

CASTE AND JUSTICE IN THE RAWLSIAN THEORETICAL FRAMEWORK: DILEMMAS ON THE ‘CREAMY LAYER’ AND RESERVATIONS IN PROMOTIONS

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In contemporary times, there has been constant debate on the legitimacy and efficacy of caste-based affirmative action systems in India. The Supreme Court has laid down the ‘creamy layer’ exclusionary principle that has caused a nation-wide stir. Additionally, in March 2016, the Supreme Court issued a controversial judgment on reservation in promotions in the matter of Suresh Chand Gautam v. State of U.P. In the backdrop of these developments, this paper is an intervention that locates affirmative action policies within the Rawlsian theoretical framework on justice. In the course of this paper, we provide a critique of the 2016 judgment. Additionally, we demonstrate that although an exclusion of the ‘creamy layer’ from the scheme of reservations may be constitutionally valid, it is important for the law to respond to the social stigmatisation and caste-based discrimination that members of these groups face. We extend the Rawlsian frame, using the idea of reflective equilibrium, to suggest how actors behind the veil of ignorance would respond to the question of the ‘creamy layer’ and the question of reservation in promotions. We also make some legal recommendations on these issues that would further the consensus arrived at and cater, responsibly and holistically, to the linkages between caste, power and justice in present-day India.

I. INTRODUCTION

One of the most contentious areas of the Indian constitutional system is the system of affirmative action or reservations granted by the Constitution of India to the marginalised communities. When handling questions on affirmative action, the debate within jurisprudence and legal theory has grappled with one fundamental question: what system truly caters to the goal of justice and how best can we build such a system? Several tentative answers have been provided to this question but few are as relevant and comprehensive

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as the conception of justice within the work of iconic political and legal philosopher, John Rawls. The Rawlsian theory of justice finds relevance in legal systems across the world as these systems attempt to ground their laws within coherent principles of justice and consistent moral principles of fairness, equality and non-discrimination.

In the course of this paper, we attempt to explore the debate on caste-based affirmative action in India through the lens of the Rawlsian principles. We deal with two aspects of reservations – first, the exclusion of the ‘creamy layer’ from the scheme of reservations and second, the debate on the moral validity of reservation in promotions. We refer to these questions as the ‘twin questions’ we take up for further analysis in the course of our paper. We aim to first give an overview of the developments in these two areas and examine their validity in the Rawlsian theoretical framework. Hence, our paper is broadly divided into three parts. In Part II, we will provide a legal overview of the developments on the ‘creamy layer’ front and of aspects of reservations in promotions in India. We detail the happenings with respect to each question to arrive at a clear understanding of the *status-quo*. In Part III, we analyse the Rawlsian idea of ‘justice as fairness’ as provided in his landmark work ‘A Theory of Justice’.¹ We specifically focus on two aspects of this theory – the principles chosen by actors behind the veil of ignorance and the principles arrived at, as well as the theory of ‘reflective equilibrium’. Having described this theoretical frame, we examine the ‘twin questions’ within this frame and test their validity within the Rawlsian principles. In Part IV, we provide certain recommendations that serve as concrete solutions that further the justifications provided in the Rawlsian framework with respect to the ‘twin questions’. First, for the ‘creamy layer’ question, we recommend the creation of grievance committees to address caste-based discrimination, attempting to address concerns of the members of the ‘creamy layer’. Second, for reservation in promotions, we argue for mandatory data collection programs that should be ordered by the court in order to uncover discrimination in matters of promotion. In light of this, our aim is to provide a moral and institutional justification for the existence of protection against social discrimination for members of the ‘creamy layer’ and to extend reservations to promotions *via* methods of judicial proactivity in favour of communities that have been historically marginalised.

¹ JOHN RAWLS, A THEORY OF JUSTICE (Rev. ed., 2009).

II. AN OVERVIEW OF DEVELOPMENTS: THE EXCLUSION OF THE ‘CREAMY LAYER’ AND RESERVATION IN PROMOTIONS

Caste in India has been a primary cause for discrimination since early Indian society and polity.² The caste-based occupational hierarchy placed certain communities at the bottom of the list and consequently in a perennial cycle of occupational servitude and discrimination across the country.³ In light of extensive historical and statistical data that clearly established the existence of a unique form of discrimination in India rooted in the idea of caste, the drafters of the Constitution recognised the need to address this discrimination. Hence, as part of a myriad of policies and measures aimed at protection and empowerment, a scheme of affirmative action or reservations was accommodated in the constitutional framework as a form of permissible policy. In order to place these marginalised communities, referred to in the current legal parlance as the Scheduled Castes (‘SCs’) and Scheduled Tribes (‘STs’), on an equal footing with the other sections of the society, the drafters adopted a policy of ‘compensatory’ or ‘protective discrimination’ based on the idea of affirmative action.⁴

The overarching principle behind any kind of affirmative action is equality. Articles 14,⁵ 15⁶ and 16⁷ deal with the constitutional scheme of equality. While Article 14 embodies the main principles of equality before the law and equal protection of the laws, Articles 15 and 16 entail the idea of affirmative action or unequal treatment of persons in ‘unequal circumstances’.⁸ By supporting affirmative action, the Supreme Court of India has distinguished between formal and substantive equality, arguing that the latter must be the basis on which laws are created. In *M. Nagaraj v. Union of India* (‘Nagaraj’),⁹ the Court made a distinction between equality in fact and equality in law.¹⁰ Equality in law, or formal equality, advocates that equality of opportunity only

² GOVIND SADASHIV GHURYE, *CASTE AND RACE IN INDIA* 6 (1st ed., 1957) (Ghurye here notes that the characteristic feature of the system is that everywhere in India, there is a definite scheme of social precedence amongst the castes, with the Brahmin as the head of the hierarchy.)

³ *Id.* (Ghurye notes that this discrimination is based on the idea of pollution. Theoretically, the touch of a member of any caste lower than one’s own defiles a person of the higher caste; but in actual practice, this rule is not strictly observed and the practice of untouchability exists only against the lowest caste or those outside the traditional caste or ‘varna’ system).

⁴ This is seen under Articles 14, 15 and 16 of the Constitution of India and the system of affirmative action incorporated therein.

⁵ The Constitution of India, Art. 14.

⁶ The Constitution of India, Art. 15.

⁷ The Constitution of India, Art. 16.

⁸ *Id.*

⁹ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

¹⁰ *Id.*

requires elimination of legal obstacles towards ensuring a level-playing field.¹¹ On the other hand, equality in fact, or substantive equality, requires “the additional elimination of all relevant differences directly attributable to inequalities in social conditions”.¹² The difference between the two approaches to equality of opportunity is also their underlying normative frameworks, wherein the proponents of formal equality value a minimal state and a non-interventionist approach.¹³

*State of Kerala v. N.M. Thomas*¹⁴ exemplifies the application of formal *vis-a-vis* substantive equality in the context of affirmative action in India. The eight-judge bench of the Supreme Court looked at the different dimensions of equality while deliberating upon the constitutional validity of the rules made by the State Government of Kerala that granted exemptions to employees belonging to backward classes with regards to Article 16(1) that mandates equality in public employment for all citizens. The judgment clearly distinguished between formal and substantive equality and thereafter proceeded to expound about the importance of substantive equality in furthering affirmative action. It stated that the rule of equality cannot imply that all laws would have universal or standardised application to all people, irrespective of their circumstances or attainments.¹⁵ This would be a mere formal equality. The circumstances which govern a group of people may not be the same as those influencing another group; hence, the question of unequal treatment between groups does not arise when they are affected by different conditions or circumstances. While formal equality involves treating all persons equally,¹⁶ substantive or proportional equality ensures that equals are treated equally, whereas unequals are treated unequally.¹⁷ There is a difference between equality in the ‘moral’ sense and equality in the ‘physical’ sense¹⁸ and proportionate or substantive equality has to be resorted to in many spheres to achieve real social justice.¹⁹ Finally, the Court stated that a rule ensuring equality of representation in the services for unrepresented classes is in furtherance of equality of opportunity. True equality in opportunity can only be achieved when preferential treatment for members of backward classes is provided.²⁰ Equality of opportunity for unequals worsens the state of inequality.²¹

¹¹ Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1696 (1986) (‘Reverse Discrimination Controversy’).

¹² *Id.*

¹³ *Id.*

¹⁴ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 : AIR 1976 SC 490.

¹⁵ *Id.*, ¶31.

¹⁶ *Id.*, ¶78.

¹⁷ *Id.*, ¶79.

¹⁸ *Id.*, ¶78.

¹⁹ *Id.*

²⁰ *Id.*, ¶44 (The Court cautioned, however, that any such preferential scheme must give due regard to administrative efficiency).

²¹ *Id.*

The guarantee of equality in the constitutional paradigm whether before the law or in matters of employment is greater than what is required by formal equality.²² It requires differential treatment of persons who are unequals. As an exercise of egalitarian principles, the government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims.²³ Hence, the Court reached the conclusion that there is no reason to curb a practice that adopts a standard of proportional equality which takes into account the differing and regressive conditions and circumstances of a class of citizens which have hampered their equal access to the enjoyment of basic rights or claims.²⁴ If members of SCs and STs can maintain minimum necessary requirement of administrative efficiency entailed in Article 335, not only representation but also preference may be given to them to enforce equality and to eliminate inequality.²⁵ Hence, it is seen that formal equality of opportunity tolerates significant inequalities that are caused by differences in social conditions and natural talents due to its advocacy of a non-interventionist, minimal state. However, an approach rooted in substantive equality would not tolerate these inequalities and instead, would only deem equal opportunity to be given if social inequalities were also checked by an interventionist, proactive state.²⁶ The concept of substantive equality, also called proportional or egalitarian proportional equality, would expect that states take affirmative action in favour of the disadvantaged sections of the society within the framework of a liberal democracy.²⁷ This principle of substantive equality is what is embodied within the mandate of Articles 15 and 16. Equality in fact or egalitarian equality justified steps taken to give preferential treatment to a class of society such as reservation in public employment under Article 16(4).²⁸ The aforementioned provisions for affirmative action are subject to one fundamental limitation – whether making a reservation is consistent with the maintenance of efficiency in administration as provided in Article 335.²⁹ As the concept of reservations can appear antithetical to the concept of efficiency in administration, there has been an explicit recognition of the efficiency objective in Article 335.

²² *Id.*, ¶91.

²³ *Id.*

²⁴ *Id.*, ¶98.

²⁵ *Id.*, ¶44.

²⁶ The Reverse Discrimination Controversy, *supra* note 11.

²⁷ *Id.*

²⁸ M. Nagaraj v. Union of India, (2006) 8 SCC 212 : AIR 2007 SC 71, ¶75(2).

²⁹ The Constitution of India, Art. 335 (It states:

“The claim of the members of the Scheduled Castes and the Scheduled Tribes shall be taken in to consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of the State.

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”).

The *first* section in Part I contains a detailed legal overview of the judgments elaborating the legal framework on the controversial issue of exclusion of the ‘creamy layer’ from the mandate of affirmative action. The *second* section extensively deals with reservations in the matters of promotion and the legal position in this heated debate. The *third* section focuses on the 2016 Supreme Court case of *Suresh Chand Gautam v. State of U.P.* (‘Suresh Chand’)³⁰ and analyses this judgment, and its departure from the ruling in Nagaraj.

A. EXCLUSION OF THE ‘CREAMY LAYER’ FROM THE MANDATE OF AFFIRMATIVE ACTION

The concept of the ‘creamy layer’ was first introduced by the nine-judge bench of the Supreme Court in the landmark case of *Indra Sawhney v. Union of India* (‘Indra Sawhney’).³¹ In this case, the court analysed the concept of caste-class distinction and their association with the policies of affirmative action, and hence, introduced the concept of the ‘creamy layer’. Thereafter, the historic case of Nagaraj re-iterated and affirmed these points illustrated in Indra Sawhney. We analyse these two judgments to demonstrate the evolution of the debate in India with respect to the ‘creamy layer’.

The entire provision of reservation is based upon the premise of the ‘backward class of citizens’ or the ‘backwardness’ of certain communities. There have been several debates surrounding who constituted these backward classes and over time, the Court had given different opinions pertaining to the question. The Indra Sawhney case put to rest the entire debate by analysing the terms ‘caste’ and ‘class’ as the basis for delineating what constitutes ‘backward classes’ for the purpose of Article 16(4).

The Court recognised the fact that the term ‘backward class of citizen’ had not been defined in the Constitution.³² It also acknowledged that in the pre-constitution era, the expression caste and class were used synonymously, caste being understood as an enclosed class.³³ This is evident from the fact that Dr. Ambedkar referred to the backward classes as “collection of certain castes”.³⁴ The Court reasoned that caste and class cannot be synonymous to each other because the word ‘caste’ cannot replace ‘class’ under Article 16(4).³⁵ The Court concluded that the two must be understood as distinct concepts and hence, observed that ‘caste’ referred to a socially and occupationally homogeneous group whose membership was hereditary – that is, an individual

³⁰ *Suresh Chand Gautam v. State of U.P.*, (2016) 11 SCC 113 : AIR 2016 SC 1321.

³¹ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

³² *Id.*, ¶746.

³³ *Id.*, ¶785.

³⁴ *Id.*, ¶770.

³⁵ *Id.*, ¶58.

had to be born into a particular caste.³⁶ However, the ideas of caste and class are often confused with each other rather than being seen as the two different identities and privileges that individual members of a community are subject to. Hence, drawing from Indra Sawhney, it is important to note that caste refers to a socially and occupationally sanctioned hereditary hierarchy, whereas, class refers to a system of economic capability and power where one's command over economic resources determines one's class group.³⁷

A key concept developed in the Indra Sawhney judgment was the concept of the 'creamy layer'. The 'creamy layer' was defined by using what the court termed as the 'means test' - the 'creamy layer' was seen as an income limit for the purpose of excluding people (of the backward classes) whose income is above the said limit from reservation in public employment.³⁸ This 'layer' of people that have a higher income than the limit set by the court would constitute the 'creamy layer'. Hence, put simply, the 'creamy layer' refers to the members of the backward caste groups who have managed to become upwardly mobile with respect to class and have high levels of income. The people who fell within the category were to be excluded from the scheme of reservation benefits.

The main argument made by the court was that the members of the 'creamy layer' are highly socially as well as economically and educationally advanced.³⁹ The members are the forward section of that particular backward caste and in reality match up to any other forward caste member in their educational and economic capacity.⁴⁰ However, the Court stated that despite their socio-economic status, they take advantage of all the benefits meant for the backward castes.⁴¹ Hence, when these members of the 'creamy layer' become the beneficiaries of affirmative action, it prevents the benefits from reaching the truly backward members of that group who are both backward in terms of caste and class.⁴²

On the other hand, a diametrically opposite view that is held is that the exclusion of the 'creamy layer' was a mere ruse, a trick, to deprive the backward castes of the benefit of reservations.⁴³ The focus of Article 16(4) is backwardness of an entire class of citizens and not the status of a particular

³⁶ *Id.*, ¶795.

³⁷ Unlike with caste, class is not entirely based on heredity and is more fluid. Although the family one is born into affects what class he would be in, there are possibilities of mobility that can enable one to shift from lower economic classes to higher economic classes by access to skill and on the basis of "merit".

³⁸ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, ¶807.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, ¶802.

individual.⁴⁴ Hence, the socio-economic advancement of a few members of a caste or class should not be generalised or equated with the entire class/caste. Thus, even members of this group should be entitled to benefits. It was argued that even if some people have progressed economically, social discrimination persists.⁴⁵ Therefore, once a caste is identified as backward, it should not be further sub-divided into two sub-categories based on economic criteria.

The Court, however, upheld the ‘creamy layer’ exclusion citing several reasons. First, it justified the principle based on what ‘class’ meant. The Court reasoned that a ‘class’ denotes a group of people linked together by some common traits which distinguish them from the others.⁴⁶ The connecting link between the individuals is their social backwardness and since some of the members are far too socially and educationally advanced, the connecting thread between them and the remaining class breaks.⁴⁷ The fundamental assumption that underlies the Court’s reasoning is that social advancement is a consequence of and driven by economic progress. Second, it proceeded with the explanation that exclusion of the ‘creamy layer’ benefits the truly backward – thus, the reservation policy would amount to a system of taking away with one hand what is given by the other.⁴⁸ The Court proposed that the basis of exclusion should not solely be an income limit. The economic advancement due to an income rise must be so significant that it can necessarily be equated with a rise in social stature and prestige. The income limit must be such as to mean and signify social advancement.⁴⁹ Based on the above discussions, the Court directed the Government of India to specify the criteria of exclusion of the ‘creamy layer’ on the basis of income, extent of holdings or otherwise.⁵⁰

Subsequently, this case was followed by the Nagaraj judgment. The Court in Nagaraj held that based on the means test, the ‘creamy layer’ should be excluded from the protected groups that are given the benefit of reservation. The Court listed the concept of ‘creamy layer’, a qualitative exclusion,⁵¹ as one of the constitutional requirements which support the structure of equality of opportunity in Article 16.⁵² If the State failed to adhere to the constitutional requirement, the reservation granted would be termed as excessive and be liable to be struck down. However, in this case, the Court also held that the backward classes cannot be identified only and exclusively with reference to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, ¶809.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The creamy layer was a qualitative exclusion as it depended on the qualitative description of the individuals who were economically emancipated but continued to be a part of backward caste groups.

⁵² *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71, ¶182.

economic criteria.⁵³ While economic factors could be one of the bases to determine backwardness, they could never form the sole criterion.⁵⁴ Hence, the position of excluding the ‘creamy layer’ from the benefits of reservation continued, without depending solely on economic criteria to gauge backwardness.

Hence, in light of the aforementioned discussions, the present position is that the ‘creamy layer’ or the economically advanced categories of the ‘backward castes’ are excluded for the purpose of reservation under Article 16(4).

B. MAPPING THE DEBATE ON RESERVATION IN PROMOTIONS

A significant matter that was discussed in *Indra Sawhney* was whether Article 16(4) permits reservations only at the stage of initial appointment or whether it also imports reservations in promotions. We attempt to provide a comprehensive overview of this contentious debate that culminated into the controversial *Suresh Chand* judgment, which we shall subsequently critique.

Prior to the *Indra Sawhney* judgment, there were several cases that allowed reservation in promotions. The ratio in *Southern Railway v. Rangachari* (‘*Rangachari*’)⁵⁵ was that the advancement of the socially and educationally backward classes requires adequate representation both in the lowest rung of services and the higher cadres.⁵⁶ If promotion was based on merit, there was a possibility that members of the backward classes would not get chosen in the same proportion as they are in the lower category.⁵⁷ Additionally, due to their caste status and the lack of opportunities that come with it, their mobility in the place of employment would also be detrimentally affected.⁵⁸ It settled the debate surrounding Article 335 by holding the risk involved in sacrificing efficiency of administration must be borne by the State when it decides to implement a provision providing reservations in the appointment to certain posts.⁵⁹

Subsequently, in *State of Punjab v. Hira Lal*,⁶⁰ the Court refused to reconsider the judgment in *Rangachari*. However, it paid more attention to the concern for efficiency under Article 335 and held that reservation in promotions does not affect efficiency if reservations are provided taking into account

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Southern Railway v. Rangachari*, AIR 1962 SC 36.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *State of Punjab v. Hira Lal*, (1970) 3 SCC 567 : AIR 1971 SC 1777.

the minimum efficiency required.⁶¹ Hence, the Court mandated in-service training and coaching to address the deficiencies in the skills of the employees, if any.⁶² Hence, the policy of reservations in promotions was held to be valid by courts prior to Indra Sawhney. However, Indra Sawhney changed the course of the debate.

In Indra Sawhney, the petitioners argued that reservations in promotions would be tantamount to ‘double promotion’.⁶³ They stated that the reservation of appointments or posts contemplated by Article 16(4) was to be restricted to reservations at the stage of entry into state service or in direct recruitment.⁶⁴ A provision for reservation in promotions would enable a member of a reserved category to overtake which would be contrary to the mandate in Article 335.⁶⁵ The petitioners argued that this would contribute to inefficiency in administration in two ways – *first*, the members of the open competition category would be dissuaded from working hard, creating a feeling of disheartenment and killing the spirit of competition;⁶⁶ and *second*, it would lead to complacency and lack of interest amongst the members of the reserved categories as they would be assured of promotion.⁶⁷ It would also contradict the goal of excellence referred to in Article 51A(j).⁶⁸ The petitioners relied on the Constituent Assembly debates on draft Article 10(3) (corresponding to Article 16 (4)) to argue that the debates do not mention in any manner that reservations should be extended to promotions.⁶⁹ For these reasons, the petitioners argued that reservations in promotions should be declared to be invalid.

Overruling the previous precedents, the Court agreed with the petitioners and specifically laid down that Article 16(4) does not contemplate reservations in promotions.⁷⁰ While recognising that Article 16(4) considers not merely quantitative but also qualitative support to the backward classes, the Court preferred to lay emphasis on a reading of Article 16(4) together with Article 335. The Court stated that a “handicap need not be given to backward class of citizens throughout their career because it would violate the principle of equality in opportunity”.⁷¹ The Court proceeded to equate reservations in promotions to the creation of a “vertical division of the administrative apparatus”.⁷² The reserved category candidates would compete only amongst themselves for the higher cadre jobs which would make them complacent and, at the same

⁶¹ *Id.*

⁶² *Id.*

⁶³ M. Nagaraj v. Union of India, (2006) 8 SCC 212 : AIR 2007 SC 71, ¶100.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, ¶¶544, 547.

⁷¹ *Id.*, ¶¶544, 547.

⁷² *Id.*

time, increase the feeling of despondence among the open competition members. This would prove detrimental to the efficiency and smooth functioning of the administration.⁷³ Furthermore, the Court stated that the Constituent Assembly never contemplated reservations in promotions while drafting this Article.⁷⁴ Hence, the judicial position after *Indra Sawhney* clearly prohibited reservation in promotions.

However, the Parliament, to prevent the application of the judgment, modified Article 16 through the Constitution (Seventy Seventh Amendment) Act, 1995 and inserted a new clause (4-A) to provide for reservations in promotions for the SCs and STs.⁷⁵ Subsequently, by the Constitution (Eighty Fifth Amendment) Act, 2001, consequential seniority was given in matters of reservations in promotions.⁷⁶ Following these amendments, Article 335 was also modified by the Constitution (Eighty Second Amendment) Act, 2000⁷⁷ to specifically provide that nothing in the Article would prohibit any provision in favour of reservations in promotions conferred upon the SCs and STs. It is pertinent to note that the Constitution (Eighty First Amendment) Act, 2000⁷⁸ incorporated the application of the carry-forward rule with respect to vacancies in public employment for a particular year by introducing clause (4-B) in Article 16.⁷⁹

Post the *Indra Sawhney* judgment and these amendments, in *Nagaraj*, the Court was asked to adjudge the constitutional validity of these

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The Constitution of India, Art. 16(4-A), *inserted vide* The Constitution (Seventy Seventh Amendment) Act, 2002 (w.e.f. June 17, 1995).

⁷⁶ The Constitution of India, Art. 16(4-A). Consequential seniority refers to the elevation of individuals to higher posts as a result of circumstances and not through normal rules of that organisation. For example, it is useful to assume a situation wherein X is a reserved category candidate and Y is his senior, a general category candidate. In a situation wherein X is promoted to a higher position before Y candidate owing to reservations and insufficient representation of the reserved category at the higher post, consequential seniority would imply that Y will not regain his/her seniority upon being elevated to the higher post and X would now be considered senior to him/her in the higher position).

⁷⁷ The Constitution of India, Art. 335, *inserted vide* The Constitution (Eighty Second Amendment) Act, 2000 (w.e.f. September 8, 2000) (It states:

“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”).

⁷⁸ The Eighty First Amendment Act made a provision for the carry-forward rule under Clause (4-B), but is excluded from the present paper, since it not related with the issue-in-hand.

⁷⁹ The carry-forward rule can be explained as follows: Let us assume that 50 seats are reserved for backward classes in a particular position in a State-aided organisation. If in year X, only 30 out of 50 reserved posts are filled; then, in year X+1, the twenty unfilled posts can be “carried forward” – that is, the reserved posts in year X+1 can be 50+20 =70, and so onwards through the years.

constitutional amendments. The petitioners argued that the amendments violated the fundamental right of equality which is part of the basic structure doctrine.

Other than an examination of the merits of the petition and the constitutional validity of these specific amendments, there was a parallel debate occurring at this juncture in the Indian judiciary regarding the standard of judicial review of constitutional amendments with reference to the basic structure doctrine.⁸⁰ This is a different debate altogether, but for the purposes of our analysis, it is sufficient to note that the Court held that it could, in fact, examine the validity of the constitutional amendments made by the Parliament.

The Court in this case overturned the Indra Sawhney judgment and distinguished between formal equality and substantive equality while delineating the difference between Articles 16(1) and 16(4).⁸¹ The Court held that Article 16(4) illustrates equality in fact rather than in law.⁸² This is supported by the reasoning in Indra Sawhney that Article 16(4) can be distinguished from Article 16(1) and thereby it can provide for affirmative action without violating the principle of equality in employment as provided in Article 16(1).⁸³ Therefore, the Court stated that Article 16(4-A), carved out of Article 16(4), embodied the same principle of substantive equality. Furthermore, it was held that Article 16(4) did not confer any fundamental right to reservation and it is only an enabling provision.⁸⁴ Hence, in this case, the court held that although there was no fundamental right to reservation in promotions, there was discretion vested with the states to pass a law to this effect under the Constitution and hence must be respected.

Hence, the Court said that a state could pass laws allowing for reservation in promotions. However, the court in Nagaraj laid down that, in the adoption of reservation policies, the state in question has to collect quantifiable data showing backwardness of the group and inadequacy of its representation in public employment, in addition to compliance with Article 335.⁸⁵ It also held that the state has to ensure that in no circumstances does the reservation policy breach the maximum limit of fifty per cent, obliterate the 'creamy layer' or extend the scheme of reservations indefinitely. Consequently, if the state failed to identify and implement the controlling factors, then there are chances of reverse discrimination, which would justify judicial intervention.⁸⁶

⁸⁰ For a detailed overview on the basic structure, *see* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

⁸¹ M. Nagaraj v. Union of India, (2006) 8 SCC 212 : AIR 2007 SC 71.

⁸² *Id.*, ¶35

⁸³ *Id.*

⁸⁴ *Id.*, ¶53.

⁸⁵ *Id.*

⁸⁶ *Id.*

Hence, the state has the discretion to provide reservations in promotions but it has to supply the necessary quantitative data that prove the claim of inadequate representation of SCs and STs in public employment and, through this, the backwardness of the group.⁸⁷ However, no directives or mechanisms for collecting data were outlined to ensure enforcement of the Nagaraj judgment. In light of this vacuum and lack of clarity, the case of Suresh Chand adjudged by a Division Bench of the Supreme Court in March 2016 sought to fill this vacuum. We focus on this judgment to highlight its importance in the present constitutional discourse on this issue.

C. *SURESH CHAND GAUTAM V. STATE OF UTTAR PRADESH: AN ANALYSIS*

For the purpose of our analysis, we focus extensively on the case of Suresh Chand and critique the position taken by the Court in this dispute. The case concerned reservations in promotions in Uttar Pradesh. The petitioners had two submissions before the Court. *First*, they asked for a writ of *mandamus* to be issued to the State Government of Uttar Pradesh to correctly enforce the constitutional mandate enshrined in Articles 16(4-A), 16(4-B) and 335 and enforce a system of reservation in promotions on a mandatory basis. *Second*, in the alternative, in pursuance of the Nagaraj judgment, the Court was asked to direct the State Government to collect data to show backwardness and underrepresentation in government employment. The petitioners stated that, for this purpose, the State Government would have to constitute a committee or appoint a commission chaired by a retired judge of a High Court or the Supreme Court.

Here, the petitioners contended that Articles 16(4-A) and 16(4-B) are constitutional provisions and the authorities are required to collect the data necessary to take steps to effectuate reservation in promotion meant for the backward classes.⁸⁸ The State, as a model employer, had failed in its duty and hence it is the constitutional duty of the Court to direct the State Government to carry out the procedure.⁸⁹ In such circumstances the concept of ‘power coupled with duty’ comes into play; therefore, the Court should issue appropriate direction to the State to collect the necessary qualitative data. The Court accepted the claim that failure to collect the data amounted to failure to perform a constitutional duty. However, the Court refused to pass a directive against the State emphasising on three key points of law derived from Nagaraj and other recent judicial precedents.

First, the Court laid emphasis on the fact that Nagaraj regarded Articles 16(4-A) and (4-B) as enabling provisions and not mandatory

⁸⁷ *Id.*

⁸⁸ Suresh Chand Gautam v. State of U.P., (2016) 11 SCC 113 : AIR 2016 SC 1321, ¶3.

⁸⁹ *Id.*, ¶19.

provisions.⁹⁰ Referring to the judgment, the Bench said that a state is not bound to make reservations for SCs and STs in matters of promotion. However, if a state wishes to exercise the discretion and make such provision, it has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance with Article 335.⁹¹ To put it simply, the state has a choice whether or not it wants to provide reservations in promotions; since there is no duty, it cannot be commanded to exercise this discretion.

Second, following from the first issue, the Court held that it cannot compel a State to take affirmative action for the SCs and STs.⁹² The Court referred to *Central Bank of India v. SC/ST Employees Welfare Assn.*⁹³ as a precedent, and re-iterated the point laid down therein that courts cannot issue the writ of *mandamus* to require state governments to take steps in pursuance of an enabling provision.⁹⁴ The Court said that the existence of a provision for reservations in selection or promotion is *sine-qua-non* for seeking *mandamus* as it is only when such a provision is made by the state that a right would accrue in favour of SC or ST candidates.⁹⁵

Third, the Court propounded that it can neither legislate nor issue a *mandamus* to legislate.⁹⁶ It elaborately referred to the three-judge bench decision in *Census Commr. v. R. Krishnamurthy*⁹⁷ wherein the Supreme Court had dealt with the issue of a High Court directing the Census Department of the Government of India to take measures for conducting caste-wise census in the country to achieve the goal of social justice. The Court arrived at the conclusion by quoting the opinion therein: “Interference with the policy decision and issue of a *mandamus* to frame a policy in a particular manner is absolutely different. It is not within the domain of the court to legislate.”

In the present case, there was no existing provision governing reservation. In order to issue a writ of *mandamus*, there must be a pre-existing right or a power to be exercised with regard to the duty.⁹⁸ The plea was made to direct the State of Uttar Pradesh to collect the data as enshrined in Nagaraj so that the benefit of reservations in promotions can be given to the backward classes. In other words, the prayer was to compel the State to carry out an exercise (collect data) for the purpose of exercising discretion (the decision to

⁹⁰ *Id.*, ¶42 (2).

⁹¹ *Id.*, ¶42. 42.

⁹² *Id.*

⁹³ *Central Bank of India v. SC/ST Employees Welfare Assn.*, (2016) 13 SCC 135 : AIR 2016 SC 326.

⁹⁴ *Suresh Chand Gautam v. State of U.P.*, (2016) 11 SCC 113 : AIR 2016 SC 1321, ¶42.

⁹⁵ *Id.*, ¶42(2).

⁹⁶ *Id.*, ¶44(2).

⁹⁷ *Census Commr. v. R. Krishnamurthy*, (2015) 2 SCC 796.

⁹⁸ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71, ¶42(3).

have reservation).⁹⁹ A *mandamus* would tantamount to asking the authorities whether there is ample data to frame a rule or regulation. Hence, if the relief was granted, it would tantamount to a prayer for issue of a *mandamus* to take a step towards framing of a rule or a regulation for the purpose of reservation in favour of SCs and STs in matters of promotions.¹⁰⁰ This too, the Court argued, would encroach upon the domain of the legislature as it would be tantamount to exerting pressure on it to include such a scheme.¹⁰¹ The Court dismissed the writ petition citing the above mentioned reasons.

However, another facet of the judgment worth noting is that the Court recognised the fact that in certain judgments, directions had been issued for framing guidelines or the Court had itself framed guidelines for upholding certain rights of women, children, prisoners and under-trials.¹⁰² However, the Court disregarded the contention in the present case stating that those category of cases belonged to a 'different compartment'¹⁰³ than what is envisaged in Article 16(4).¹⁰⁴ Hence, this judgment refused to direct the State Government or impose any obligations on it to take any positive action in this regard.

Hence, the position of law on the question on reservation in promotions rests as such – that states can make laws in favour of reservation in promotions. To do so, they must demonstrate discrimination and backwardness. However, the courts cannot direct the states to even gather data to determine backwardness as there is no duty towards the same. Hence, if backwardness exists, it can go unaddressed without state intervention, thereby allowing for systems of discrimination to persist and further gain traction. It is this position of the courts that we critique in the subsequent portions of the paper, locating these dilemmas of justice in a Rawlsian framework of justice as fairness.

III. UNDERSTANDING RAWLS AND EXTENDING THE THEORETICAL BASE: QUESTIONS ON THE 'CREAMY LAYER' AND PROMOTIONS

In this part of the paper, we will provide certain answers to the 'twin questions' taken up. With respect to the 'creamy layer', we argue that although reservations *per se* for the 'creamy layer' are not legitimate and the exclusion mentioned in the previous part of the paper is valid, there needs to be an attempt made to check social discrimination that members of this community

⁹⁹ *Id.*

¹⁰⁰ *Id.*, ¶44(2).

¹⁰¹ *Id.*, ¶43.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

face. With respect to reservations in promotions, we argue that reservations for the members of marginalised communities in matters of promotion are principally legitimate and in fact, crucial for the furtherance of justice. Hence, courts should ensure that states in India mandatorily conduct data collection programs to ensure reservations in matters of promotions.

In answering these questions, we root our argumentation in a particular theoretical space, within the Rawlsian doctrine of ‘justice as fairness’ in his landmark work, ‘A Theory of Justice’.¹⁰⁵ Rawls’ theoretical contribution to the idea of justice is as vast as it is ground-breaking – hence, we restrict ourselves to certain portions of the theoretical base. We explore two primary aspects of the theory – first, the nature of the original position and the principles agreed upon by actors in this position and second, the idea of reflexive equilibrium. Having explained this theoretical framework, we extend this framework to provide moral and political justifications for the conclusions to the twin questions that we have reached.

A. *THE ORIGINAL POSITION AND THE DUAL PRINCIPLES: AN EXPLANATION*

Moral philosophy, before Rawls, was arguably polarised into two distinct moral schools – the categorical thinkers and the consequentialist thinkers.¹⁰⁶ In response to the early utilitarianism of Jeremy Bentham, there were efforts made from within the consequentialist school, as well, to respond to the criticisms of a rigid utilitarian moral school that saw the greatest good for the greatest number as the primary factor that guided morality.¹⁰⁷ John Stuart Mill’s rule utilitarianism is an example of such an effort.¹⁰⁸ However, both Mill and Bentham’s utilitarianism found vibrant critique in the works of the categorical thinkers. Immanuel Kant, leading this diverse theoretical journey, argued that human beings possessed innate human dignity, the violation of which would

¹⁰⁵ RAWLS, *supra* note 1.

¹⁰⁶ CHARLES FRIED, *RIGHT AND WRONG* (1978); *see also* ERNEST NAGEL, *TELEOLOGY REVISITED* (1977) (See for an account of another school of thought proposed by Aristotle that cannot be fitted into either purely categorical or consequentialist schools.). Teleology, reductively stated, argues that the end of a thing is also its function. This idea is the foundation of Aristotle’s political naturalism and other theoretical foundations because the way to find the end of goods and to distribute them is their function alone and nothing else. For the distinction between categorical and consequentialist thinkers, *see generally* MICHAEL SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2010).

¹⁰⁷ *Id.*

¹⁰⁸ JOHN STUART MILL & GERAINT WILLIAMS, *UTILITARIANISM; ON LIBERTY; CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT; REMARKS ON BENTHAM’S PHILOSOPHY* (1993) (The ethical theory of John Stuart Mill (1806-1873) is most extensively articulated in his classical text *Utilitarianism* (1861). Its goal is to justify the utilitarian principle as the foundation of morals. This principle says that actions are right in proportion as they tend to promote overall human happiness.).

be impermissible in his moral conception.¹⁰⁹ Hence, in this evolving trajectory, the categorical and the consequentialist thinkers began to represent distinct schools of thought, where the former argued for an abstract concept of morality based on what is categorically or principally ‘right’ and the latter advocated a theory based on what is consequentially ‘good’.¹¹⁰ Rawls, however, attempts to arrive at a delicate balance between the two. In ‘A Theory of Justice’, Rawls emphasises on this effort:

“The two main concepts of ethics are those of the right and the good; the concept of a morally worthy person is, I believe, derived from them. The structure of an ethical theory is, then, largely determined by how it defines and connects these two basic notions.”¹¹¹

In light of this, Rawls’ theory of justice as fairness aims to describe a just arrangement of the major political and social institutions of a liberal society: the political constitution, the legal system, the economy, the family, and so on.¹¹² The arrangement of these institutions is the tentative Rawlsian doctrine of a society’s basic structure.¹¹³ Using this structural framework, Rawls proceeds to lay out his delicate theory and provide a procedural conception of justice that starts from a point called the ‘original position’.

By proposing the original position, Rawls turns the question “What are fair terms of social cooperation for free and equal citizens?” into the question “What terms of cooperation would free and equal citizens agree to under fair conditions?”¹¹⁴ In explaining these terms of cooperation, Rawls lays down the existence of the original position.

This original position of equality corresponds to the state of nature in the traditional theory of the social contract.¹¹⁵ However, this original

¹⁰⁹ IMMANUEL KANT & HERBERT JAMES PATON, *THE MORAL LAW: GROUNDWORK OF THE METAPHYSIC OF MORALS* (2005) (The foundations of Kant’s work on categorical thought is found here wherein he lays down a delicate theory of the categorical imperative that is the foundation of categorical moral thought in his theoretical framework).

¹¹⁰ FRIED, *supra* note 106.

¹¹¹ RAWLS, *supra* note 1, 21.

¹¹² *Id.*

¹¹³ *Id.*, 8 (Rawls admits that the concept of the basic structure is somewhat vague. It is not always clear which institutions or features thereof should be included. However, the different institutions that create a vibrant, discursive public sphere in any society are broadly seen to compose the basic structure of a democratic society).

¹¹⁴ *Id.*, 10 (Rawls states that the procedural terms of cooperation are the principles that free and rational persons concerned with furthering their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice is, what Rawls calls, justice as fairness).

¹¹⁵ *Id.*, 11.

position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture.¹¹⁶ It is understood as a purely hypothetical situation characterised so as to lead to a certain conception of justice.¹¹⁷ Hence, Rawls notes that the original position is the appropriate initial status-*quo*¹¹⁸ with which he proceeds with his theory.

In the original position, individuals or actors, participate in the collective process of entering into a contractual agreement on what principles they can agree upon to create a fair and just society.¹¹⁹ However, the uniqueness of the original position lies in the fact that all these actors are behind what Rawls terms as a ‘veil of ignorance’.¹²⁰ This veil is placed on all actors in a manner such that they are unaware of arbitrary factors that would otherwise guide their decision-making. Hence, as examples, the veil would prevent actors from knowing their class position or social status, their luck in the distribution of natural assets and abilities, their strength, intelligence, skill and additionally, their race, gender or ethnicity.¹²¹ Hence, as the actors would be ignorant about their specific locations and contexts, they make decisions that Rawls considers to be truly guided by reason – a combination of the right and the good. Hence, it is this procedural description of the original position and the hypothetical contract entered into by actors behind the veil that explains the name of theory – ‘justice as fairness’. It conveys the idea that the principles of justice are agreed to in an initial situation that is fair, and hence, the principles themselves are to be deemed as fair.¹²²

Rawls adds that one feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested.¹²³ They make decisions guided by their individual interests and their intuitive ideas¹²⁴

¹¹⁶ *Id.*

¹¹⁷ *Id.* (Rawls compares the original position to the hypothetical position of Kant’s moral theory. Kant is clear that the original agreement is hypothetical.) See generally IMMANUEL KANT, THE METAPHYSICS OF MORALS, §§47, 52 (1797); J.G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 109–112; 133-136 (1970).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (The veil of ignorance ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his/her particular condition, the principles of justice are the result of a fair agreement or bargain.)

¹²¹ *Id.*

¹²² *Id.* (Rawls argues that the lack of the particulars in a person’s identity leads to a situation of overall symmetry deeming the situation and the contract arrived at as fair.)

¹²³ This idea of rational, disinterested actors has been critiqued extensively. Two primary areas of critique exist: that of the communitarian philosophers and of the feminist care ethicists. Both schools argue that actors cannot be disinterested as Rawls envisages as they are interconnected, either in the webs of community and solidarity or in the webs of care. See Daniel Shapiro, *Liberalism and Communitarianism*, 36(3) PHILOSOPHICAL BOOKS 145 (1995); Susan Okin, *Justice and Gender*, 16(1) PHILOSOPHY & PUBLIC AFFAIRS 42 (1987).

¹²⁴ *Id.*, 13 (The foremost intuitive idea is that since everyone’s well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages

of rules that would lead to a fair and just societal framework. Therefore, Rawls argues that this constructed theoretical position would lead to an agreement on the principles of justice that would be both ‘right’ and ‘good’.

Then, what are the principles that Rawls sees the actors agreeing upon? Rawls argues that actors would agree on two fundamental principles. The first principle would require equality in the assignment of basic rights, liberties and duties.¹²⁵ The second principle would state that social and economic inequalities would only be just if they result in compensating benefits for everyone, and in particular for the least advantaged members of the society.¹²⁶ Hence, the second principle incorporates the iconic idea of the ‘difference principle’ – that inequality would be permissible if used to serve the interests of the least advantaged members of society.¹²⁷ These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified or compensated by greater social and economic advantages.¹²⁸

The agreement on these two principles by actors behind the veil of ignorance is the premise of the Rawlsian doctrine of justice as fairness. The specific question of whether actors would agree to the principles that Rawls postulates has been a subject of extensive critique from several schools within moral and political philosophy.¹²⁹ However, for the purpose of this paper, we accept the Rawlsian theoretical framework up until this point and attempt to extend it to questions of caste inequality in India. In light of this, it is important to note that the difference principle has been invoked by Rawls himself, and

should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well-situated).

¹²⁵ *Id.*, 53 (Examples of such liberties are political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are to be equal by the first principle.)

¹²⁶ *Id.*, 53 (Rawls explains that the second principle provides that while the distribution of wealth and income need not be equal, it must be to everyone’s advantage, and at the same time, positions of authority and responsibility must be accessible to all. One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits.)

¹²⁷ *Id.*

¹²⁸ *Id.* (This ordering signifies that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages.)

¹²⁹ There have been several extensive critiques of the Rawlsian process of arriving at the two principles in the original position. See CHANDRANKUKATHAS & PHILIP PETTIT, *RAWLS: A THEORY OF JUSTICE AND ITS CRITICS* (1990); see also Martha Nussbaum, *The Enduring Significance of John Rawls*, CHRON HIGH EDUC, 2001. For example, the feminist critique of the Rawlsian position is based on the ethics of care and the fact that human beings, under the original position, would see themselves as relational selves rather than individuals without relationships. For more analysis, see Susan Okin, *Forty Acres and a Mule for Women: Rawls and Feminism*, 4(2) POLITICS, PHILOSOPHY & ECONOMICS, 233 (2005).

several post Rawls scholarships, to justify and endorse systems of affirmative action. In education, in particular, race-based affirmative action in educational institutions has been justified using the Rawlsian difference principle.¹³⁰ In doing so, authors rely on the ‘fair equality of opportunity’ principle drawn up by Rawls, in harmony with his difference principle.¹³¹ This line of reasoning has been extended to justifications for caste-based affirmative action in the Indian educational system as well.¹³² However, this extension to caste has been limited to merely using the difference principle as a justification for reservations on the basis of caste.¹³³ In this analysis, we attempt to traverse further. We believe that locating caste as an inequality that actors would be forced to contemplate and asking how they would respond to certain contemporary dilemmas on the ‘creamy layer’ and reservations in promotions, is crucial in creating scholarship that responds to present day concerns. Before proceeding to make the connection between caste-based inequality and the Rawlsian theoretical framework, we find it important to focus on one other aspect of his theory – the idea of reflective equilibrium.

B. RAWLSIAN REFLECTIVE EQUILIBRIUM: IN FAVOUR OF A WIDE, POLITICAL REFLECTIVE EQUILIBRIUM

A less discussed, but integral idea, within the Rawlsian theory of justice is the concept of reflective equilibrium and its importance in conceptualising principles that would create a coherent, consistent moral theory. The broader approach to the justification of rules of inductive logic – without the label of reflective equilibrium – was proposed by Nelson Goodman in his classic, ‘Fact, Fiction, and Forecast’.¹³⁴ However, the method was given prominence and the name by which it is known by Rawls’s description and use of it.¹³⁵

Explained briefly, the method of reflective equilibrium consists of the process of working back and forth among our considered judgments about particular instances or cases, the principles or rules that we believe govern

¹³⁰ See Charles W. Mills, *Rawls on Race/Race in Rawls*, 47(1) THE SOUTHERN JOURNAL OF PHILOSOPHY 161 (2009) (Although Rawls fails glaringly as he does not directly address race as an inequality in his work, authors have tried to use the Rawlsian framework to justify the theories of affirmative action).

¹³¹ *Id.*

¹³² Sameer Pandit, *Marginalisation and Reservation in India: An Analysis in the Light of Rawlsian Theories of Justice and Equality*, 1 SOCIO LEGAL REVIEW 40 (2005) (The author here argues that although the Rawlsian framework could be used to justify affirmative action, such affirmative action has been hijacked by the creamy layer – hence, caste-based reservations *per se* are illegitimate and economic backwardness should be the only criterion for reservations. We contest this idea in the subsequent portions of the paper.).

¹³³ *Id.*

¹³⁴ NELSON GOODMAN, *FACT, FICTION, AND FORECAST* (1955).

¹³⁵ RAWLS, *supra* note 1.

them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them.¹³⁶ Rawls notes that even after the actors agree upon the principles behind the veil within the original position, discrepancies will arise.¹³⁷ In this case, Rawls states, that the actors can either modify the account of the initial situation or they can revise existing judgments, for even the judgments taken provisionally as fixed points are liable to revision.¹³⁸ By going back and forth, sometimes, altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, Rawls assumes that eventually the actors shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match the considered judgment.¹³⁹ This state of affairs, of reconsideration and reflection, in light of new facts, circumstances or principles, is what Rawls refers to as reflective equilibrium.¹⁴⁰ It is a state of equilibrium because at last the principles and judgments coincide; and it is reflective since the actors know what principles their judgments conform to and the premises of their derivation.¹⁴¹ At any point, this equilibrium is not necessarily stable and in fact, is liable to be upset by further examination of the conditions by particular cases which may lead us to revise our judgments.¹⁴² However, still, at that point, the actors have done what they can to render coherent their convictions of social justice and hence, root these convictions within justification.¹⁴³ The method of reflective equilibrium can be carried out by individuals acting separately or together. In the latter case, the method is dialogical and agreement among participants may or may not be accompanied by a search for coherence.¹⁴⁴

In a well-known series of articles, Norman Daniels has drawn a contrast between wide reflective equilibrium and a more traditional method of theory acceptance in ethics that would be employed by a sophisticated moral

¹³⁶ *Id.*

¹³⁷ *Id.*, 18.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Norman Daniels, *Reflective Equilibrium*, April 28, 2003, available at <https://plato.stanford.edu/archives/win2016/entries/reflective-equilibrium/> (Last visited on May 21, 2017) (An acceptable coherence requires that our beliefs not only be consistent with each other (a weak requirement), but that some of these beliefs provide support or provide a best explanation for others. Moreover, in the process, we may not only modify prior beliefs but add new beliefs as well.).

intuitionist.¹⁴⁵ In ‘A Theory of Justice’,¹⁴⁶ Rawls does not use the terminology of narrow and wide reflective equilibrium, an omission he remarks about with regret in ‘Justice as Fairness: A Restatement’.¹⁴⁷ The demarcation between the two types of reflective equilibrium, however, is something that we eventually find clarity in. A narrow reflective equilibrium, according to Rawls, is a process that merely irons out minor incoherence in a person’s system of beliefs, to ensure no inconsistencies exist in the belief system itself.¹⁴⁸ Rather than this method, Rawls argues that a wide reflective equilibrium is one that seeks what results from challenging existing beliefs by arguments by comparing them to evolved, alternative moral positions.¹⁴⁹ Therefore, the former merely advocates for internal consistency within one’s own moral position that should be the composition of reflection, whereas the latter states that one’s own moral position must, at every stage of reflection, be compared with alternate, well defined moral positions to arrive at the equilibrium. Rawls’s proposal is that “we can determine what principles of justice we ought to adopt, on full reflection, and be persuaded that our choices are justifiable to ourselves and others, only if we broaden the circle of beliefs that must cohere”.¹⁵⁰ Indeed, we should be willing to test our beliefs against developed moral theories of various types, obviously not all available views or we would never arrive at a conclusion, but at least against some leading alternatives that are relevant for the theoretical determination. We often do so in discussions and deliberations with others. How conclusive an argument or deliberation is may depend on what alternative views are considered or on who is included in the deliberation. Hence, Rawls endorses a wide reflective equilibrium as a process that is a pre-requisite for deriving a theory rooted in ideas of justice and fairness by all actors behind the veil of ignorance.

C. THE ‘CREAMY LAYER’ QUESTION

We now consider the question of the exclusion of a certain layer – the ‘creamy layer’ – from the policies of affirmative action in India, as discussed in Part I. Debates on the ‘creamy layer’ have caused intensive polarisation in the national consciousness, with the general narrative that reservations in India have failed as benefits are provided to the ‘creamy layer’ being dominant. In this context, we advance certain specific propositions. First, we argue

¹⁴⁵ *Id.*; See also Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76(5) THE JOURNAL OF PHILOSOPHY 256 (1979); Norman Daniels, *Reflective Equilibrium and Archimedean Points*, 10(1) CANADIAN JOURNAL OF PHILOSOPHY 83 (1980); Norman Daniels, *On Some Methods of Ethics and Linguistics*, 37(1) PHILOSOPHICAL STUDIES 21 (1980) (These articles elaborate on the methodology of reflective equilibrium proposed by John Rawls and on the distinction Rawls draws between wide and narrow reflective equilibrium).

¹⁴⁶ RAWLS, *supra* note 1.

¹⁴⁷ Daniels, *supra* note 144.

¹⁴⁸ *Id.*; RAWLS, *supra* note 1, 43.

¹⁴⁹ RAWLS, *supra* note 1, 43.

¹⁵⁰ *Id.*

that the exclusion of the ‘creamy layer’ is valid due to the denial of benefits that it causes to the members of the community that are discriminated against on the basis of class and caste. Second, we argue that although reservations are not provided, there will still be social discrimination on the basis of caste that needs to be addressed and tackled by political and legal systems. In doing so, we try to understand how actors within the veil would react to these questions within a Rawlsian theoretical paradigm.

The ‘creamy layer’, and its construction in the popular imagination, seems to be of a group of people that are economically privileged and are ‘free-riding’ through reservation policies.¹⁵¹ However, statistics reveal that members of this layer face discrimination on the basis of their caste-identity alone as a unique form of stigmatisation, even if they are economically emancipated.¹⁵² The question then is how we see actors responding to these questions in the Rawlsian hypothetical, unaware as they are of the particular identities that would regulate or guide their decisions.

Scholarship post Rawls notes that the principle of fair equality of opportunity enshrined in the justice theory differs from the principle of formal equality of opportunity.¹⁵³ As mentioned in Part II of the paper, in a system that only requires formal equality, there must simply be no formal, or regulated, limits on who may be granted an opportunity.¹⁵⁴ This, however, does not rule out informal limits, including the social injustices that formal inequality does not tackle.¹⁵⁵ In order for Rawls’ principle of fair equality of opportunity to be fulfilled, “chances to acquire cultural knowledge and skills should not depend on one’s position in society, and so the school system, whether public or private, should be designed to even out class barriers”.¹⁵⁶ In other words, Rawls theory implies that no individual should be barred from seeking out qualification by financial or other barriers that exist to equal opportunity. Hence, as per the Rawlsian doctrine, actors behind the veil would support an equality of opportunity premised on the principle of fair equality, and not formal equality, and hence, principles of affirmative action. However, it is important to note that affirmative action can only be justified under the difference principle when it is structured to benefit those members of communities that are the most disadvantaged.

¹⁵¹ See Pandit, *supra* note 132 (Pandit sees the politicisation of caste as problematic as members of the creamy layer take advantage of the reservation policy when they are actually at a position of privilege.)

¹⁵² See generally Kalpana Kannabiran, Reservations and the Creamy Layer, *THE HINDU*, October 24, 2006; Sukhadeo Thorat, and Paul Attewell, *The legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, 42(41) EPW (2007).

¹⁵³ Janelle Garcelon, *Fair Equality of Opportunity: Reconceiving Affirmative Action through a Rawlsian Lens*, available at http://scholarship.claremont.edu/cm_c_theses/1046/ (Last visited on May 21, 2017).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

According to the difference principle, a marginal benefit for a single worst-off person should be preferred to an enormous gain in well-being that would be enjoyed by many better-off persons.¹⁵⁷ This policy of prioritising the truly disadvantaged or the worst-off is termed as the ‘priority view’ in Rawlsian scholarship.¹⁵⁸ Hence, affirmative action policies, as well as other policies that are required to achieve equality, under the difference principle, are required by justice when, but only when, they can be expected to work effectively to benefit the truly disadvantaged, the worst-off whose interests should be assigned special priority according to the priority view.¹⁵⁹ In light of this requirement, that the difference principle must serve the interests of the truly most disadvantaged, post-Rawls scholarship like the works of scholars, it has been argued that the difference principle is too rigid. Richard Arneson, has critiqued the difference principle for being too rigid only in that it has a very strict view regarding the worst-off person, or group of persons as a particular sub-set of people within a group that can only be defined theoretically in the abstract.¹⁶⁰ Cumulatively, hence, affirmative action programs should target individuals that have had the least equality of opportunity, as demonstrated by the lowest rates of social mobility.¹⁶¹ Social mobility, in a Rawlsian framework, refers to a multitude of inequalities on the basis of power that restrict persons within a backward social confine and make mobility towards opportunity particularly difficult.¹⁶² This is the basis on which the difference principle, within the theory of justice, has been constructed and justified.

This is crucial to note in case of the ‘creamy layer’ question in the Indian caste and reservation dilemma. As Rawls notes, actors under the veil of ignorance are singularly motivated by their own interests in adjudging principles of justice and fairness and hence, function in a fair hypothetical contract. In this paradigm, the only way that they would agree to affirmative action policies is when the inequality was catering truly to the worst-off in the society as per the strict mandate of the difference principle.¹⁶³

¹⁵⁷ Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93(1) *PHILOSOPHICAL STUDIES* 77 (1999) (Here, the principle of the worst-off means that justice strictly requires compensatory aid to be given to natively talented individuals with low skill levels, given the initial distribution of socialisation, up to the point that fair equality is reached.).

¹⁵⁸ *Id.* (It is stated that a plausible version of the priority view will hold that the processes that determine the composition of the worse-off groups in society are to be assessed according to the extent to which they maximise a function that is positively responsive both to minimising the numbers of people in the worse-off groups. Hence, put simply, these groups must be given priority in the principles of justice.).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (Arneson reads Rawls as stating that institutions should be arranged so that as a matter of first lexical priority, the position of the individual who has least primary social goods should be made as favourable as possible, then as a matter of second lexical priority, the position of the second-worst-off individual should be made maximally favourable, and so on up to the best-off individual.).

¹⁶² *Id.*

¹⁶³ *Id.*

The ‘creamy layer’ as defined by the Supreme Court consists of a group of people who have economically achieved a certain position of success in a relative societal comparison, but still continue to be marginalised on the basis of their caste identity.¹⁶⁴ These people, in the Rawlsian framework, do face a barrier to equal opportunity, as many argue, on the basis of their caste. Caste-based discrimination in India is so entrenched and pervasive that even economic prosperity does not allow members of these communities to rid themselves of caste-based stigma and oppression.¹⁶⁵ Hence, in some ways this does act as a barrier to equal opportunity.

However, under the Rawlsian framework, members of this ‘creamy layer’ must be compared not to other economically prosperous, upper caste members of the Indian society, but to the lower class, lower caste members who face double marginalisation or a double barrier to equal opportunity. Members of this group are not only marginalised on the basis of caste as their counterparts in the ‘creamy layer’ group are, but also face the very real and hugely influential barrier to opportunity – that of a lack of economic resources.¹⁶⁶ The lack of economic resources is crucial as members of this group do not have access to infrastructure, primary school education, basic resources and the exposure that would allow them to compete with others in a fair race of meritocracy. The lack of economic capacity, in a metaphorical sense, ensures that the starting line for the rich and the poor in the race is nowhere near the same, hence, making the hypothetical race, in itself, structurally unfair and unjust.¹⁶⁷ In light of this, lower-caste, lower-class groups are clearly the worst-off as per the Rawlsian construction of barriers to equal opportunity.¹⁶⁸

The ‘worst-off’ part of the difference principle is rooted in the idea that if a system of affirmative action is structured to cater to those who are discriminated against, but not those that are clearly worst-off, the system loses its moral and political justification. For Rawls, the only way that inequality

¹⁶⁴ Kannabiran, *supra* note 152 (The author argues that the formulation of the creamy layer in itself is “an exercise in dominance disaggregates discrimination and narrows its articulation down to economic status alone, thus distorting the realities of disadvantaged castes, Dalit and Adivasi realities.” The reduction of these individuals to solely their economic status ignores other forms of discrimination on the basis of caste that persist.).

¹⁶⁵ *Id.*

¹⁶⁶ RAWLS, *supra* note 1, 266 (Rawls refers to both “social” and “economic” inequalities. In light of this, social equalities would in this case be the marginalised caste identity. Economic inequality would be caste disparity. Individuals with both forms of marginalisation face a double inequality, and hence, would qualify as worst-off in the Rawlsian metric of backwardness.).

¹⁶⁷ See generally John Rawls, *Distributive Justice*, CHRON HIGH EDUC 3rd Ed. 48 (1967).

¹⁶⁸ Within the lower-caste, lower-class group, of course, there are people who are relatively worse off than others – for example women and with it, arguably disabled women. The categorisation is fluid and endless and that, in some ways, could be articulated as the strength of the Rawlsian theory. However, to determine who is the worst-off for a legal policy purpose, it is crucial to ask what the particular system of affirmative action targets. Since the policy exists particularly to combat caste and class based discrimination, the worst-off group would be the lower-caste, lower-class group.

is permissible is if that inequality works against the privileged, in favour of those who are truly worst-off.¹⁶⁹ Hence, if the ‘creamy layer’ was granted reservations, this would be unjust in a Rawlsian framework. This is because the inequality between the ‘creamy layer’ and the lower caste, lower class group would be inequality in favour of an upper-class group to the disadvantage of a lower class group. This would be impermissible in the Rawlsian framework. Such an inequality would, in itself, make the system of justification collapse within the Rawlsian sense and hence, we see no justification for giving reservations to members of the ‘creamy layer’ in comparison to members of both, a low caste status as well as a low economic capacity.

However, having noted this, it is important to note that caste-based discrimination *per se* is still a matter of concern for actors behind the veil as this could act as a barrier to opportunity and a route to discrimination. Hence, they would still be concerned with such discrimination even if a system of reservation would not be the solution. Hence, the basic premise that these actors agree on is that individuals should be protected against discrimination. In furtherance of this, we provide a model of protection against discrimination in Part IV of this paper which we argue addresses the marginalisation that members of the ‘creamy layer’ face on the basis of their caste identity that leads to constant stigmatisation and discrimination.

D. ON RESERVATION IN PROMOTIONS

In addressing our second dilemma on reservation in promotions, we draw upon the Rawlsian doctrine of wide reflective equilibrium to understand the decision-making of actors behind the Rawlsian veil. For Rawls, the doctrine of reflective equilibrium applies in the same sense to the public sphere or a group as it does to an individual.¹⁷⁰ This wide, public reflective equilibrium refers to the process of working back and forth among the key shared ideas in the public, democratic culture and the articulated features of the political conception of justice.¹⁷¹ Rawls, supported by Daniel Normans, in his theoretical work, argues in favour of such a wide reflective equilibrium as opposed to a narrow reflective equilibrium.¹⁷² This is for several reasons. First, it is argued that a wide form is preferable to a narrow form because the former allows us to make a stronger and hence, more defensible claim about the initial credibility of considered moral judgments.¹⁷³ Second, the wide form is preferable as moral principles are tested against and derive independent support from background

¹⁶⁹ Arneson, *supra* note 157.

¹⁷⁰ RAWLS, *supra* note 1.

¹⁷¹ Daniels, *supra* note 144; Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76(5) THE JOURNAL OF PHILOSOPHY 256 (1979).

¹⁷² *Id.*

¹⁷³ Margaret Holmgren, *The Wide and Narrow of Reflective Equilibrium*, 19(1) CANADIAN JOURNAL OF PHILOSOPHY 43 (1989).

theories, which are generally more reliable than considered moral judgments in all their rigidity.¹⁷⁴ Finally, a wide form is preferable to a narrow form because the former embodies a more effective strategy for avoiding accidental generalisation of our considered moral judgments than the strategy embodied in a narrow form of reflective equilibrium.¹⁷⁵ Hence, Rawls, as an advocate of a wide, reflective equilibrium believes that the balance and the results of the principles originally agreed upon should alter with a change in circumstances in a way that makes actors question the basic premises of their original judgment. Actors should not strive towards mere internal consistency of their beliefs, but in fact, allow for the fundamental agreed upon principles to be re-hashed and re-imagined with a change of circumstances. While narrow reflective equilibrium strives only for internal consistency of the beliefs, a wider form of the same requires that actors completely re-think their moral judgments in light of any new circumstances that may arise.

This theoretical suggestion has interesting ramifications for the debate on reservations in promotions in India and the discourse it has generated. The political movement in favour of reservation in promotions began due to the realisation that caste-based discrimination did not end at the entry level of employment but persisted even post-entry at several levels in the employment hierarchy.¹⁷⁶ Several instances had occurred in government employment wherein members of the SC community were not promoted to higher positions and discrimination was both claimed and uncovered in these situations.¹⁷⁷ This also became statistically evident with the lack of members from these marginalised communities at top positions in employment hierarchies across the board.¹⁷⁸ However, this political movement in favour of reservations in promotions has been met with strong opposition. The opponents of reservation in promotions seem to argue on two prongs: first, the Indian system of affirmative action was conceptualised to allow affirmative action only at the entry stage and the same must be adhered to and second, that often promotions are not granted due to a 'lack of merit', rather than the presence of discrimination. Both these claims will be assessed in the Rawlsian framework and further suggestions will be made in order to deal with this dilemma in Part IV.

Although the initial moral judgment under the original position in a hypothetical sense would be to mandate a system of reservation only at the entry level, this position is subject to reconsideration. Applying the doctrine of reflective equilibrium, certain political considerations may arise that

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Thorat and Attewell, *supra* note 152 (This study is based on a field experiment where prospective job applicants who were upper caste Hindu, Muslim and Dalit respectively were surveyed to understand discrimination in applying for jobs even after economic emancipation.); *see also* Manipal Sandhu, *Judicial Correlates of Job Reservation*, 4 IRJMSH (2014).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

become relevant post arrival at the judgment, thus mandating a re-reflection into the judgment arrived at in the original position.¹⁷⁹ If such situations do arise, however, an entirely new reflection is a must under the Rawlsian framework. In light of this, if actors in the original position were to be faced with data and narratives of discrimination that are faced by members of the marginalised communities even after entering employment, their judgment is liable to be reassessed. In fact, as per the Rawlsian mandate, this process of reflection is crucial and without this, the equilibrium arrived at would be artificial and unrepresentative of the true circumstances prevalent in political and societal structures.¹⁸⁰ Hence, applying the doctrine of wide, political reflective equilibrium that requires a complete reassessment of moral principles as a process of reflection, if it could be clearly shown that a lack of promotions occurred due to discriminatory forces, actors behind the veil would be forced to reflect and later alter their position to allow for a system that mandates reservations in promotions.

However, real-world social and political functioning is more complex and multi-faceted than can ever be imagined in the Rawlsian original position. It would be impossible to prove by some scientific data-based empiricism that in every situation wherein a member of marginalised community is not promoted, it is an instance of caste-based discrimination.¹⁸¹ However, this does not mean that we disregard the very likely possibility of discrimination being a sole motivating factor in a lot of promotion matters.

In light of this, political and legal systems attempt at coherence by settling for the best, closest solution to the dilemmas of discrimination. It is in light of this justification that we traverse into Part IV of the paper wherein we argue that reservations in promotions should be allowed in states where there is evidence of discrimination. However, this data-collection must not be a choice given to the states, but instead must be mandated to ensure that the worst-off are protected not only at the entry level, but also, applying the doctrine of reflective equilibrium, at the level of promotions.

¹⁷⁹ Daniels, *supra* note 144.

¹⁸⁰ RAWLS, *supra* note 1.

¹⁸¹ This kind of empiricism is not what the Rawlsian theory of justice requires, in any case. Hence, theoretical and quantitative approximations can be the only basis for making policies based on the Rawlsian justice framework.

IV. RECOMMENDATIONS: CREATION OF GRIEVANCE COMMITTEES AND REVERSAL OF THE SURESH CHAND JUDGMENT

A. THE 'CREAMY LAYER' QUESTION: CREATING INSTITUTIONAL AND LOCAL LEVEL GRIEVANCE COMMITTEES

In this part of the paper, we aim to concretise the conclusion arrived at in Part III with respect to members of the 'creamy layer'. Although their exclusion from the scheme of reservations is legitimate, the state needs to address the marginalisation that these individuals face solely as a result of caste-based identities in public employment.¹⁸² In light of this, we suggest the constitution of complaints committees at institutional and local levels that would respond to the grievances of individuals that have been the target of discriminatory treatment.

The parallel that we seek to draw here is with the sexual harassment redressal mechanisms that have been created in India. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('the Act') was passed on April 22, 2013, in pursuance of the guidelines laid down by the Supreme Court of India in *Vishaka v. State of Rajasthan* ('Vishaka').¹⁸³ Hence, we first aim to provide an overview of the Act and the kind of committees it sets up in order to draw an analogy to the present case.

The Act defines 'workplace' to include any private sector organisation or unorganised sector workplace, hospital or nursing home, sports institute, or even a place visited by the employee during the course of employment, including transportation provided by the employer for undertaking such journey.¹⁸⁴ In interpretation, the Court has stated that the word 'workplace' should be broadly defined as the statute is a beneficial legislation and hence, deserves

¹⁸² See Livemint, *Caste Matters Everywhere: Schools, Jobs or Life at Large*, January 28, 2016, available at <http://www.livemint.com/Opinion/wquRqpqgRGfDP58kN9BNOM/Caste-matters-everywhere-schools-jobs-or-life-at-large.html> (Last visited on May 21, 2017); Justice News, *Why Did Kolkata's Presidency University Dismiss These Dalit & OBC Teachers?*, May 12, 2017, available at <http://justicenews.co.in/kolkatas-presidency-university-dismiss-dalit-obc-teachers/32969> (Last visited on May 21, 2017); Times of India, *Is India's Private Sector Casteist?*, February 10, 2014, available at <http://timesofindia.indiatimes.com/home/Is-Indian-private-sector-casteist/articleshow/30163185.cms> (Last visited on May 21, 2017); Sonalde Desai & Amaresh Dubey, *Caste in 21st Century India: Competing Narratives*, 46(11) EPW 40 (2011).

¹⁸³ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

¹⁸⁴ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §2(o).

a broad ambit.¹⁸⁵ Although the Act is multi-faceted, its most important mandate is the constitution of the Internal Complaints Committee ('ICC'). Every workplace has to establish an ICC by an order in writing.¹⁸⁶ The Committee is composed of a Presiding Officer who is a woman employed at a senior level at workplace, and not less than two members who are committed to the cause of women or who have experience in social work or have legal knowledge.¹⁸⁷ In addition to that, there has to be one member from amongst non-governmental organisations or associations working in the same field.¹⁸⁸ Importantly, the ICC has to be located at all administrative units or offices, including any divisional or sub-divisional branches.¹⁸⁹

The Act provides for the establishment of a Local Complaints Committee ('LCC') to receive complaints of sexual harassment from establishments where the ICC has not been constituted owing to less than ten workers or if the complaint is against the employer himself.¹⁹⁰ The LCC is constituted by the District Officer who is the District Magistrate or the Collector or the Deputy Collector of that particular district.¹⁹¹ It includes a Chairperson who is a woman eminent in the field of social work and committed to the cause of women, one women member working at the block level and two members nominated from NGOs and associations committed to the cause of women.¹⁹² Furthermore, at least one of the two women nominated from NGOs and associations have to belong to the SC or the ST or OBC or minority community.¹⁹³ There is also a nodal officer in every block who receives complaints and forwards the same to the concerned LCC within a period of seven days.¹⁹⁴ The ICC and the LCC are constituted for a term not exceeding three years from the date of nomination of the members.¹⁹⁵

The Act also provides a detailed outline as to how an inquiry of the sexual harassment complaint is to be conducted. An aggrieved woman may file a complaint of sexual harassment at workplace to the ICC or the LCC.¹⁹⁶ In case the woman cannot draft a written complaint, the members of the bodies would help her in all reasonable ways.¹⁹⁷ The time limit of three months from

¹⁸⁵ See *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*, 2014 SCC OnLine Bom 814 : 2014 Indlaw Mum 869.

¹⁸⁶ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4(1).

¹⁸⁷ *Id.*, §§4(2)(a),(b).

¹⁸⁸ *Id.*, §4(2)(c).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*, §6(1).

¹⁹¹ *Id.*, §5.

¹⁹² *Id.*, §§7(a),(b).

¹⁹³ *Id.*, §7(1)(c), ¶(3).

¹⁹⁴ *Id.*, §6(2).

¹⁹⁵ *Id.*, §§4(3), 7(2).

¹⁹⁶ *Id.*, §9(1).

¹⁹⁷ *Id.*, §9(1), ¶(1).

the date of the incident to the filing of the complaint is not rigid and can be extended if the members opine that the woman could not have made the complaint within the stipulated time frame.¹⁹⁸ Upon receipt of the complaint, the ICC or the LCC must proceed to make an inquiry in accordance with the service rules applicable to the respondent.¹⁹⁹ The ICC or the LCC may also forward the complaint to the police for registering the case under §509 of the Indian Penal Code within seven days.²⁰⁰ Both the ICC and the LCC are mandated to prepare an annual report and submit the same to the employer and the District Officer.²⁰¹ The employer has to report the number of cases filed and their disposal under this Act in the annual report of organisation²⁰² and the District Officer has to forward a brief report on the annual reports received to the State Government.²⁰³ The State Government has to monitor the implementation of this Act and maintain data on the number of cases filed.²⁰⁴

In addition to the positive duties, in case the employer fails to constitute an ICC and take action under Act, he is liable to be fined to the tune of fifty thousand rupees.²⁰⁵ Similarly, the District Officer has to monitor the timely submission of reports by the LCC and take measures to engage non-governmental organisations for creating awareness on sexual harassment.²⁰⁶ Although several problems have been noted with the ICC model,²⁰⁷ it is still regarded as an important step in addressing discrimination at the institutional level in public employment.

Similarly, the Indian context is also characterised by another primary form of identity-based discrimination, that of caste. Discrimination in employment is particularly relevant with respect to caste as the caste system, in itself, sets up an institutionalised occupational hierarchy. Hence, there is a certain rigidity in the Indian mindset wherein members of certain castes are seen unfit to be able to be a part of certain professions.²⁰⁸ Such mindset, and the historic and cultural sanction for having the same, makes caste a fundamental basis for discrimination in public employment. Similar to claims of sexual harassment, often, traditional methods of criminal litigation at state-level are

¹⁹⁸ *Id.*, §9(1), ¶(2).

¹⁹⁹ *Id.*, §11(1).

²⁰⁰ *Id.*

²⁰¹ *Id.*, §21(1), ¶(2).

²⁰² *Id.*, §22.

²⁰³ *Id.*, §21(1), ¶(2).

²⁰⁴ *Id.*, §32.

²⁰⁵ *Id.*, §26(1).

²⁰⁶ *Id.*, §20.

²⁰⁷ For a detailed explanation of the shortcomings of the ICC model, See Paramita Chaudhari, *Sexual Harassment at the Workplace: Experience with the Complaints Committee*, 43(17) EPW 99 (2008).

²⁰⁸ See generally S. Madheswaran & Paul Attewell, *Caste Discrimination in the Indian Urban Labour Market: Evidence from the National Sample Survey*, 42(41) EPW 4146 (2007).

considered unsuitable to adjudicate claims of caste-based discrimination.²⁰⁹ In fact, due to the existence of massive pressure groups, employees often do not proceed criminally against other people in their workplace even if clear discrimination is seen. Hence, there is a need to evolve systems of alternative dispute resolution, in institutional spaces, to address and combat issues of caste discrimination. In this regard, we suggest a similar model to that under the sexual harassment framework.

It is important to note that these committees will have to deal with a broad range of issues that can fall under the ambit of “discrimination”. Defining the same will be a legislative function and beyond the scope of this paper – however, the need for discrimination to be defined is clear. Furthermore, these committees should exist at an institutional level and at a local level – hence, allowing for transparency and accountability in their functioning. Although the functions of the committees will be decided by the legislature, it is important that these committees deal with the issues faced by the members of the ‘creamy layer’ as well. Often members of this ‘creamy layer’ are seen to be privileged and hence, undeserving of their place in the occupational structure leading to specific discrimination.

In the context of the ICC/LCC model, occurrences of harassment are to be sexual- however, under a model of caste-based complaint systems, any casteist slurs, remarks, actions or behaviour towards individuals will have to be targeted. Although a remedy does exist under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, this remedy is at the state-level and not at an institutional level.²¹⁰ The nature of power hierarchies in the workplace makes it extremely difficult for a person to approach the court as a response to every instance of discrimination. Hence, it becomes important to resolve these disputes pertaining to everyday discrimination at an institutional level itself.

In recent times, a Bill has been tabled in the Parliament dealing with the issue of discrimination in public employment, by parliamentarian Shashi Tharoor, on the suggestion of eminent professor of legal theory and discrimination, Tarunabh Khaitan.²¹¹ This Bill makes it mandatory for organisations to carry out anti-discrimination and diversification duties, and provide scholarships, recruitment measures and trainings, and targeted advertisements to ensure more diversity in their employment.²¹² The Bill suggests the creation of a Central Equality Commission and State Equality Commissions to tackle

²⁰⁹ *Id.* (Often members of marginalised caste-based communities are not in a position to levy the same bargaining power as their employers in state structures or before courts. Hence, internal, non-adversarial mechanisms could be beneficial.)

²¹⁰ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

²¹¹ For suggestions of the creation of such models, *See* Anti-Discrimination and Equality Bill, 2016; TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW (2015).

²¹² *See* Anti-Discrimination and Equality Bill, 2016.

discrimination.²¹³ However, in this suggestion, the Bill deals with several forms of discrimination and creates remedies at a Central or State governmental level. However, in the course of this paper, we have suggested that caste-based discrimination should be dealt with mandatorily at an institutional level as this makes it easy for employees to avail of remedies in their workplace and protect them against discriminatory behaviour. This is particularly relevant for members of the 'creamy layer', who still continue to face discrimination on the basis of their caste irrespective of their economic status or seniority. Hence, as per the consensus reached in Part III, it is crucial for the legislature to create these bodies to deal with the reality of everyday caste-based discrimination at the institutional level in India.

B. RESERVATION IN PROMOTIONS: CRITIQUING THE SURESH CHAND JUDGMENT AND ADVOCATING FOR JUDICIAL PROACTIVITY

In this part, we critique the position taken by the court in the Suresh Chand judgment. In pursuance of the Rawlsian argument made in Part III, we further the idea that reservation in promotions for the members of marginalised communities is crucial when discrimination in public employment is clearly visible. Hence, we oppose the position of the court in Suresh Chand and argue in favour of mandatory data collection programs to be conducted by states to uncover discrimination at the level of promotions. We do not argue that all states should mandatorily have reservation in promotions. However, we argue that the collection of data relating to backwardness and discrimination should be mandatory for states. It is this latter argument that we aim to further in the course of this portion of the paper.

The petitioners in the *Suresh Chand* judgment, requested the court to direct the state governments and the concerned authorities, *via* a writ of *mandamus*, to survey and collect necessary qualitative data relating to the SCs and the STs in the services of the State for granting reservations in promotions in light of the direction given by this Court in *Nagaraj*.²¹⁴ The Court rejected this contention. First, the Court stated that Article 16(4) was merely an enabling provision in the Constitution and hence, did not confer any legal right.²¹⁵ Second, the court said that in absence of such a legal right, it was not empowered to issue the specific writ of *mandamus*.²¹⁶ Finally, the Court distinguished this case from other cases where a proactive stance has been taken by courts in favour of other marginalised communities by stating that unlike other constitutional articles that were used to cater to these community interests,

²¹³ *Id.*

²¹⁴ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : AIR 2007 SC 71.

²¹⁵ *Suresh Chand Gautam v. State of U.P.*, (2016) 11 SCC 113 : AIR 2016 SC 1321.

²¹⁶ *Id.*

Article 16(4) was merely enabling in nature and hence, no protection could be sought.²¹⁷

Before understanding the flaws in the judgment, it is important to take a brief glance at the nature and language of Article 16(4), which reads:

“Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”²¹⁸

In light of this wording, the Court furthers its first prong of argumentation stating that the clause clearly highlights the discretion vested in the states and hence, deems Article 16(4) as a merely enabling provision.

However, in doing so, the Court clearly ignores precedent which states that often, the wording of discretionary clauses actually connotes the existence of a power coupled with a duty – and not merely a power. In *Bachahan Devi v. Nagar Nigam, Gorakhpur*,²¹⁹ the Court reasoned that in order to interpret the legal import of the word ‘may’ in a discretionary clause, the court has to consider various factors, namely, the object and scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like.²²⁰ The Supreme Court, on several occasions in the past, has relied on the landmark case of *Julius v. Bishop of Oxford*²²¹ to state that, often, even the use of discretionary language can indicate that the power is coupled with a duty, thereby giving it mandatory import.²²² In *Ambica Quarry Works v. State of Gujarat*,²²³ the Court had considered the view that in understanding the language of the article, it is often understood that:

“[...] there may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person

²¹⁷ *Id.*

²¹⁸ The Constitution of India, Art. 16(4).

²¹⁹ *Bachahan Devi v. Nagar Nigam, Gorakhpur*, (2008) 12 SCC 372 : AIR 2008 SC 1282.

²²⁰ *Id.*

²²¹ *Julius v. Bishop of Oxford*, (1880) LR 5 AC 214 (HL).

²²² *Tara Prasad Singh v. Union of India*, (1980) 4 SCC 179 : AIR 1980 SC 1682; *Makarand Dattatreya Sugavkar v. Municipal Corpn. of Greater Mumbai*, (2013) 9 SCC 136.

²²³ *Ambica Quarry Works v. State of Gujarat*, (1987) 1 SCC 213 : AIR 1987 SC 1073.

in whom the power is reposed, to exercise that power when called upon to do so.”²²⁴

In response to these cases, the Court relies on the case of *Ajit Singh Januja v. State of Punjab*,²²⁵ wherein the Court held that Articles 16, 16(4-A) and 16(4-B) are enabling provisions and there is no power coupled with duty in this constitutional scheme.²²⁶ However, the Court in this case also noted that in some cases, where it may be fit, courts have often interpreted even enabling provisions to envisage the fulfilment of a duty before the power can be exercised. In fact, the same is very clearly seen from the language of Article 16(4) which states that discretionary power can be exercised when in the opinion of the state, members of the marginalised communities are not adequately represented in the services under the State. Hence, although the power is discretionary, there is a corresponding duty, read in by the Nagaraj case as well, to conduct data collection programs to adequately demonstrate backwardness. Hence, the situation at hand is comparable clearly to a situation where a power is coupled with a duty and could have been read so by the Court.

The Court’s second prong of argumentation was that in cases where the provision is an enabling provision, there exists no legal right and hence, the writ of *mandamus* cannot be issued. However, this stands in direct opposition to the precedent in *S.P. Gupta v. Union of India* (‘S.P. Gupta’).²²⁷ In *S.P. Gupta*, the Court issued directions to the Union of India to conduct data collection initiatives to determine, within a reasonable time, the strength of permanent judges required for disposal of cases instituted in the High Courts and to take tests to fill up the vacancies after making such determination.²²⁸ In this case, the Court held:

“A discretionary power is typically conferred by words and phrases such as “may”, “it shall be lawful”, “if it thinks fit” or “as it thinks fit”. A statutory discretion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties.”²²⁹

²²⁴ *Id.*, ¶13.

²²⁵ *Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715 : AIR 1996 SC 1189.

²²⁶ *Id.*; *Ajit Singh (2) v. State of Punjab*, (1999) 7 SCC 209; *Ajit Singh (3) v. State of Punjab*, (2000) 1 SCC 430.

²²⁷ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

²²⁸ *Id.*

²²⁹ *Id.*, ¶1259.

In this case, Article 216 of the Constitution was being interpreted which stated that every High Court shall consist of a Chief Justice and such other judges as the President *may* from time to time deem necessary.²³⁰ Although the Court admitted that Article 216 was an enabling provision, it stated that in public statutes, words that seem only directory, promissory or enabling have a compulsory force where the thing to be done is for public benefit or in furtherance of public justice.²³¹ Hence, the Court concluded that though Article 216 was an enabling provision, it should be interpreted as conferring a certain legal right as it was in the interest of the public in general. Finally, the court relied on existing precedents to hold that statutory discretion is not necessarily or indeed usually absolute; it may be qualified by express or implied legal duties to comply with substantive and procedural requirements before a decision.²³² Hence, the S.P. Gupta case is the perfect example of a situation wherein the court concretised a procedural duty in the context of an enabling provision, as the result was for public good or in furtherance of justice. Hence, courts in the past have read enabling provisions as having a mandatory import, as and when the situation demands it.

This idea ties in logically to the third prong of argumentation made by the Court wherein it distinguished this case from other cases in favour of women, children and other marginalised communities.²³³ The Court itself noted that in certain decisions, directions have been issued in the past for framing of guidelines or the court has itself framed guidelines for sustaining certain rights of women, children or prisoners or under-trial prisoners – however, these cases and the communities they cater to fall into a different compartment according to the Court.²³⁴ This is where the Court's analysis becomes not only flawed, but also problematic. By the Court's own admission, there have been instances wherein the court has taken a proactive stance in favour of marginalised communities, be it in the case of Vishaka, wherein the Court created new legal rights for women against sexual harassment in the workplace in the context of a legislative vacuum or in *Bandhua Mukti Morcha v. Union of India* ('Bandhua Mukti Morcha'),²³⁵ wherein the Court took a positively interventionist approach and passed guidelines towards the protection of bonded labourers.²³⁶ In fact in the *Bandhua Mukti Morcha* case, it was held that if the Supreme Court were to adopt a passive approach and decline to intervene in cases where there was a

²³⁰ The Constitution of India, Art. 216.

²³¹ S.P. Gupta v. Union of India, 1981 Supp SCC 87, ¶1248 supported by Vide R. v. Tithe Commissioners, (1849) 14 QB 459, ¶474; Julius v. Bishop of Oxford, (1880) LR 5 AC 214 (HL), ¶222-223. A public statute refers to a legislation for public good or motive that catered to the good of the society as a whole and the procedures for ensuring justice.

²³² *Id.*, ¶1251; See Padfield v. Minister of Agriculture, Fisheries and Food, 1968 AC 997 : (1968) 2 WLR 924.

²³³ *Id.*, ¶43.

²³⁴ *Id.*

²³⁵ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802.

²³⁶ *Id.*

lack of relevant material or data, this would amount to a gross violation of the fundamental rights of vulnerable communities.²³⁷

When such clear authority exists in favour of judicial proactivity in the case of marginalised communities, it seems clear that the court does not regard the SC and the ST communities to be vulnerable to the same extent as women, children or bonded labourers. This is a misconception in itself as members of these communities have been side-lined on the basis of their caste identity for centuries within the Indian polity and societal structure. Individuals in these communities are putting in due effort and possess the skills necessary for securing public employment after years of hard work and toiling. If, at this stage, they are denied promotions they deserve due to blatant caste-based discrimination, this is a fundamentally reprehensible form of injustice in itself – one which the Indian courts are under a duty to mitigate. Hence, the Court should have viewed Article 16(4) as a provision to protect the interests of the marginalised and hence, although it is an enabling provision, it is a provision for public good. Applying the ratio of S.P. Gupta, mandatory data collection to prove backwardness and discrimination would be a logical and desirable conclusion. Under Article 16(4), a State can make reservation in promotions, where in the opinion of the State, a certain backward group, is not adequately represented in the services under the State.²³⁸ The fact that the Article uses the phrase “in the opinion of the State” gives the Court the power to concretise the formation of this opinion into a legal duty. For any state to form an opinion, the collection of data on backwardness and discrimination is a must. Hence, the Court failed to ensure justice for caste-based backward groups by ignoring precedent that would have allowed it to meet the ends of justice for marginalised groups.

Finally, it is important to note that in the course of this paper, we are not critiquing the Court for failing to concretise reservations *per se* into a legal obligation upon states as this would be blatantly problematic and against the will of the drafters of the Constitution. However, the petitioners also place a very reasonable demand before the court that follows from the decision in the Nagaraj case – one of data collection to uncover discrimination. This is the minimum responsibility that the court is expected to codify in order for the rights of the marginalised communities to be furthered. The Court failed in filling this gap. Hence, the result is that if discrimination exists that furthers backwardness, the states have no duty at all to respond to it. This is clearly not what the drafters of the Constitution envisaged and additionally, it contradicts the will of the Court as laid down in the landmark Nagaraj judgment. Hence, cumulatively, the Suresh Chand judgment reveals apathy of the Court in both analysing precedent in a coherent and comprehensive manner and doing its

²³⁷ *Id.*

²³⁸ The Constitution of India, Art. 16(4).

duty to protect the members of communities that have been historically and socially marginalised.

V. CONCLUSION

In the course of this paper, we have eventually provided certain recommendations with respect to the twin questions we have taken up – the creation of committees and the mandatory effect of data collection programs. In doing so, we have attempted to root these positions in philosophical justifications derived from the Rawlsian theory of justice as fairness. Attempting to extend the Rawlsian theory to questions of caste, we have contemplated that an extension of the theory would also feature actors within the process of reflective equilibrium, responding to the changes that they must take into account. Cumulatively, hence, this process of justification gives the positions taken moral and political coherence and allows us to respond to questions of inequality through a clear vision of justice.