be right to say that fraternity comes in only with the acceptance of differences. She asked whether it would be reasonable to expect society to accept differences too.

Ms. Munusamy also remarked on the point of addressing Dr. Sukumar as a 'Dalit intellectual', and whether this should be considered as assertion or stigmatization. She spoke about how she had experienced the same situation. She spoke about how she is always referred to as a 'Dalit lawyer', as opposed to being referred to as a Supreme Court lawyer, as other lawyers would be addressed. She has not only taken up cases under The Scheduled Castes and Tribes (Prevention of Atrocities) Act but had also taken up cases on the transgender appointment, promotion in services, amongst others. So, Ms. Munusamy spoke about how when a member of her group addresses her as a lawyer who has reached the SC from her community, she feels assertive and respected. But when a person from outside her community addresses her as a Dalit lawyer, she feels stigmatized.

Prof. Sukumar also objected to the statement that reservations have been blocking anti-caste politics. According to him, anti-caste politics has been shaped by reservations. He also wondered whether there was even a possibility of common humanity in a caste society. With regards to the failure of caste mobility and anti-caste politics, he asked whether it was only the agenda of the Dalits to address this failure. According to him, the failure of anti-caste politics is also the problem of the one who created the caste identity. Because, one has to look at who is the person who is against the fraternity, inter-caste marriages and inter-caste dining. It is the person who created the caste identity.

Prof. Sukumar also agreed with Ms. Munusamy's statement and said that he would like to identify himself as a Dalit. But he would not like it if someone else addresses him as a Dalit. Thus, it would depend entirely upon the context. According to him, everybody has their own agency and one has to recognize

it. Also, in Ambedkarite agitations, the caste identity is asserted. Here, caste is used to argue that equality has been denied. For this, one has to use caste. He also referred to Dr Gudavarthy suggesting a common schooling system. Prof. Sukumar said that the common schooling system already exists, but prejudices continue to prevail in Indian schools.

In response to Ms Munusamy's question, Dr Gudavarthy clarified that when he emphasized fraternity, he did not mean the Rortian, undifferentiated fraternity. He said that this is not desirable in the Indian context. He explained that we would need to keep these differences, as caste is a ladder-like structure. But one must look into ways of reading this difference along with a notion of fraternity. Thus, we need to keep this question of fraternity and the form that it ought to take, alive, especially in this time of surging nationalism.

According to Dr Gudavarthy, this is something that Dalit-Bahujan politics must think about. He said that the caste Hindus would never think about this as they have been historically ruled out. A persuasive answer for this would come from Gyorgy Lukacs who said that when people who have been objects of history become the subjects of history, then we will realise the new universal.

Dr Gudavarthy further explained that if one wants to get a sense of historicity, one would realise that the Dalit-Bahujan perspective is a project on reading the differences between social mobility and the notion of fraternity. This was also the main difference between Ambedkar and Gandhi. Gandhi undermined social mobility and overemphasized collective fraternity. But Ambedkar was trying to conjure a dialectic between difference, mobility, recognition, and fraternity. He said that this was something that was missing in Dalit-Bahujan politics, which was partly under the influence of neo-liberalism.

But Prof. Sukumar disagreed with Dr Gudavarthy on this point. According to Prof. Sukumar, Dr Gudavarthy was questioning anti-caste politics. He also said that one cannot simply say that only Dalit-Bahujan politics ought to look at ways of reading differences along with a notion of fraternity. According to him, caste Hindus must also look into the same.

However, Dr Gudavarthy clarified that he was not questioning anti-caste politics, but was only questioning a variant of anti-caste politics. He also said that in an ideal world it would be great if Brahmins also tried to talk about the fraternity. But historically, they have no reason to do it as they are happy in this current system. Hence, he argued that Dalit-Bahujan politics cannot simply mimic what caste Hindus are doing.

He also responded to Ms Munusamy's point by saying that the issue of identity has two sides to it. This is because the identity of a Dalit is historically

imposed. One can signify it in terms of assertion or rebellion, but one should not forget the fact that this is a historically imposed identity in terms of its discriminatory practice. Often Dalit intellectuals themselves abdicate their Dalit identity, for instance, as seen in the case of Gopal Guru. However, in this scenario, Dalit-Bahujan groups criticized him for this and called him an opportunist. Here, he was actually trying to transcend his identity, but this came across as an abdication of responsibility. Thus, identity raises all kinds of intricate and touchy questions.

Adv. Jayna Kothari also raised a point regarding the issue of common humanity and fraternity that had been brought up. She said that, in principle, she agreed with the idea of moving towards a common humanity. However, her issue was with respect to what possible meaning ought to be given to the term 'common humanity'. She said that the definition could end up being one that did not recognize differences. In an instance like this, the specificities are very important. Referring to Dr Gudavarthy's statement regarding the dilemma which exists, Ms Kothari said that the dilemma would always be there. For instance, should one say that one is a woman or is gender non-conforming? This is because there is no idea of humanity that encompasses everything.

Dr Kundu continued on a point that had been made by Dr Gudavarthy. Dr Gudavarthy had said that we have enriched our understanding with the classification of caste and that we know much more about social and deprivation issues. However, Dr Kundu spoke about how he had been asked multiple times whether the Sachar Committee had even achieved anything, or whether it had helped the Muslim population in any way. In fact, the criticism made against the Sachar Committee was that the greater knowledge and understanding that it had brought about had not really helped the political process, but had instead polarised it. Thus, according to Dr Kundu, this was an important issue, and he said that he agreed with Dr Gudavarthy's point that the larger solidarity issue is important.

Dr Kundu also referred to Amartya Sen and his book 'Identity and Violence'.²⁹ In that book, Dr Sen said that a Muslim would have a large number of identities. For instance, he/she could be a professor, the chairman of the local resident association etc. But the present politics is such that, whenever it comes to any kind of benefits, only the identity of being a Muslim is upheld. All the other identities are forgotten. Reservation is meant to address all the inequalities in the system. However, capability inequality is very high, and 50% of capability inequality is not because of individual factors; it is because of societal factors. Dr Sen's question was whether society discriminates against individual Muslims or the entire community at large. For instance, you find out that society's discrimination is not against an individual, but is against the

²⁹ Amartya Sen, *Identity and Violence* (New York and London: W.W. Norton 2006).

whole caste. Here, you would require policies for the whole caste, not for an individual. Individual caste level inequality is a matter which is conditioned by several other things. If social discrimination, historical deprivation, and historical discrimination is a subject that is to be redressed, then one would have to find out how society discriminates. Thus, according to Dr Kundu, just increasing the depth of knowledge is of course very important. But one must also find out on what basis discrimination is being made and try to address that.

An audience member had a question about tackling caste in the private sphere. His question was that since the law does not provide an answer to the private domain, what would be the solution to tackle the logic of caste that prevails in the private sphere.

Another question was whether sustainable development could help solve the problem of reservation. This was in the context of Dr Gudavorthy's statement that there is a need for an alternative for reservation, and Dr Mahajan's statement that due to scarcity of resources, there are a lot of problems in society.

C. Jayna Kothari

The third panellist of the session was Ms Jayna Kothari, Senior Advocate, Supreme Court of India, and co-founder of the Centre for Law and Policy Research. She began the discussion by saying that she intended to look at the topic of reservations based on two emerging themes, but would not get into the 103rd Amendment to the Constitution and reservation based on economic criteria.³⁰

She instead decided to delve into two emerging themes, which would chart out a new direction on reservations and would help us think deeper and wider on the reservation and affirmative action debate. Concerning the issue of widening affirmative action, she dealt with horizontal reservation for transgender and inter sex persons. On the issue of deepening affirmative action, she spoke about promoting reservation for people with disabilities. She said that horizontal reservations and reservations in promotions are classical reservation themes. But they take on a new dimension when we speak about it in the context of transgender persons and persons with disabilities.

The Indian society's primary debate on the reservation has always been in terms of caste, and lately based on economic criteria. However, the challenge is to look at reservations based on the claims of transgender persons and persons with disabilities. Their issues have always been sidelined, but they are now entering the reservation debate, legally, in courts. Therefore, we would have to look at how the courts would address this.

³⁰ The Constitution (One Hundred and Third Amendment Act, 2019).

Ms Kothari first addressed the issue of horizontal reservation for transgender persons. In the case of *National Legal Services Authority v Union of India* (NALSA case),³¹ the Supreme Court held that all persons have the right to self-identify their gender as male, female or transgender. It was the first time the Constitution recognized the rights of transgender persons. The Court recognized that there has been discrimination and stigma faced by the transgender community for a very long time. Therefore, they should be provided special provisions and reservations under Art. 15(4) and 16(4), and that they should be recognized as socially and economically backward communities, backward classes, Scheduled Castes (SC) and Backward Classes (BC). Ms Kothari specified that although she used the umbrella term ‘transgender’, the term covered many non-gender-conforming identities, including intersex persons.

According to her, a problem with the *NALSA* judgment has been that the SC gave very confusing directions in the case. It said that transgender persons should be provided reservations. But it also held that they should be recognized as a socially and educationally backward class and should be provided reservations under Art. 15(4) and 16(4). They specified that. But they didn’t go any further to see in what manner the reservation should be provided. It left this issue unresolved and did not provide any directions for the same. According to her, providing reservations under Art. 15(4) and 16(4) was not the right way.

However, following the *NALSA* judgment, nothing much has been done. Most states have yet not provided any form of the reservation to transgender persons. However, Tamil Nadu has taken some steps towards this end. What Tamil Nadu did was, it introduced a government order including transgender persons within the category of ‘Most Backward Persons’ (MBC). Tamil Nadu simply calls its OBC as MBC. Transgender persons are included within this MBC list. There is no subdivision of percentage within the MBC category. So, for instance, if there is ten percent reservation for the MBC category, and there are 20 different categories within the MBC, the Tamil Nadu government’s policy does not say how much each would get. So here, the MBC category becomes a pool.

One would have to look into why there is a demand for horizontal reservation. The horizontal and vertical categories were first defined in the case of *Indra Sawhney v Union of India*.³² Vertical categories were the social categories of caste, SC, ST, OBC etc. The horizontal categories were the special categories, for instance, women, persons with disabilities, amongst others. And therefore, there could be interlocking or intersectional categories. For instance, if you’re an SC woman, you would be assured of some reservation within the SC category, or if you’re an ST woman or an OBC woman.

³¹ *National Legal Services Authority v. Union of India and others* [AIR 2014 SC 1863: (2014) 5 SCC 438].

³² *Indra Sawhney v. Union of India* AIR 1993 SC 477.

However, putting transgender persons within the MBC category as a form of providing reservation could lead to issues because, in such a scenario, transgender persons who are SC or ST would have to give up their SC or ST identity if they want to be recognized as transgender persons under the MBC category. The SC or ST category reservations also have additional benefits and more favourable concessions. Therefore, if individuals belonging to these categories want to get additional benefits, they would have to give up their transgender identity. Thus, one cannot enjoy the benefits of both categories. One can have both only if there is a horizontal category or a special category of transgender, that is made, which would then allow individuals to assert their SC, ST or OBC identity as well.

According to Ms Kothari, this could lead to the problem that Dr Gudavarthy pointed out, wherein people are clamouring for more pieces of the same pie, which could lead to more strife. However, if one looks at the experiences of the transgender community, they really have no other option if they want to get access to public employment. In order to give an example of how the inclusion of the transgender community in the MBC category is working out, Ms Kothari gave the example of a case which she was working on. In that case, three transgender persons had applied for the post of police constables. The post of the police constable is the only post where a majority of transgender people are able to apply for employment. When they apply as trans people, they often fall under the MBC category. However, the age concessions given to MBC persons are much lower than the age concessions given to say, SC or ST people. For example, if you fall within the MBC category, you have to be 24 years old in order to apply, and you can apply up to 26 years of age. If you belong to the SC/ST category, you can apply up to the age of 30, and if you are a destitute widow, you can apply up to the age of 35. The educational qualification for the post of police constable is the 12th standard. However, for most transgender people, it is quite difficult to even complete their 12th standard due to their personal circumstances. A lot of them drop out of their homes and schools and are not able to complete their 10th or 12th standard until they are 27 or 28 years old. Under these circumstances, they may not make it even under the MBC category. Ms Kothari had argued that they did not meet the eligibility criteria as they did not meet the age cut-off, not because of a lack of educational qualifications. Therefore, a first case was filed where it was argued that transgender people should be allowed to apply despite the age cut-off for the MBC category.³³

The next phase was regarding the marks cut-off. This can be a question of merit. The way reservation policies are framed, every category gets a differential cut-off in marks. For instance, if the general cut-off is 50, for MBCs,

³³ Deccan Herald, 'Transgender seeks age relaxation up to 45 years' (*Deccan Herald*, 15 June 2019) < <https://www.deccanchronicle.com/nation/current-affairs/150619/transgender-seeks-age-relaxation-up-to-45-years.html>>

the cut-off would be 40, for SC/STs, it would be 30. Hence, we talk about reservation because every category and interlocking criteria that an individual falls under improves their chances of getting into public employment or getting public education. And this is very essential for moving up or to be able to do anything in life. Putting transgender persons in the vertical category is not allowing them to move up. Thus, there is the issue of widening reservations to new categories of transgender persons. A question arises as to whether we must slot them in the horizontal category of the gender of women, or whether there should be another category of transgender persons under the horizontal category.

Ms Kothari then moved on to the issue of deepening affirmative action. With respect to this, she took up the issue of reservations in promotions for persons with disabilities. Reservations for persons with disabilities are not provided for in the Constitution. It has only been done through legislation. Earlier, we had the Persons with Disabilities Act, 1995 (PWD Act).³⁴ Before that most state legislation and state recruitment service regulations provided for some reservations for people with disabilities in the lowest posts. But the PWD Act 1996 and the Rights of Persons with Disabilities Act, 2016,³⁵ provide for reservations for persons with disabilities up to 4% in public employment and public education as well. However, they do not talk about reservations in promotions. The issue of reservations in promotions is a hot topic, but when it comes to persons with disabilities, the debate is silent. The statute only says 3% or 4% reservations in employment. The statute does not say reservations ‘only in the entry level’. The government has issued several office memoranda or government orders to say that reservations in promotions for persons with disabilities will only be at the lowest post, which is Group C and Group D posts, and not in the upper posts of Group A and Group B which are the highest level posts. This was challenged because persons with disabilities were not able to move up, as many posts could be filled only by promotions. This led to the SC decision of *Rajeev Kumar Gupta v Union of India* in 2017.³⁶ In this decision, J. Chelameshwar held that the law talks about ‘employment’ and employment includes promotions as well. Therefore, there is no bar to reservations in promotions. The government then raised an issue saying that this matter should be referred to a larger bench because it didn’t interpret *Indra Sawhney* correctly. And now this issue has been referred to a larger bench and is pending hearing in the Supreme Court. It doesn’t make the news because issues of persons with disabilities don’t make the news.

Going back to the *Indra Sawhney* case, it didn’t really focus much on promotions. It overruled the decision in *General Manager, S. Railway v*

³⁴ The Persons with Disabilities Act, 1995.

³⁵ The Rights of Persons with Disabilities Act, 2016.

³⁶ *Rajeev Kumar Gupta vs Union of India*(2016) 13 SCC 153.

Rangachari that reservations in promotions should not happen for five years.³⁷ So there was an amendment to the Constitution where a provision for reservations in promotions for SC/ST persons in employment was inserted. That was challenged in *M. Nagaraj v Union of India* and the Supreme Court upheld it.³⁸ But, despite that being upheld, the issue of merit and efficiency in administration is being raised again, in the context of persons with disabilities and promotions for them.

Ms Kothari explained that she had brought this up to show how the categories of transgender persons and persons with disabilities are always sidelined with respect to the issues of horizontal reservations and reservations in promotions. These issues need deliberation. According to her, we cannot yet do away with reservation, and the widening and deepening have to continue taking place. Categories like transgender persons, persons with disabilities, Muslim minorities, amongst others need recognition and inclusion within the reservation policy. However, she also agreed that there was a need to supplement the reservation strategy with a discourse that focussed on equality. We would have to address both, discrimination and prejudice. She referred to an Equality Bill that had been drafted by the Centre for Law and Policy Research (CLPR).³⁹ The Bill aimed to address prejudice and to ensure that in addition to reservation, there are positive obligations of equality that are imposed. This could be by means of a Diversity Index or by inclusion in the public and private sphere. Along with this, one should also look at the emerging themes on the reservation.

An audience member sought Ms Kothari's views on the Transgender Bill with regards to the *NALSA* judgment.

Ms Kothari spoke about how there is quite a lot of criticism against the Transgender Bill, which is now an Act. The criticism mostly pertains to the issue of identification. The issue of identification and how it is addressed has a direct impact on all reservations. The Act does not actually provide for any reservations, though it provides for non-discrimination. The Act says that there would be no discrimination against transgender people in employment, education etc. But it makes no provision for reservations. But with respect to the issue of identification, the SC had said that one could self-identify one's gender or identity. But the Act mandates a procedure for identification which includes an application to the District Magistrate. Then, a procedure could be laid down by which an identity card or some sort of recognition will be given. All of this

³⁷ *General Manager, Southern Railway, Personnel Officer (Reservation) v. Rangachari* AIR 1962 SC 36.

³⁸ *Nagaraj v. Union of India* (2006) 8 SCC 212.

³⁹ The Draft Equality Bill, 2019<<https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-4.pdf>>

is right in the face of the *NALSA* judgment. However, one would have to wait and see how this whole procedure will pan out.

However, Ms Kothari said that when the issue of self-identification was brought up in courts, the courts raised the question as to how self-identification could be allowed. Courts said that there could be a possibility that people would misuse it, and try to get an identification of being transgender so that they would get reservation benefits. However, according to Ms Kothari, self-identification would be possible, despite the SC saying that doing so would be difficult.

Another question was regarding the *NALSA* judgment which had directed the state to consider the transgender community in the SC/BC category. The question was whether putting them in the SC/BC categories was justified, or if they're not considered in the SC/BC category, what was the present status of the transgender community.

Ms Kothari replied that the problem with the SC/BC category was that it is very complicated in nature. The SC decisions on the SC/BC category are very confusing and are not clear. Largely, socio-economic SC/BC category is equated more or less to the OBC category. This is what is happening in Tamil Nadu. But according to Ms Kothari, this is not adequate. She said that the SC made a mistake by saying that it should be the SC/BC category. Instead, the SC should have left this open. What is important is that people must not be made to choose their category of reservation.

D. Dr. Gurpreet Mahajan

The fourth panellist in this session, Dr. Gurpreet Mahajan⁴⁰, sought to reflect on all the issues that were discussed and engage with them.

Commencing with the issue regarding the policies on affirmative action, Dr. Mahajan pointed out that India has many policies on affirmative action other than those of reservation. However, reservation has been a pivotal component of these policies, and has been the subject of discussion for a long time. Hence, Dr. Mahajan limited her attention primarily on reservation.

She pointed out that throughout the day, the panellists had used three concepts, that is, equality, diversity and justice. One would have to identify which concept would be best suited to understand the idea of reservation in India. The temptation would be to begin with the idea that reservation is placed within the broader ambit of equality. However, Dr. Mahajan submitted that whenever the question of reservation is raised, a challenge is posed to it from

⁴⁰ Professor, Centre for Political Studies, Jawaharlal Nehru University.

the discourse on equality, which requires the justification on the need for reservation. Thus, reservation has a very complex and uneasy relationship with the concept of equality. Reservation has entered the debate from the vantage point of formal equality. Here, the idea is about equality before law, non-discrimination and identical treatment of all persons. This has been further discussed in the terms of equality of opportunity which allowed many analysts to bring in the issue of inability to ensure equality of opportunity unless there is a level playing field. This provides an explanation or a justification for differential treatment at times. According to Dr. Mahajan, the analysts argued that formal equality will not really be serving any purpose because that parameter of formal equality is being undermined due to an unfair playing field. So, reservations or the idea of reservations of various kinds or differential treatment for any category of people find their place in this analysis. But it needs to justify itself all the time especially when it is pitted against the discourse on equality. For this, one has to look at the historical context of the idea of equality. The idea of equality came up against the notion of differential treatment or different rights for various categories of people. If one looks at the discussions and debates on equality from the 16th century onwards, people always question the distribution of certain kinds of privileges to a particular category or group of people. This could have been on the basis of property, noble birth, gender or race. The entire discussion on equality has been about doing away with these privileges, and arguing for equal treatment. Moreover, affirmative action of any kind, reservations in particular, put a question mark against that idea that identical treatment serves us well throughout.

Thus, when understood in this historical context, the entire idea of reservation is to say that sometimes differential treatment is required. However, the need for reservation is required to be justified all the time. The questions posed range from the grounds on which this difference is made, its necessity etc. Thus, Dr. Mahajan contended that reservations have always had a very complex relationship with the idea of equality.

However, the question of substantive equality has rarely been the theoretical site of discussion around affirmative action. This is because, here, the contention is not about the equality of the end result. However, equality of opportunity has to ensure that everyone has the same starting point so that they can compete equally with each other. So, if some people are starting from a certain kind of disadvantage from the beginning, then that has to be rectified. Thus, it is not about substantive equality.

She then moved on to the concept of justice which also figures quite prominently around the discourse on affirmative action, reservation and quotas. The term compensatory justice is most often used in the West and North America. This refers to the idea that if some harm has been done to individuals historically, you have to compensate them. Both these terms of 'compensatory

justice' and 'harm done historically' are something that fitted well within the dominant liberal discourse of Western democracies. Dr. Mahajan said that she was not someone who would make a distinction between Eastern and Western thinking. However, she believes that a historical context makes a difference to the content that is put into the idea of equality and justice. For instance, in America, debates occurred around the possibility of parallel lists to pursue affirmative action for African-American and other groups. Here, the debate was about correcting the harm done and the historical wrongs committed. But the principle of compensatory justice invariably led to debates about who compensates whom. It is very individual-centred and led to all kinds of defence. Dr. Mahajan further asserted that in India, the thoughts about this subject was different and with greater insights because India didn't have the inheritance of a million languages of harm. Today, the idea of justice is understood as the idea of social justice because the point which is sought to be put across through reservation and affirmative action policy is that the social structure needs to change.

This idea is forward looking as it suggests that society in the future must not look like the society that exists at this moment or like the one which was inherited from the past but one which has changed in the best possible manner. So, it was a utopian thinking of the fundamental structure of such a society. However, political utopias play a very positive role in imagining the future. The notion here was that we could perhaps think of ideas like affirmative action and reservations because they would create a different kind of society.

When one looks at the Constituent Assembly Debates regarding reservation, it is visible that the Assembly members rarely use the word 'historical wrong'. Many people in fact use the language of guilt, and they use it often when they talk about collective responsibility. According to Dr. Mahajan, this is an interesting shift in terminology because the language of historical wrongs means that we have to correct it and set it back right.

If one studies the debate on affirmative action in America then one of the issues that comes up is the assertion that if a particular individual did not hurt a person, and they did not hold any prejudice against that person, then why should they be asked to give up something or be denied admission. To this, Dworkin had answered that nobody has a right to higher education. Nobody can argue that they are one of the millions who want to be a lawyer and therefore, there should be one million seats for lawyers. Dworkin says that there is a right to basic education, but there is no right beyond that. The reservation issue thus contends that it does not matter whether a particular individual has been complicit in the system, or whether they did it themselves. However, what matters is that they are a part of a society where they are implicitly benefiting from the structure that exists, because of which they enjoy a positional

advantage. Therefore, the individual is collectively implicated in the manner in which the society has come to be.

According to Dr. Mahajan, we need to put an alternative vocabulary in place with respect to the issue of reservations and the issue of justice. We have to think back apropos the many ways in which we have been advantaged or disadvantaged due to collective actions.

She thereafter flagged the third concept of diversity. She mentioned that the diversity discourse came up in the Michigan University case,⁴¹ where the courts allowed for some parallel lists in the name of diversity but not for past discrimination. Dr. Mahajan maintains that this judgment was very interesting to tell us what diversity arguments often entail. This case did not focus on past discrimination, but instead focussed on how it would be good for the society to have a diversity profile and to have a learning experience with each other among other things. In India, the term diversity is often used to imply that we are a diverse country or that we are culturally plural. But when it comes to the issue of caste or reservation, the term diversity is not used at all. In Dr. Mahajan's opinion, the Western analysts had got this idea, understood this idea, made the difference in the conceptual vocabulary and left it for us to reflect over.

In India, the Constitution making was a process of consensus making. Therefore, one cannot think of any one principle which is at work consistently all through the chapters of the Constitution. With respect to reservations, there are three different logics at work. One is focussed on the idea of discrimination and past social prejudice standing in the way of opportunities being given to those who were the object of the prejudice. The second is concerned with the presence of an inclusion element. Since many tribal communities have a particular way of life, they have learnt to stay away. Hence, there is a need to bring them in and include them. Thus, there are the two different aspects of the inclusion element, that is, discrimination and a distinct way of life.

However, there was a second logic that was at work discussed previously in the session, that is, discrimination, and disadvantages. There was a huge debate around the term which ought to be used; whether it should be backward classes, minorities, or backward castes, classes and minorities. The members finally settled on Other Backward Classes since they were thinking in terms of the different kinds of disadvantages that people might face, and leave it to the government to decide what would be suitable in order to deal with the disadvantages.

⁴¹ *Gratz v. Bollinger*[2003] 539 U.S. 244.

The third element pertains to the adequate representation. However, Dr. Mahajan asserts that these are separate logics, because they actually pull in different directions. Nonetheless, the Constitution in its present form makes a separation between discrimination and disadvantage. The measures that are given for including people, who on account of social prejudice would not be included constitute one category of people. However, there is also an enabling clause which says that governments can decide how to deal with disadvantages that the people face who come under the category of backwardness. Nevertheless, this then leads to the problem of determining what would be the measure of backwardness. Many court judgments have held that caste cannot be the sole criteria. So, they bring in backwardness in terms of occupation and other kinds of positionality that one would have to give up. Thus, different judgments actually pull out different logics, and most often, there are different kinds of logic at work.

Dr. Mahajan specified that the discussion was regarding central level policies on reservation. The diversity of practices and policies relating to reservation at the state level is enormous. Dr. Mahajan gave the example of Karnataka, and explained how the state made a five-fold classification. One of these was for economically weaker sections which included all other groups. Thus, the idea of disadvantage, which is one part of the Constitution, has been interpreted in many different ways in State Commission Reports on Backward Classes. According to Dr. Mahajan, there as on why the discussions in India actually make a distinction between SC, ST and reservations around them, and the OBCs is that there is a difference in the logic that is being operationalised when we make claims of reservation for both these categories. In the case of SCs, it is discrimination which is the central concern and entails disadvantage of various kinds. These include the social, economic and educational disadvantage.

Dr. Mahajan also brought up the issue of intersectionality and the problems they pose, which are not limited to inclusion and exclusion. She pointed out how the day's discussion majorly revolved in terms of those who think that reservation is necessary versus those who think that it is not necessary. However, there is also a challenge from groups who are the recipients but are questioning as to why their demands for inclusion into the share of people who want to move from one category to another, for instance, from the SC category to the ST category, or from the OBC category to the SC category, are not being fulfilled. According to Dr. Mahajan, some of the most difficult questions in the history of reservations are posed by the people who ask where they ought to be positioned. The second element of this issue is when an individual has already been positioned within a category then how should they be treated within it. Another issue pertains to the framework within which they should take up these issues. There is a historical difference in terms of the orientation of the various groups, and in terms of what they demanded and what they are

seeking now. This is seen with respect to the Valmiki community in Punjab who wanted sub-quotas. They were given the sub-quotas but this was later pulled out.

Talking about the way forward, Dr. Mahajan opines that the identity should not become a permanent asset. A policy has to be devised which works in such a way that no identity becomes a permanent asset. Thus, one would have to find a way of churning internally so that all these sub-group claims that are emergence cannot be met by simply giving sub-quotas. She also said that we need to think in terms of those who are economically vulnerable but do not fall within the ritually lower caste groups. This is something which the Backward Classes Commissions in many states have started thinking about. Here, one would also have to think about weightages. She explained about Prof. Kundu's Department which had devised a category of backward districts. So, for instance, if a person studied in a school in a backward district, they could be given certain weightage, for example, additional marks to offset the person's disadvantage. According to Prof. Mahajan, disadvantages allow for some kind of manoeuvrability in the kind of policies that are enacted. However, for discrimination, stronger measures are needed.

Another issue that was raised earlier in the session had been about the accomplishments apart from all the numbers and figures. India is a country where there is a scarcity of almost all facilities. Rawls had said that no principle of justice can work in a situation of acute scarcity and justice principles can only work in situations of moderate scarcity. However, we do not live in a world of moderate scarcity, but instead, live in a world of acute scarcity. Hence, according to Dr. Mahajan, there is a very good reason to make a distinction between the policies for people who have been discriminated against and the policies for those who have received a variety of disadvantages.

Dr. Mahajan proceeded to give an example for why she believed that a distinction has to be made. This would also help in answering the question which has often been asked regarding the need for reservations. She took the example of a person wants to get into AIIMS or any good public hospital. This is often exceedingly difficult to achieve because of the limited number of beds. In such a scenario, in absence of the ability to meet a specialist, the person might use their group or community network. By using the community network, they will at least try to get an appointment with the specialist. In situations of scarcity, networks are ways in which people have access to basic facilities which they otherwise would not have had. This element of presence of different groups in different spheres, makes a huge difference to the amount of access one can have to the facilities that are available to everyone. If that is a general statement about presence then there is an even greater reason for people who have an added burden of being excluded due to social prejudice and being discriminated against, to assert their presence.

Prof. Sukumar posed a question to Dr. Mahajan wherein he referred to her point that no identity must be permanent. In response, he argued that when it comes to reservation or any other kind of benefits, the identity can be an asset. He further asked that excluding the reservations for SCs, whether hypothetically equality would prevail in the case of stigma. Dr. Mahajan, in this regard, clarified that she had rather contended that there must be no identity at all, and further that discrimination is an issue different from disadvantage.

Ms Kothari raised her difference with Prof. Mahajan regarding the terms, 'disadvantage' and 'discrimination'. According to her, sometimes, disadvantage and discrimination may collapse. This can be seen with respect to a person with a disability. Such a person can say that they faced disadvantage, but they might also have faced deep-rooted discrimination. Therefore, one cannot always say that disadvantage and discrimination are such tight compartments.

An audience member raised a question for Dr. Mahajan which pertained to institution-based reservations vis-à-vis department-based reservations. Institution-based reservations might perpetuate ghettoization more than department-based reservations. Thus, it raises the issue regarding the policies that are otherwise really caste conscious, but also leads to perpetuation of the logic of caste in the longer term. To address this issue, the question arises as to whether the answer is within the ambit of reservations or if there is a need to completely rethink the way affirmative action is done?

Another question raised was concerned with whether sustainable development could help solve the problem of reservation. This was in the context of Dr. Gudavarthy's statement that there is a need for an alternative for reservation, and Dr. Mahajan's statement that due to scarcity of resources, there are a lot of problems in the society.

The third question posed to Dr. Mahajan from the audience was whether primary education would help in reducing the reservation criteria. This was in the context of her assertion that primary education plays an important role in the development of the backward classes. Another audience member enquired as to what the government could do to ensure that children get proper primary education.

Dr. Mahajan replied that it is true that reservation is implemented from the level of higher education, and the issue often comes up about how opportunities are being distributed at an earlier level. That is something which must be looked into. For instance, the Delhi government is trying to persuade schools which receive government benefits to take in students from different groups and castes. Government schooling was intended to be something which would be mixed. But when people have economic and other social resources, they

move of out of the government schooling system. Once the middle class left the government system, the education became worse off thus creating multiple levels of disparities which is unacceptable. This is another issue which needs to be addressed. According to Dr. Mahajan, this is where the law becomes important because it gives the victim or the concerned affected party an opportunity to make the claim for justice. While law cannot always change behaviour patterns, it does intervene in the private sphere. This was clearly seen in the bill against domestic violence. Thus, the issue is about effecting a change in attitudes because law can bring some relief to those who are the victims. However, this entire issue of government schooling is also a very complicated issue when one looks at the factors such as weak infrastructure in districts which have a large Muslim population, the factors mentioned in the Sachar Committee Report⁴² etc.

Dr. Mahajan also took up some additional issues which had come up from the other panellists. She informed that she was not in favour of merely splitting the population. According to her, the problem associated with thinking in terms of sub-groups is that there is always the possibility of further sub-groups emerging. Thus, she advocated the idea of thinking only in terms of quantitative measures. For her, a good starting point is the distinction between discrimination and disadvantage, wherein the former has a legal and social sanction where as the latter can be accrued due to a variety of reasons. For instance, in the OBC list, there are many groups which were artisans or were engaged in occupations which are no longer tenable, or occupations which have become marginalised because of technology and industry. This shows that disadvantage can have many aspects. Thus, we may need to do similar things like reservation. According to Dr. Mahajan, straight proportionality would also not work.

Dr. Kundu then made a few points on what Dr. Mahajan had spoken about. He referred to Dr. Mahajan's statement that networks often work for getting admission or getting an expert's opinion in a hospital. He said that he wanted to substantiate this point by referring to the urbanisation data. For Muslims, the rural-urban gap is very high in terms of income and consumption expenditure, life expectancy, education as well as in terms of access to quality jobs. In the last two decades, the migration of Muslims from the rural to urban areas had gone down the lowest. However, this is not the case when one looks at the data regarding the SC population. The migration of the Hindu SC population to the urban areas is slightly higher. Similarly, the migration of the non-Hindu SC population percentage share in the urban areas has increased largely because of networks that get created.

⁴² Ministry of Minority Affairs, *Sachar Committee Report* (Government of India, 2006).

Dr. Kundu also questioned Dr. Mahajan's point about collective social responsibility based on the idea that there would always be the question of who ought to compensate. Dr. Kundu mentioned a particular instance at a university where he spoke about collective social responsibility while talking about climate change. A student asked him as to why she should be held responsible today for what her grandfather or great-grandfather did with respect to the pollution. Therefore, according to Dr. Kundu, there are not many takers for this idea of collective social responsibility.

Dr. Kundu also questioned on how one could explain collective social responsibility in the backdrop of the Hindutva agenda of efficiency and competition in the global market. According to him, one possible solution for this could be the Diversity Index. For instance, one could tell corporations that the Diversity Index would have to be complied with otherwise they would not get access to concessional land or concessional input. As mentioned previously, there aren't too many takers for the idea of collective social responsibility at global negotiations or national level negotiations. Hence, in order to bring about a movement to celebrate diversity, one could try to recommend the Diversity Index based incentive and disincentive system, and the naming-blaming of certain private companies.

Dr. Mahajan clarified that she did not believe that India needed a set of concepts which was so unique to the country that nobody else could relate to it. Even though the West did not realise it but they were using the idea of collective responsibility. The future generations have agreed to the belief that this is a possible way of thinking. Governments might not agree to this and persuading governments is a different issue.

Dr. Mahajan also mentioned that the issue of desegregation, cultural difference and stigma had come up often. She mentioned that large-scale hostility in sending children to desegregated schools was well-documented. The feminist movement and the African-American movement had tried to turn this negative stigma and cultural difference into a positive one. Thus, there is a need to address the issue of stigma, cultural recognition and differences that came up at that point of time.

She also maintained that she agreed with Ms Kothari regarding the issue of fraternity. She opined that the challenge currently is to think in terms of what notions of fraternity would have a moment of universality and particularity in it. Dr. Mahajan further opined that when we think about fraternity, it has to be a new kind of fraternity which has space for differentiated selves.