COURTING SUBSTANTIVE EQUALITY: EMPLOYMENT DISCRIMINATION LAW IN INDIA†

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Learned men see with an equal eye
a scholarly and dignified priest,
a cow, an elephant, a dog,
and even an outcaste scavenger.[1]

1. INTRODUCTION

Inequality in India is made particularly pervasive by the fact that India's rigid social hierarchies are intertwined with longstanding quasi-religious principles.[2] Notwithstanding the fact that equality, based on the intrinsic divinity of all beings, is a principle inherent to Hinduism[3]—the country's dominant religion, India has long been defined by a strict system of social stratification legitimated by perceived cultural and religious principles.[4]

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1 THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR 59 (Barbara Stoler Miller trans., 1986).

2 Vikraman Nair, *The Search for Equality Through Constitutional Process: The Indian Experience*, 2001 ACTA JURIDICA 255, 256 (2001) ("Religious tenets, scriptures and even customs were distorted and manipulated and were used to institutionalise, justify and perpetuate . . . oppression and subordination [by race and caste].").

3 *Id.* at 255; *see also* THE BHAGAVAD-GITA, *supra* note 1, at 67 ("I exist in all creatures, so the disciplined man devoted to me grasps the oneness of life . . . .").

4 Nair, *supra* note 2, at 256.

The hierarchies that define Indian society bear upon every aspect of life.[5] In the realm of employment, hierarchical norms define the types of occupations into which a person might enter, as well as the conditions of employment she may expect to encounter.[6] Many industries remain *de facto* segregated by caste and gender.[7] Prejudice often operates at a surface level, and a certain level of classification by social status is the norm rather than the exception.[8]

Since employment discrimination in India is primarily the result of structural inequalities that assign a subordinate social status to women and disadvantaged minority groups, the problem is best addressed through a systemic approach that attacks the underlying hierarchies directly.[9] A substantive conception of equality is enshrined in India's Constitution, which directs the state to take affirmative action to empower women and disadvantaged minorities to compete, on more equal terms, with

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[5] CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE & HUMAN RIGHTS WATCH, CASTE DISCRIMINATION AGAINST *DALITS* OR SO-CALLED UNTOUCHABLES IN INDIA 54 (2007), *available at* www2.ohchr.org/english/bodies/cerd/docs/ngos/chrgj-hrw.pdf [hereinafter CASTE DISCRIMINATION AGAINST *DALITS*] (discussing, *inter alia*, labor and employment rights to work, the right to form and join trade unions, housing and property rights, the right to access services in a non-discriminatory manner, education rights, and the right to equal participation in cultural activities); Sumita Ray, *The Women's Reservation Bill of India: A Political Movement Towards Equality for Women*, 13 TEMP. INT'L & COMP. L.J. 53, 53 (1999) (discussing labor and employment and other rights in the gender context).

[6] CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 55; SURINDER MEDIRATTA, HANDBOOK OF LAW, WOMEN, AND EMPLOYMENT: POLICIES, ISSUES, LEGISLATION, AND CASE LAW 2 (2009) (noting the persistence of gender inequality in India despite the egalitarian provisions in the Indian Constitution and the implementation of myriad International Law Organization conventions and recommendations).

[7] CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 55 ("Dalit's talents, merits, and hard work are of little consequence in a system where occupational status is determined by birth."); *see also* MEDIRATTA, *supra* note 6, at 17 (observing that female mobility into managerial positions is extremely limited).

[8] Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 260 (2008) (contrasting discrimination against *Dalits* with the South African apartheid system).

[9] Sean A. Pager, *Anti-Subordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 329 (2007) (contrasting caste-based discrimination in India with the "irrational prejudice" against an immutable trait such as skin color that underlies racism in the United States).

members of more privileged social groups.[10] The government has been guided by this constitutionally-sanctioned substantive impetus and has implemented a system of "compensatory discrimination" in the form of quotas for women and members of disadvantaged castes in government jobs.[11] In taking a primarily substantive, rather than formal, approach to equality, India rightly recognizes that neutral application of laws and policies will perpetuate the subordination of already disadvantaged groups.[12] Given the salience of social hierarchies in the Indian context, disadvantaged minorities contend with near insurmountable barriers to availing themselves of opportunity.

Despite its commitment to substantive equality, India's existing approach to employment discrimination has fallen short of its egalitarian ideals.[13] One explanation for this shortfall is the lack of a comprehensive employment discrimination framework

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[10] M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV. 101, 105-07 (1992) (noting that the "compensatory discrimination" provisions of the Indian Constitution permit unequal treatment based on "reasonable classifications" aimed at remedying social ills); *see also* INDIA CONST. art. 16, § 4 ("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.").

[11] Nair, *supra* note 2, at 258 (noting, also, quota systems in legislatures, higher education, land and housing allotment, health care, scholarships, grants, and legal aid). Compensatory discrimination "is a daring attempt to remedy past injustices suffered by those who are at the lower levels of India's four-tier caste hierarchy." E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 65-66 (1996).

[12] *See* Manuela Tomei, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT'L LAB. REV. 401, 411 (2003) ("[C]onsistent treatment of different people may produce unequal results."); *see also* Narula, *supra* note 8, at 314 (observing that "there are no objective standards of merit applicable to all groups within society, given that dominant groups shape traditions within which they make judgments of merit").

[13] *See* Takahiro Ito, *Caste Discrimination and Transaction Costs in the Labor Market: Evidence From Rural North India*, 88 J. DEV. ECON. 292, 299 (2009) (observing that India's reservation-based approach to employment discrimination has had limited impact); *see also* Sukhadeo Thorat & Paul Attewell, *The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, 42 ECON. & POL. WKLY. 4141, 4144 (2007) (highlighting the high incidence of caste discrimination in the relatively unregulated Indian private sector); Geeta Gandhi Kingdon & Jeemol Unni, *Education and Women's Labour Market Outcomes in India*, 9 EDUC. ECON. 173, 173 (2001) ("[W]omen do suffer high levels of wage discrimination in the Indian urban labour market . . . .").

adequately addressing the myriad of ways discrimination operates. The existing legal protections against such discrimination include constitutional provisions mandating equality[14] and a handful of scattered criminal statutes. There is no umbrella employment discrimination statute to regulate private sector workplaces in India.[15] Reservations, constituting the primary means by which the government addresses employment discrimination, do not extend to the private or agricultural sectors. This is highly problematic, given the fact that these sectors together encompass the lion's share of the workforce.[16] The existing statutory provisions provide some measure of protection to women in the private sector workforce, but many of these do not address caste discrimination.

The social affliction engendered by entrenched hierarchies is exacerbated by the hesitance of the legislative and executive branches of government to take action beyond the existing system of quotas to benefit disadvantaged minorities.[17] Compensatory discrimination has become a highly politicized endeavor, with various political parties vying for the support of caste-based interest groups.[18] In the process, influential members of nominally disadvantaged groups are unfairly benefited and the interests of the genuinely underprivileged are neglected.[19]

The Indian Supreme Court has attempted to fill the void created by the legislature's abdication of responsibility.[20] Since the late 1970s, the Court has adopted an increasingly activist posture in

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[14] INDIA CONST. arts. 14–16.

[15] *See Anti-Discrimination/Sex Equality*, LAWYERS COLLECTIVE, http://www.lawyerscollective.org/womens-rights-initiative/anti-discriminationsex-equality.html (last visited May 3, 2013) ("There is no comprehensive anti-discrimination code in India although there are laws that address specific aspects related to equality.").

[16] *See* S. Sakthivel & Pinaki Joddar, *Unorganised Sector Workforce in India: Trends, Patterns and Social Security Coverage*, 41 ECON. & POL. WKLY. 2107, 2108–10 (2006) (noting that approximately 92 percent of India's workforce is employed in the unorganized sector, which accounts for nearly the entire agricultural workforce [with the exception of plantation workers] and the vast majority of the private sector workforce. Only approximately 8 percent of the workforce is employed in the organized sector, encompassing the whole of the public sector workforce and the organized portion of the private sector).

[17] Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies From India*, 41 VAND. J. TRANSNAT'L L. 833, 845 (2008).

[18] Pager, *supra* note 9, at 338.

[19] *Id.*

[20] Sood, *supra* note 17, at 844.

an effort to uphold the rights of the disadvantaged.[21] Yet despite the Court's commitment to substantive equality, it has not been wholly immune from the regressive, traditional norms that pervade Indian society.[22] The Court has also selectively superimposed formal equality principles on a vision of substantive equality colored by traditional norms, an approach that has at times yielded unsatisfactory results.[23] The Apex Court's occasional reliance on traditional stereotypes has sometimes had the effect of calcifying social hierarchies.[24]

While the entrenched hierarchies that undergird Indian society necessitate a substantive approach to equality that takes into account the painfully real social differences that limit access to opportunity for certain groups, India's substantive approach has hitherto failed to generate the anticipated results. The deficiencies in India's approach to substantive equality are the lack of a comprehensive framework addressing employment discrimination in its various forms and the selective intermingling of formal and substantive equality with traditional norms. This article argues, therefore, that India's commitment to equality in employment would be better realized through (1) a comprehensive employment discrimination framework, which would ease the litigation burden on disadvantaged victims, offer a wider range of remedies than those currently available under the constitution and criminal laws, and extend the protections of employment equality further than the limited sphere to which they currently apply and (2) a strong commitment to a primarily substantive approach, disentangled

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[21] *Id.* at 837.

[22] *See* Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic and International Levels*, 41 GEO. WASH. INT'L L. REV. 541, 558–59 (2010) (describing the Indian Supreme Court's reliance on traditional caste identities in reaching some of its judgments).

[23] *See*, *e.g.*, Javed v. Haryana, A.I.R. 2003 S.C. 3057 (India) (upholding a law that prevented men and women with more than two children from serving in municipal governments, despite clear evidence that this disproportionately burdened and disqualified women, because it was not "arbitrary, unreasonable, or discriminatory"); *see also* Sood, *supra* note 17, at 888 (quoting Supreme Court Justice Ruma Pal as observing, "[t]he most frequent judicial failures to conceptualize the offence arise when the Court approaches the issue with certain judicial predispositions, based on either class or gender").

[24] Kalpana Kannabiran, *Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India*, 44 ECON & POL. WKLY. 88, 90 (2009).

from formal equality and free from the regressive effects of traditional stereotypes.

2. HIERARCHIES

Perhaps the most visible of India's social hierarchies, the caste system, divides Hindus into four classes, called *varnas*: the *Brahmins* (priests), the *Kshatriyas* (warriors), the *Vaishyas* (businesspeople), and the *Shudras* (laborers), in order of descending authority.[25] Below the caste system lies a fifth group, the *Dalits*, or scheduled castes, who have historically been subjugated through their perceived untouchability, whereby contact with them has been viewed as inauspicious and polluting.[26] Within the larger *varnas* are various subcastes, or *jatis*, which vary from one region to another and which have, over the course of time, dictated the occupations into which a person might enter.[27] The caste system is a complex social code, which, as per tradition, governs all aspects of human interaction, with the upper castes exercising considerable subjugating influence over the lower castes and those below the caste system.[28] The almost total absence of intermarriage across castes reinforces these social divisions.[29] The system is one of graded inequality, a factor that has significantly contributed to its continuing relevance because of the incentive it provides at each level to maintain the status quo.[30] Thus, certain *jatis* among the *Dalits*, for instance those involved in the practice of manual scavenging or the cleaning of dry latrines, are viewed as untouchables even among the *Dalits*.[31]

No less significant in Indian society is the hierarchy that separates men from women and draws for legitimacy upon gendered cultural values purportedly rooted in religious

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[25] Sarkin & Koenig, *supra* note 22, at 547 (identifying and describing the caste divisions in India).

[26] *Id.*

[27] *Id.*

[28] Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy*, 6 ASIAN L.J. 99, 102 (1999) (describing the caste system as a way of organizing Indian society).

[29] Narula, *supra* note 8, at 276 ("Prohibitions on inter-marriage are not only a hallmark feature of the caste system . . . but are essential to maintaining its very existence.").

[30] *Id.* at 260.

[31] CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 56.

doctrine.[32] Traditional conceptions of women as being primarily suited to domestic roles have restricted the roles that women, in particular, those of the upper castes, have played in the public sphere.[33] Women who enter the workforce must overcome significant hurdles at every step of the way, from contending with familial and societal expectations that they remain in the domestic sphere to facing discrimination in all aspects of employment.[34] Women of the lower castes are particularly vulnerable due to their position at the intersection of caste and sex discrimination.[35] These women account for the majority of those engaged in what are viewed as the most dangerous and degrading occupations and face significant opposition to any attempts on their part to empower themselves.[36]

Inequality in India is particularly problematic because of the scale on which it occurs and its tendency to dominate all aspects of

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[32] *See* A.P. THAKUR & SUNIL PANDEY, 21ST CENTURY INDIA: VIEW AND VISION 132 (2009) (observing that, in the Indian social structure, "[m]en outrank women of the same or similar age . . . ."). For an example of the ways in which religious gender hierarchies bear upon the Indian system of laws, see Kamala Sankaran, *Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution*, 23 S. AFR. J. ON HUM. RTS. 277, 285 (2007) (describing Indian courts' widespread practice of upholding sex discrimination that falls under the purview of so-called religious personal laws).

[33] KARIN KAPADIA, *Translocal Modernities and Transformations of Gender and Caste, in* THE VIOLENCE OF DEVELOPMENT: THE POLITICS OF IDENTITY, GENDER AND SOCIAL INEQUALITIES IN INDIA 142, 167 (Karin Kapadia ed., 2002) (attributing the harsher subordination of women in the higher classes to their seclusion); *see also* Wendy Olsen & Smita Mehta, *Female Labour Participation in Rural and Urban India: Does Housewives' Work Count?*, 93 RADSTATS J. (2006) (underscoring the perceived desirability of the status of a housewife in areas of the country significantly influenced by Hindu Brahminical norms, particularly in rural households where women are compelled by necessity to work outside the home).

[34] ANIL DUTTA MISHRA, PROBLEMS AND PROSPECTS OF WORKING WOMEN IN URBAN INDIA 59 (1994) (stating that some of the forms of oppression that women experience in the workplace include stares, remarks, and mockery).

[35] *See* Narula, *supra* note 8, at 277–78 (noting that *Dalit* women are uniquely oppressed due to their vulnerability to violence, their unequal access to services, employment opportunities, and education, and the fact that government development programs tend to prioritize initiatives that benefit *Dalit* men).

[36] Sesha Kethineni & Gail Diane Humiston, *Dalits, the "Oppressed People" of India: How Are Their Social, Economic, and Human Rights Addressed?*, 4 WAR CRIMES, GENOCIDE, & CRIMES AGAINST HUMAN. 99, 104–05 (2010); *see also* Shuriah Niazi, *Madhya Pradesh's Manual Scavengers Caste in a Trap*, NEWS TRACK INDIA (Jan. 23, 2009), http://www.newstrackindia.com/newsdetails/64125 (describing the occupation of manual scavenging, or the cleaning of non-flushing latrines, which many lower-caste and marginalized women feel compelled to enter even though they have been outlawed in India).

people's lives.[37] As Smita Narula notes, "India is also an example of injustice in the extreme: the numbers affected are greater, the poverty is deeper, the atrocities are an every day affair, and enforced servitude and segregation is the norm."[38] Pervasive *de facto* occupational segregation creates immediately apparent social division and limits the ability of members of disadvantaged groups to better their social position. Due to intense discriminatory attitudes on the part of employers, skewed distribution of resources, and historical patterns of disadvantage, *Dalits*, the so-called backward classes (certain of the extremely disadvantaged *Shudra* subcastes), and women are often relegated to menial and/or undesirable areas of employment.[39] The ingrained structures of inequality that constitute the framework of Indian society necessitate an approach to equality that takes into account the insurmountable barriers that prevent certain sections of society from availing themselves of opportunity.

3. INDIA'S APPROACH TO EMPLOYMENT DISCRIMINATION

The Indian government has primarily taken a substantive view of equality, selectively applying formal equality principles in certain cases.[40] In line with this emphasis, the government has focused on compensating for and remedying existing social hierarchies.[41] Substantive equality recognizes the existence of social classifications and seeks to target those social structures that contribute to the subordination of historically disadvantaged groups.[42] Formal equality, in contrast, overlooks social classifications and attempts to ensure neutral application of laws and policies and non-discrimination among individuals.[43] While substantive equality, with its recognition of real social differences

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[37] Narula, *supra* note 8, at 260.

[38] *Id.*

[39] CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 55; MEDIRATTA, *supra* note 6, at 17.

[40] Chandola, *supra* note 10, at 110.

[41] Sridharan, *supra* note 28, at 99–100.

[42] Claire McHugh, *The Equality Principle in E.U. Law: Taking a Human Rights Approach?*, 14 IRISH STUDENT L. REV. 31, 34 (2006).

[43] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (describing the formal-equality based antidiscrimination principle employed by U.S. Courts in interpreting the Equal Protection Clause of the Constitution as reflecting the idea that "similar things should be treated similarly").

between groups, embraces affirmative action in favor of disadvantaged groups as being in itself an essential part of equality, formal equality views affirmative action as an exception to equality to be avoided if at all possible.[44]

The Indian Constitution contains both formal and substantive equality provisions, suggesting recognition on the part of the founders that uniformly applied formal equality would perpetuate the existing structural inequalities.[45] Although the Constitution mandates equality under the laws and prescribes a merit-based regime of advancement in government employment, it also expressly endorses a vision of substantive equality that is anchored in affirmative action to empower minorities to compete on more equal terms with members of more privileged groups.[46] That the state has embraced this constitutional directive is evident in the fact that the primary approach the government has taken to eradicating employment discrimination is a system of compensatory discrimination in the form of quotas.[47] Under this system, 49.5% of positions in higher education and national government employment are reserved for members of the scheduled and backward classes.[48] The reservation system for women is less comprehensive, but nevertheless sets aside one third of seats in municipal (local) governments for female candidates.[49] Various other affirmative action provisions implemented on discretionary bases by the state and central governments complement this approach.[50] Compensatory discrimination is rooted in the belief that, in the absence of strict quotas, minorities disadvantaged due to rigid societal hierarchies will be denied access to gainful employment.[51] There is also the hope that the

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[44] Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 73, 81 (2003).

[45] Chandola, *supra* note 10, at 110.

[46] Sridharan, *supra* note 28, at 144.

[47] *Id.* at 111–12.

[48] Morgan-Foster, *supra* note 44, at 87.

[49] Raghabendra Chattopadhyay & Esther Duflo, *Women as Policy-Makers: Evidence from a Randomized Policy Experiment in India*, 72 ECONOMETRICA 1409, 1410 (2004).

[50] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA 380 (1984).

[51] *See* Prior, *supra* note 11, at 77–78 ("The [framers of India's Constitution] believed that compensatory discrimination in this field was both a method to

increased presence of members of disadvantaged groups in positions of power will translate into more opportunities for members of these groups across the board.

In addition to constitutional protections against employment discrimination, the legislature has enacted a handful of statutes that address various aspects of discrimination in the workplace. For the purposes of this analysis, the most significant of these statutes is the Equal Remuneration Act of 1976, which guarantees women equal treatment in the workplace.[52] The Act forbids discrimination in hiring, pay, and conditions of employment between male and female workers engaged in the same or similar work, except where dissimilar treatment is mandated or permitted under the law.[53]

4. THE LIMITATIONS OF THE CURRENT SYSTEM

Although India's primarily substantive approach to equality in employment rightly recognizes the potential for perpetuation of existing hierarchies in the absence of special solicitude for the interests of the disadvantaged,[54] the Indian approach has failed to generate the anticipated results. The shortcomings of the Indian approach lie in: (1) its limited reach, (2) the near abdication of responsibility by the legislative branch of government, and (3) the judiciary's seemingly incoherent superimposition of formal equality principles on a vision of substantive equality colored by regressive cultural norms.

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strengthen India's underprivileged and a means of preventing upper classes from obstructing the admission of backward classes into government employment.").

[52] Equal Remuneration Act, 1976, No. 25, Amendment 1987, No. 49 (India).

[53] *Id. Cf.* Equal Pay Act, 29 U.S.C. § 206 (1963) (forbidding discrimination in wages between men and women engaged in similar work in regulated American workplaces).

[54] Sandra Fredman, *Facing the Future: Substantive Equality Under the Spotlight* 25 n.62 (Univ. of Oxford Legal Research Paper Series, Working Paper No. 57, 2010) (noting that the Indian substantive equality approach allows individuals who show socio-economic disadvantage as well as membership in a certain disadvantaged status group to qualify for benefits in order to achieve equality. In addition, the Indian Constitution permits special provisions to be made for two categories of disadvantaged groups, of which one is comprised of "Scheduled Castes and Scheduled Tribes").

4.1. The Lack of a Comprehensive Framework

The lack of a comprehensive legal framework to address employment discrimination in its various forms imposes significant barriers to the realization of a robust equality of employment opportunity in India. India has thus far relied almost exclusively on its system of compensatory discrimination to root out such inequality, and this approach has met with only moderate success.[55] A system grounded almost entirely on quotas is inherently limited because it disregards the manifold ways in which discrimination and structural inequality may operate in the workplace.[56] For example, a quota system does not address disparities in wages, promotion opportunities, and conditions of employment. The limitations of India's reservation-based approach are compounded by the fact that reservations are primarily concentrated in relatively undesirable areas of employment such as menial or janitorial work.[57] In this manner, members of disadvantaged groups remain segregated in areas of employment traditionally associated with their castes.[58] Instructive in this regard is the experience of nearly a hundred *Dalit* workers in the city of Ahmedabad, who, despite having advanced degrees in a range of subjects, could find only janitorial employment.[59]

In practice, reservations benefit less than one percent of the *Dalit* population.[60] The private and agricultural sectors, which together account for a huge percentage of the total market, are

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[55] Sridharan, *supra* note 28, at 111–12 ("India's policy of 'compensatory discrimination' consisted primarily of quotas, or strict reservations of designated percentages of government positions for beneficiary groups, according to their representation in the society. Membership in a beneficiary group alone qualified a candidate to receive a reserved position.").

[56] *See* Ito, *supra* note 13, at 299 (underscoring the limitations of India's reservation-based approach to employment discrimination).

[57] *See* CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 28 (noting that *Dalits* occupy more than 65 percent of government sweeping positions and only 16.7 percent of non-sweeping positions).

[58] *Id.*

[59] Randeep Ramesh, *Untouchables in New Battle for Jobs*, THE GUARDIAN (Manchester), Oct. 2, 2004, http://www.guardian.co.uk/world/2004/oct/03/india.randeepramesh.

[60] Narula, *supra* note 8, at 312–15 (arguing that although reservations provided greater opportunities for *Dalits* to reach political and government positions, as well as positions as engineers and surgeons, they have not yet benefited the majority population of *Dalits*).

outside the purview of reservations.[61] The recent trend toward liberalization, with its concomitant privatization of industries, has further limited the compensatory discrimination system by taking these jobs out of the reach of reservations.[62] Due to a range of factors, including resistance on the part of private employers and the informal working conditions prevalent in agricultural work, these sectors have been left almost wholly unregulated.[63] Although the Equal Remuneration Act and a smattering of other legislation provide women in private sector workplaces with some measure of protection from discrimination, members of the scheduled and backward classes are excluded from many of these protections under the existing statutory scheme.[64] Discrimination outside the public sector is both blatant and rampant. To take one example, as reported in *The Guardian*'s story of *Dalits* battling for better jobs, Prakash Chauhan, who held a masters degree in Commerce, found his offer of employment at an accounting firm rescinded upon the firm's discovery that he was a *Dalit*. Chauhan

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[61] *See* Thorat & Attewell, *supra* note 13, at 4144 ("[I]t appears that caste favouritism and the social exclusion of dalits . . . have infused private enterprises even in the most dynamic modern sector of the Indian economy."). For employment figures, see *Employment in Public and Organised Private Sectors*, RESERVE BANK OF INDIA, http://www.rbi.org.in/scripts/PublicationsView.aspx?id=13602 (last visited May 3, 2013); *see also* BINO PAUL ET AL., INDIA LABOUR MARKET REPORT 2008 (2009), *available at* http://www.macroscan.org/anl/may09/pdf/Indian_Labour.pdf (analyzing Indian labor market composition, trends, and issues).

[62] Narula, *supra* note 8, at 318 (stating that the economic liberalization in India, or more specifically, the philosophy of increased reliance on market forces and the reduced role of the state, has lead to the shrinking of the public sector and thus harmed the efficiency of the reservations model and its possible effects).

[63] *See* Barbara Harriss-White & Nandini Gooptu, *Mapping India's World of Unorganized Labour*, 37 SOCIALIST REG. 89, 89 (2001) ("Out of India's huge labour force, over 390 million strong, only 7% are in the organized sector . . . . 'Organized sector labour' means workers on regular wages or salaries, in registered firms and with access to the state social security system and its framework of labour law. The rest—93% of the labour force—works in what is known as the 'unorganized' or 'informal' economy."); *see also* Priya Deshingkar, *Extending Labour Inspections to the Informal Sector and Agriculture* 7 (Chronic Poverty Research Ctr., Working Paper No. 154, 2009), http://www.chronicpoverty.org/uploads/publication_files/WP154%20Deshingkar.pdf (noting that informal workers, including agricultural workers, are not covered by basic labor laws).

[64] *See* CASTE DISCRIMINATION AGAINST *DALITS*, *supra* note 5, at 26 (noting that India has failed to provide *Dalits* with adequate protection against discrimination in employment).

was ultimately forced to take up sweeping when he could find no other employment.[65]

Even for those nominally protected under the existing statutory scheme, effective recourse has proven difficult or impossible to obtain.[66] The Equal Remuneration Act is a criminal statute, which requires victims of employment discrimination to register complaints with labor inspectors designated by the states.[67] The criminal system is limited in its ability to adequately address employment discrimination in its various forms.[68] The penalties for violations of employment statutes are relatively minimal, and suffer from chronic underenforcement.[69] The limited legal redress offered disincentivizes complaints because victims have little to gain from expensive and drawn-out litigation that gives them little in the way of compensatory damages. Corruption is endemic, and labor inspectors tend to be overworked and underpaid.[70] The interests of marginalized groups are thus often neglected.

4.2. The Legislature's Abdication of Responsibility

India's approach to employment discrimination has also fallen short of the Constitution's egalitarian objectives because of the failure of the legislative branch to adequately fulfill its part in implementing substantive equality.[71] Political expediency tends to

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[65] Ramesh, *supra* note 59.

[66] *See* Aditi Kavarana, *Equal Remuneration Act* 11 (Ctr. for Civil Soc'y, Working Paper No. 15, 2000), http://economics--www.ccsindia.org/ccsindia/policy/rule/ studies/wp0015.pdf (reporting that Assistant Labour Commissioner K.R. Sawhney's claim that enforcement of the Equal Remuneration Act is accorded minimal importance in Delhi).

[67] Equal Remuneration Act, *supra* note 52.

[68] *Cf.* Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008) (proposing that employment discrimination should be conceptualized as being neither civil nor criminal in order to overcome the limitations of each of these procedural paths).

[69] Kavarana, *supra* note 66, at 10–11 (explaining that enforcement of these laws suffer from inefficiency since, among other issues, labor inspectors are often over-burdened with work as they are few in number and are required to oversee the implementation of more than 28 labor laws, in addition to the general reluctance of workers to file complaints).

[70] *Id.* at 10.

[71] Sood, *supra* note 17, at 847–48 (noting the danger of "judicial overreaching" and the Supreme Court's activism while arguing that the judiciary lacks the competence of the legislative and executive branches to enact laws and make administrative decisions).

drive legislative decisions, and there is a perceived need by legislators to appease influential voting blocs.[72] That need for political support makes legislators hesitant to champion controversial initiatives that seek to mitigate discrimination against minorities when these initiatives do not align with the legislators' political interests.[73] Thus, influential members of nominally disadvantaged castes have gained at the expense of the genuinely disadvantaged.[74] The highly politicized system of compensatory discrimination provides one example of this. New castes are continually added to the affirmative action rosters at the behest of politicians eager to secure their interest with these groups, with little inquiry into their backwardness or lack thereof.[75] These castes, unlike the *Dalits*, vary widely in terms of their social and economic status with many in fact being economically and politically powerful.[76] Few are ever removed from the reservation lists.[77]

The legislative branch has repeatedly reneged on its constitutional obligation to introduce legislation to remedy the

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[72] Pager, *supra* note 9, at 338 (arguing that a politicized process in the determination of "disadvantaged" groups could cause manipulation of the system and lead to corruption, as evidenced in India).

[73] Sarkin & Koenig, *supra* note 22, at 552 (describing the formation of caste-based interest groups, each lobbying for economic benefits and the extension of reservations to members of their caste, is "used by politicians to mobilize support for elections and collective action.").

[74] *Id.* at 550 ("In general, the benefits only reach those lower caste people who have already attained an elite position in society through economics, politics, or education.").

[75] The *Dalits*, in contrast, tend to be almost uniformly marginalized. Reservations tend to dominate any discussion on empowering *Dalits*, and other important considerations are inadequately explored. In this regard, commentator P. Sainath has observed, "In the media, any debate on Dalit rights is about reservation, and not about water, health, sanitation or land rights. In the minds of the media audience, we have created a stereotype that Dalit is equal to reservation, which is taken out of the context of all these other deprivations." *Trend of Repackaging Casteism Growing*, THE HINDU (Chennai), Dec. 7, 2007, http://www.hindu.com/2007/12/07/stories/2007120759081200.htm.

[76] Narula, *supra* note 8, at 324–25 (noting that the Indian government implemented on individuals who attempt to claim disadvantaged status to receive benefits a more complex test, which accounts for a variety of social, educational, and economic factors such that the claimant's occupation and wealth, for example, would be considered).

[77] Pager, *supra* note 9, at 338 (arguing that the cause of this permanent status is rooted in the "reservation politics," which "dominate election campaigns and attract corruption").

effects of discrimination on disadvantaged minorities. Although the media, the public, and the Sachar Committee have called for a comprehensive employment statute in recent years, no concrete action in this direction has yet been taken.[78] Nor has the legislature followed up on proposals to establish a centralized agency to address discrimination in employment.[79] Large gaps remain in the employment discrimination framework, and there has been little action to fill this void.

The legislature's inadequate discharge of its responsibilities has forced the judiciary to assume an increasingly activist position.[80] For example, the Court created so-called public interest litigation, a framework that empowers public interest agencies and the public to litigate claims on behalf of underprivileged victims of alleged government discrimination or inaction.[81] In *Vishaka v. State of Rajasthan*, the Supreme Court of India filled a conspicuous void in employment discrimination law by issuing comprehensive sexual harassment guidelines binding on both public and private employers.[82] The Court issued these guidelines after considering a case in which a government employee had been raped in retaliation for her work against rural child marriage.[83] Even though the sexual assault occurred in a public workplace, the Court's resultant employment discrimination guidelines regulated private employers too, underscoring judicial activism. In drafting these guidelines, the Court pointed to the complete absence of

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[78] *See Anti-Discrimination/Sex Equality*, *supra* note 15 (stating that in 2006, the Sachar Committee recommended a new framework for addressing discrimination against minorities in employment, arguing that "India needs an equality legislation that protects multiple characteristics, extends beyond the private and public divide and addresses manifest discrimination in society").

[79] *See id.* (highlighting the 2008 Menon Committee's recommendation that an Equal Opportunity Commission be formed to address the grievances of minority workers).

[80] *See* Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP. L. REV. 55, 56 (2009) (examining how a particular academic approach can contribute to the evolving discourse on judicial activism in the Indian Supreme Court).

[81] *See* Sarkin & Koenig, *supra* note 22, at 560 (noting that the Indian Supreme Court's introduction of public interest litigation has contributed to increasing opportunities for the adjudication of incidents of alleged discrimination).

[82] *See* Vishaka v. Rajasthan, (1997) 6 S.C.C. 241 (India) (citing a petition brought by social activists that sought to bring attention to the rights of working women and assist in identifying methods by which gender equality in India can be achieved).

[83] *Id.*

legislation addressing the pervasive problem of sexual harassment in the workplace.[84] The Court also acknowledged the shortcomings of a judicially mandated sexual harassment framework, but maintained that the importance of the issue necessitated extraordinary action.[85] It stipulated that its guidelines would be binding only until appropriate legislation was enacted.[86] Legislative inaction has thus enabled the Supreme Court to assume an increasingly prominent role in shaping employment discrimination policy.

4.3. The Supreme Court's Intermingling of Formal and Substantive Equality

The effective implementation of substantive equality in the realm of employment has also been hindered by the Supreme Court's seemingly random intermingling of formal equality principles with a substantive equality framework that has at times drawn upon regressive cultural norms.[87] The Court's embrace of a primarily substantive approach to equality is reflected in its recognition of the differences between social groups.[88] Thus, the Court has repeatedly upheld the validity of affirmative action schemes to benefit disadvantaged castes and women. The Court has noted that a strictly neutral application of laws and policies, as required by formal equality, will not meaningfully implement the

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[84] *Id.*

[85] *Id.* For a discussion of the drawbacks of judicial policymaking, see Sood, *supra* note 17, at 847–48 (explaining that, as appointed officials, judges are not directly accountable to the people, that the judiciary is inherently limited in its ability to acquire a wide range of information to create effective policy, and that judicial overreaching risks retaliation by the other governmental branches, leading to loss of judicial credibility).

[86] *Id.*

[87] Kannabiran, *supra* note 24, at 90 (explaining the issue of sex discrimination in the context of relationships as expressed in the jurisprudence on sex discrimination).

[88] *See, e.g.*, Kerala v. Thomas, (1976) 2 S.C.C. 310 (India) (permitting the government of the state of Kerala to make special exceptions, other than reservations, for members of the scheduled castes and tribes in government employment); *see also* Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (India) (affirming the state's authority to make provision, in the form of reservations, concessions, or exceptions, for the advancement of the backward classes, provided that backwardness was not determined solely on the basis of caste).

guarantee of equality enshrined in the Constitution.[89] Although the Court has, on many occasions, appropriately recognized the disparities in social standing among different groups, it has not uniformly applied these substantive equality principles in cases involving extremely underprivileged parties. The Court has, on occasion, resorted to a shortsighted, selective application of formal equality principles, specifically in the context of cases involving discrimination against women, and the incoherence of its doctrine in this regard has yielded unsatisfactory results. Thus, for instance, in *Javed v. State of Haryana*, the Supreme Court upheld a state law that prevented people with more than two children from serving in municipal government roles in spite of evidence that such a requirement would disproportionately burden women, who are often pressured or coerced by husbands and in-laws into having more children than they otherwise wish to bear.[90]

In *Air India v. Nergesh Meerza*, the Court was confronted with a discriminatory policy that distinguished between the male and female members of the cabin crew of India's biggest airline. Air India established separate cadres, with different terms of employment for the male assistant flight pursers and the female

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[89] *See Thomas*, 2 S.C.C. 310 at 513 ("The principle of proportionate equality is attained only when equals are tr[e]ated equally and unequals are treated unequally.").

[90] Javed v. Haryana, A.I.R. 2003 S.C. 3057 (India) ("It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not only his wife, but himself as well. We do not think that with the awareness which is rising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so."); *see also* Letter from Melissa Upreti, Senior Manager & Legal Adviser for Asia, Ctr. for Reproductive Rights, to the Committee on Economic, Social, and Cultural Rights (Apr. 17, 2008), *available at* http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/CFRR India40.pdf ("These types of policies disproportionately affect women, as they fail to take into account the 'social context of early marriages, early pregnancies and son preferences . . . all the responsibility is placed only on individuals, particularly women, with serious consequences for them.' Policies such as the Haryana provision exacerbate social problems such as sex-selective abortions and the abandonment of female infants. Other consequences of the Haryana policy and similar include rampant falsification of hospital and birth records; marital desertion; divorce; denial of paternity by male political candidates; and general disenfranchisement of the women who are already underrepresented in decision-making bodies—those from marginalized and poor communities.").

airhostesses.[91] The two classes performed substantially similar types of work.[92] The policy at issue required airhostesses, but not assistant pursers, to quit (1) upon marriage, if it occurred within four years of joining the airline, (2) upon conception of a child, or (3) upon reaching the age of thirty-five, unless granted a special extension up to the age of forty-five.[93] In a convoluted opinion that mixed substantive and formal equality provisions, the Court upheld certain parts of the policy while striking others. In upholding the clause that required airhostesses to remain unmarried for four years after joining the airline, the Court reasoned that the provision was in the interests of the employees.[94] In the Court's view, the requirement would ensure that airhostesses would only enter into the institution of marriage physically prepared and with the necessary maturity.[95] The Court also upheld the differential retirement ages for airhostesses and pursers, observing in this regard that the two cadres were separate classes and therefore did not have to be governed by the same terms of employment.[96] It stipulated, however, that extensions of employment up to the age of forty-five were to be granted on a non-discretionary basis provided that the airhostess in question was in good health, in order to ensure non-discrimination *within* the airhostess cadre.[97] Finally, the Court struck down the prohibition on pregnancy, remarking that "divert[ing] the ordinary course of human nature" in this manner was "an open insult to Indian womanhood—the most sacrosanct and cherished institution."[98] It wholeheartedly sanctioned, however, a proffered alternative version of the provision that mandated retirement upon an airhostess' third pregnancy.[99]

Upon nearly identical facts, in July 2003, the Supreme Court in *Air India Cabin Crew Association v. Yeshawinee Merchant* reversed a

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[91] Air India v. Nergesh Meerza, A.I.R. 1981 S.C. 1829 (India) (discussing the disparity in treatment between employees of the airline on the basis of sex, including the employees' age of retirement and promotional opportunities).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

Bombay High Court decision mandating non-discrimination between the male and female cadres, upholding in full its 1989 *Nergesh Meerza* decision.[100] In delivering its opinion, the Court noted that some of the airhostesses were members of the union that had negotiated these disparate terms.[101] It reflected, with regard to the earlier retirement age mandated for airhostesses, that "[t]here is nothing objectionable for airhostesses to wish for a peaceful and tension-free life at home with their families in the middle age and avoid remaining away for long durations on international flights," apparently overlooking the fact that the airhostesses challenging the policy were not so inclined.[102] Perhaps most surprisingly, the Court, viewing the union's negotiation of the conditions of retirement as evidence that the airhostesses considered this provision "favourable to them," categorized this provision as the type of "special treatment" authorized by the Equal Remuneration Act to be performed in favor of women.[103] In other words, the

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[100] Air India Cabin Crew Ass'n v. Yeshawinee Merchant, A.I.R. 2004 S.C. 187 (India) (reviewing the correctness of the view taken by the Bombay High Court with respect to the alleged sex discrimination on the part of Air India against its employees).

[101] *See id.* ("Where terms and conditions are fixed through collective bargaining as a comprehensive package deal in the course of industrial adjudication and terms of service and retirement age are fixed under agreements, settlements or awards, the same cannot be termed as unfavourable treatment meted out to the women workers only on basis of their sex and one or the other alone tinkered so as to retain the beneficial terms dehors other offered as part of a package deal."). *Cf.* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1458 (2009) (holding that provisions in a collective bargaining agreement compelling arbitration of statutory claims are enforceable).

[102] *Yeshawinee Merchant*, A.I.R. 2004 S.C. 187 at ¶ 57. These disparate terms of employment now dictated as follows: (1) that airhostesses retire at the age of fifty while pursers have until the age of fifty-eight to do so, (2) that women retire upon their third pregnancy, while men are free to continue working regardless of how many children they have, (3) that women are not entitled to hold supervisory positions on board the aircraft and (4) that airhostesses older than thirty-five years old receive yearly gynecological examinations as a condition of employment, while pursers are exempt from any examination. *See also* Anupama Katakam, *A Case of Discrimination*, FRONTLINE, Oct. 11, 2003, http://www.frontlineonnet.com/fl2021/ stories/ 20031024005413000.htm.

[103] *See Yeshawinee Merchant*, A.I.R. 2004 S.C. 187 at ¶ 39 ("The twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan."). This finding is particularly startling because the lower court had found that one of Air India's central reasons for establishing separate cadres for male and female staff was the universal opposition of male

Court interpreted the substantive equality exception to the Equal Remuneration Act, which permits the government to take special action for the benefit of women, to allow Air India to mandate that its female employees retire at an earlier age than similarly situated males.

Nergesh Meerza is widely cited by scholars as a thorn in the Supreme Court's substantive equality jurisprudence.[104] In interpreting the equality provisions of the Constitution, the Court employed myopic and circular reasoning that essentially upheld continuing discriminatory treatment based on a superficial division of men and women into different classes that assigned men arguably preferable terms of employment.[105] The results fell far short of the egalitarian objectives expressed by the framers of the Constitution.

Consistent with a substantive approach to equality, the *Nergesh Meerza* and *Yeshawinee Merchant* Courts viewed themselves to be acting for the particular benefit of female workers, whom they perceived as being differently situated and having different priorities from their male coworkers. The Court believed that in

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staff to the possibility of reporting to a female supervisor. Air India drafted the policy to ensure that only a male staff member could serve as a flight supervisor. Kannabiran, *supra* note 24, at 95 ("The [Bombay High Court] rejected this argument[,] asserting that 'the hierarchy on board the aircraft will be based on seniority irrespective of sex,' a decision the Supreme Court set aside.'"); *see also* Katakam, *supra* note 102 (describing the apparent nature of the union's priorities in the statement by Rajeev Joshi, Vice-President of the Air-India Cabin Crew Association, the union responsible for negotiating these terms: "[T]he girls were recruited to serve passengers. The airline wanted young and beautiful women to be the face of Air-India. How can we keep up our service standards with women who don't look fresh and capable?").

[104] *See, e.g.*, Kannabiran, *supra* note 24, at 92 (citing various passages from the *Nergesh Meerza* decision that demonstrated the court's focus on the role Indian women play in family planning and analyzing the provisions concerning the four-year ban on marriage and the termination of employment upon a woman's first pregnancy).

[105] *See Nergesh Meerza*, A.I.R. 1981 S.C. 1829 at ¶ 59 (employing circular reasoning that nullified constitutional and statutory guarantees of equality, the Court essentially accepted Air India's blatantly discriminatory system of classification as *per se* evidence of men and women being differently situated for the purposes of formal equality analysis: "[A]Hs [Air Hostesses] from [sic] an absolutely separate category from that of the AFPs [Air Flight Pursers] in many respects having different grades, different promotional avenues and different service conditions."); *see also* Kannabiran, *supra* note 24, at 95 (noting that the employer is not required to demonstrate, task by task, the differences in work requirements for males and females in order to justify differential treatment based on gender).

permitting airhostesses to negotiate terms purportedly favorable to them, it was acting in their best interests.[106] This approach to substantive equality ultimately failed because it *assumed*, on the basis of regressive gendered norms, that male and female employees had different priorities.[107] It imposed what it believed to be substantive equality of opportunity to negotiate terms of employment without inquiring into the actual bargaining power of women within the union or the ways in which the gendered context in which they were operating limited their ability to negotiate better terms for themselves.[108]

Compounding the problem was the Court's myopic application of formal equality. It essentially viewed the airline's classification of male and female employees into separate cadres, with attendant disparate terms of employment, as evidence of these two cadres being separate classes not similarly situated for the purposes of formal equality analysis. Although the Court applied formal equality *within* the class of airhostesses to strike down the discretionary aspect of extensions beyond the default age of retirement, it refused to mandate that the airline offer the same terms of employment to both male and female employees. This

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[106] *See Yeshawinee Merchant*, A.I.R. 2004 S.C. 187 at ¶ 41 ("In employment requiring duties on Air craft, gender-neutral provisions of service may not be found necessarily to be beneficial for women. The nature of duties and functions on board of an Air craft do deserve some kind of a different and preferential treatment of women compared to men.").

[107] For an overview of the Supreme Court's application of similarly regressive reasoning in recent case law in this and other contexts, see Kannabiran, *supra* note 24.

[108] This is a particularly pressing concern because trade unions in India have failed to adequately prioritize the interests of women and other underprivileged groups. *See* Rohini Hensman, *Trade Unions and Women's Autonomy: Organisational Strategies of Women Workers in India*, *in* GENDER, DIVERSITY AND TRADE UNIONS: INTERNATIONAL PERSPECTIVES 95, 95 (Fiona Colgan & Sue Ledwith eds., 2002) ("[W]hile some progress has certainly been made, women and disadvantaged sections of society remain marginalised in the labour force, and trade unions still fail to recognise the importance of tackling this issue."); Kamala Sankaran & Roopa Madhav, *Gender Equality and Social Dialogue in India* 32–33 (ILO, Working Paper No. 1/2011, Jan. 2011), *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_150428.pdf ("The lack of women in such negotiations also has adverse effects on women. The agreements concluded with the cabin crew in the Air India [sic] agreed to a disparity in retirement age for women; challenges by individual women were turned down by the courts on the ground that these were binding on all cabin crew. Even in the recent collective agreements entered into by the Air India Cabin Crew Association and Air India, there were no women representing employees.").

decision was so despite the Court's acknowledgment of a substantial similarity in the types of work performed by the airhostesses and the pursers.[109] In accepting the airline's superficial distinction between the two classes based on discriminatory terms of employment and the purportedly different interests and priorities of the two groups, and in refusing to require equal conditions for similar work, as required by the terms of the Equal Remuneration Act, the Court intermingled substantive and formal equality in such a manner as to render both doctrines ineffective.

5. SOLUTIONS

5.1. Legislative Solutions

The deeply ingrained and multilayered structural inequalities that underlie Indian society necessitate the adoption of a substantive approach to equality that takes into account the fact that actors differently situated may not benefit in the same ways from a uniform application of equality principles.[110] However, India's existing approach to substantive equality has yielded unpredictable and unsatisfactory results, in part, because the existing framework is limited in its reach and flawed in its approach to employment discrimination.

The limitations of a primarily reservation-based system and the inadequacy of the current statutory scheme to account for various types of discrimination against a full range of disadvantaged groups significantly qualify the ability of the current framework to address the problem of employment discrimination.[111] One possible solution that has been increasingly proposed in recent

[109] *See Nergesh Meerza*, A.I.R. 1981 S.C. 1829 at ¶ 62 (observing that the difference in the type of work performed by the two cadres was "one of degree rather than of kind").

[110] In this regard, Chief Justice Bhagwati of the Indian Supreme Court observed, "In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities . . . are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit . . . ." Jain v. Union of India, A.I.R. 1984 S.C. 942, 968 (India) (discussing the concept of equality under the Constitution of India and the prospect of equality becoming a "living reality for the large masses of people" in the country).

[111] INDIA CONST. arts. 14–16.

years has been to extend reservations to the private sector.[112] However, this step would have to be carefully considered in view of the significant opposition such proposals have met in the private sector.[113] India is a developing country, with strong reasons to encourage a competitive business environment, and the possible detrimental effects of such legislation on industry would therefore need to be fully explored.

A less drastic solution might involve the legislation of a comprehensive umbrella employment statute,[114] which would guarantee freedom from discrimination in the workplace to a full range of disadvantaged minorities. Such a statute would articulate the types of adverse actions that would qualify as illegal employment discrimination and the remedies to be made available to victims of such discrimination. It might impose a responsibility on private employers to take reasonable steps to ensure the full participation of minorities in the workplace. Given existing hierarchies, such a provision would necessarily require that employers make certain reasonable accommodations to create an environment in which disadvantaged workers would have the opportunity to function on par with their more privileged coworkers. An employment discrimination statute would provide

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[112] Narula, *supra* note 8, at 319 (describing the arguments of Indian economist Sukhadeo Thorat in favor of extending reservations to the private sector to redress market discrimination against *Dalits*); *Anti-Discrimination/Sex Equality*, *supra* note 15 (elaborating on the issues pertaining to anti-discrimination and sex equality, including the constitutional background, the existing legislative framework, and a proposed law concerning the matter). State governments have taken some steps in this direction. *See, e.g.*, *Mayawati Announces Reservations in Private Sector*, EXPRESSINDIA (Jan. 18, 2008), http://www.expressindia.com/latest-news/Mayawati-announces-reservations-in-private-sector/262923/ (highlighting an initiative by the government of Uttar Pradesh to introduce reservations in companies working on projects in conjunction with the state).

[113] Narula, *supra* note 8 at 319 (stating private employers and political parties still strongly oppose the private sector proposal). For a discussion of the arguments in favor of and against reservations in the private sector, see generally Jayati Ghosh, *On Reservations in the Private Sector*, FRONTLINE, Nov. 4, 2005, http://www.flonnet.com/fl2222/stories/20051104004110800.htm (explaining that although a policy of reservation in the private sector would not affect efficiency, it would help to correct historically entrenched and still pervasive social discrimination); *see also* G. Thimmaiah, *Implications of Reservations in Private Sector*, 40 ECON. & POL. WKLY 745, 745–50 (2005) (outlining the implications of the proposal to extend reservations to the private sector).

[114] *Cf.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (prohibiting discrimination in employment on the basis of sex, race, color, religion, or national origin).

guidelines for the courts in interpreting state guarantees of equality, and would extend equality protections to the private and agricultural sectors. It might incorporate a presumption in favor of disadvantaged employees in order to ease the extremely heavy burden of litigation.[115]

The existing employment discrimination framework would be further enhanced through the provision of positive incentives such as tax breaks, subsidies, and new business licenses to encourage employers to hire more workers from disadvantaged groups and to take extraordinary steps to ensure substantive equality in the workplace. Employers should be encouraged to educate themselves and their employees about their rights and responsibilities under the law. Positive incentives would likely be met with a greater level of acceptance within the private sector than would more drastic remedies such as private-sector reservations. They would carry the additional benefit of ensuring a happier and better-trained workforce, as employers would be incentivized to provide such accommodations as additional training for workers from disadvantaged groups.

The limitations of the existing framework might be further addressed through the provision of civil remedies in addition to the existing criminal penalties for violations of employment law. The Equal Remuneration Act is a criminal statute, which prescribes fines and imprisonment for illegal discrimination.[116] Although the criminal law places the responsibility of prosecuting offenses on the state, and thereby alleviates the burden of litigation on victims of employment discrimination who may have limited financial resources, the absence of damages may disincentivize the pursuit of judicial remedies. Concomitantly, the relatively minimal penalties associated with infractions fail to deter employers from

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[115] Such presumptions are relatively common in the Indian legal system. *See, e.g.*, Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AM. J. COMP. L. 89, 101 ("[U]pon the establishment of certain facts in an abetment of suicide prosecution, a court *may presume* that the defendant abetted the victim's suicide . . . . [P]resumptions of this kind reflect 'those natural inferences which the 'common course of natural events,' human conduct, and public and private business suggest to us.'") (quoting M.C. SARKAR, S.C. SARKAR, & PROABHAS C. SARKAR, 1 SARKAR'S LAW OF EVIDENCE 66, 67 (13th ed. 1993)).

[116] Equal Remuneration Act, 1976, No. 25, Amendment 1987, No. 49 (India).

engaging in discrimination.[117] Widespread corruption among labor inspectors and the fact that the inspectors are overworked and underpaid result in a failure to adequately prioritize women's interests.[118] These obstacles deter prospective complainants from asserting their rights under the Act. The provision of a civil cause of action may bridge this gap by providing incentives for victims to seek judicial recourse and by ensuring that, at least in some cases, those pursuing judicial remedies will have a vested interest in the outcome. High-profile employment litigation, with significant damages at stake, may act as a general deterrent to employers who might otherwise discriminate with impunity.

To ensure adequate protection for complainants with limited means, the Indian government should explore possible incentives to encourage public interest organizations and other entities to help provide adequate legal representation.[119] Members of disadvantaged groups are often unaware of their rights, and thus cannot take advantage of the protections afforded to them under the law.[120] An agency that could work in tandem with the Courts and would have the power to oversee, investigate, and litigate employment disputes would help fill this gap.[121] Such an agency would presumably have the resources to effectively issue concrete guidelines that would help employers remain within the bounds of the law and would assist the Courts in reaching informed judgments.[122] It would also have the power to oversee the actions

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[117] Indira Hirway & Neha Shah, *Labour and Employment Under Globalization: The Case of Gujarat*, 46 ECON. & POL. WKLY., no. 22, 57, 62 (May 28, 2011).

[118] *See* Deshingkar, *supra* note 63, at 12–14 (discussing the inadequate labor inspection machinery in India).

[119] Public interest litigation is one vehicle by which public service agencies are empowered to help provide legal representation. *See supra* section 4.2.

[120] Chandola, *supra* note 10, at 128 (explaining that although the untouchable litigants have access to the judicial system in India, sometimes they do not pursue legal remedies due to their ignorance regarding legal options).

[121] India might be guided in this regard by the example of, for instance, the American Equal Employment Opportunity Commission.

[122] The Equal Employment Opportunity Commission in the United States, for instance, provides guidance as to the government's equal employment opportunity program and adjudicates disputes. *See About EEOC*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/ (last visited Mar. 13, 2013) (aggregating useful information about the Commission, including its purpose, relevant laws, and enforcement and litigation issues relating to discrimination against job applicants or employees).

of labor inspectors and to address allegations of corruption and misconduct within their ranks.

A more comprehensive framework, which would flesh out and expand the existing protections, would help ensure robust substantive equality in the realm of employment discrimination law. However, given the failure of the legislature thus far to fulfill its part in upholding substantive equality aside from the system of reservations, the judiciary may be called upon to continue to take an active role in paving the path to fuller minority rights.

5.2. Judicial Solutions

The fact that the legislature has been relatively reluctant to take bold steps, other than in the form of reservations, to protect disadvantaged minorities from discrimination in employment, has meant that the judiciary has taken a more active role in upholding the rights of the underprivileged.[123] Some of the judiciary's actions have been problematic, but in the overall analysis, it has stepped in to fill the vacuum created by the legislature's inaction.[124] Although structural solutions are more properly the province of the legislature, which has the resources and temporal bandwidth to enact effective policies, in the current circumstances, it may continue to fall to the judiciary to take the necessary steps to prod the legislature into fulfilling its part in upholding substantive equality.[125]

Vishaka opens up a means by which the judiciary may be able to provide interim solutions to the deep-rooted structural inequalities in India.[126] In *Vishaka*, the Court issued sexual harassment guidelines that were to be binding upon employers until the Legislature enacted a comprehensive sexual harassment law.[127] Following the decision in *Vishaka*, the Parliament

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[123] Sood, *supra* note 17, at 845 (characterizing the activism of the judiciary as largely the result of an effort to compensate for the inaction of the legislative and executive branches of government).

[124] Narula, *supra* note 8, at 322 (describing the Indian judiciary's attempt to reconcile India's constitutional ideals with the "abysmal" condition of Dalit social reality).

[125] For a discussion of the problems inherent in judicial policymaking, see text accompanying *supra* note 17.

[126] *See* Sood, *supra* note 17, at 843 (noting that Courts have extremely wide leeway in fashioning appropriate remedies in public interest litigation).

[127] *See* Vishaka v. Rajasthan, (1997) 6 S.C.C. 241 (India) at 6–10 (noting that these guidelines are necessary "in the absence of enacted law to provide fro [sic]

introduced a sexual harassment bill that publicly acknowledged the Court's role in helping to bring this matter to the notice of the Legislature.[128] Although, as was observed by the Court itself, judicially imposed corrective measures may not be an ideal solution, they may in some measure alleviate the worst of the problems that exist in the employment sphere.[129] Such action on the part of the Court may also play a useful role in prodding the Legislature into action.[130] The Legislature has often found it expedient to let the courts take the first step in addressing divisive matters that have the power to backfire against legislators, who are directly accountable to the people.[131] Whatever one thinks of the Legislature for relinquishing its obligations in this manner, it may be more willing to act when the Court has already confronted divisive issues in the first instance.

In its interpretation of the State's guarantees of equality, particularly with respect to women, the judiciary should strive for a richer vision of substantive equality, free from the regressive effects of traditional norms. Substantive equality, as a matter of principle, recognizes that in an intensely hierarchical social context, members of disadvantaged groups are not similarly situated to members of more privileged groups such that formal equality would provide meaningful protection. When there is a significant disparity in the social standing of individuals, a neutral application of laws and policies will operate to the disadvantage of subjugated groups. However, for substantive equality to be meaningful, it cannot rely on the same stereotypical norms that underlie existing

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the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places").

[128] *See* Sood, *supra* note 17, at 872. The so-called Protection of Women Against Sexual Harassment at Workplace Bill remains pending in Parliament. Himanshi Dhawan, *Sexual Harassment Law May Soon Cover Domestic Workers*, TIMES OF INDIA, Jan. 12, 2012, http://timesofindia.indiatimes.com/ india/Sexual-harassment-law-may-soon-cover-domestic-workers/articleshow/11456584.cms.

[129] *See* Sood, *supra* note 17, at 845–46 (noting that the public is strongly supportive of the judiciary's activism, particularly in light of the failure of the other branches of government to fulfill their obligations).

[130] *Id.* at 844 (noting that the Court has on occasion directed the Legislature to enact necessary laws through the vehicle of public interest litigation).

[131] *Id.* at 847–48 (stating that some government branches have even welcomed the judiciary's activism, especially when it enabled politicians to abdicate their legislative responsibility, claiming they must adhere to the Court's orders).

social classifications.[132] Judicial legitimization of regressive stereotypes has the effect of reinforcing social hierarchies that serve to devalue certain people at the expense of others.[133]

Nergesh Meerza and *Yeshawinee Merchant* demonstrate that the intermingling of substantive and formal equality, without regard to the ways in which hierarchical norms define the social position and expectations of members of disadvantaged groups, exacerbates existing structural inequality.[134] A strict application of formal equality, which would have invalidated the classification between pursers and airhostesses, may have produced more palatable results in these cases; however, it has been observed that, in intensely hierarchical contexts, formal equality often works to the disadvantage of subordinated groups.[135]

To adequately account for the differences in both social standing and access to opportunity between privileged and underprivileged groups, the judiciary should, as a matter of general practice, first look at cases through the lens of a substantive equality approach designed to dismantle those factors that operate to perpetuate the subordination of the disadvantaged. Formal

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[132] *See* Kannabiran, *supra* note 24, at 90 ("To the extent that they reflect and correspond with systems of social inequality, differentiation and classification may be the source of discrimination.").

[133] Scholars have similarly lamented this judicial tendency to legitimize regressive stereotypes in legal contexts outside employment discrimination. *See id.* at 91 (observing that "the court regret[ted] the fact that women are chattel within marriage and yet lock[ed] them firmly into the position of chattel by substituting constitutional morality with codes of public morality," with regard to a case in which the Supreme Court upheld a statutory provision that empowered men, but not women, to prosecute those who committed adultery with their spouses).

[134] *See* Air India Cabin Crew Ass'n v. Yeshawinee Merchant, A.I.R. 2004 S.C. 187 (India). Interestingly enough, Air India discarded its discriminatory system of classification in 2005 in response to a legislative directive to the effect that the differential retirement ages for men and women should be eliminated. It then had to fight to defend this decision in the courts, as male members of the cabin crew challenged a new provision that permitted women to serve in supervisory capacities. In 2011, the Supreme Court upheld Air India's decision to implement gender-neutral terms of employment, ending once and for all the airhostesses' long and hard-fought battle for equality (on paper, at least). *See* Sankaran & Madhav, *supra* note 108, *and* Zoe Li, *Air India Operates (Almost) All-Female Flights*, CNN TRAVEL (Mar. 8, 2012), http://travel.cnn.com/mumbai/visit/air-india-operates-almost-all-female-flights-868673.

[135] *See, e.g.*, Javed v. Haryana, AIR 2003 S.C. 3057 (India) (failing to consider the unequal burden on women imposed by a state ban on serving in public office after having more than two children).

equality should be applied only as a secondary approach, after having established that the relevant parties are in fact meaningfully similarly situated, such that application of formal equality will not merely overlook existing structures of subordination.

A more effective approach to substantive equality in *Nergesh Meerza* and *Yeshawinee Merchant* would have more closely examined the ways in which the collective bargaining process operates to the disadvantage of the airhostesses. Factors such as the relative bargaining power of the airhostesses within the union and the possibility that the same gendered expectations that originally led Air India to create separate male and female cadres might impose limitations on the airhostesses' ability to meaningfully negotiate would be relevant to this inquiry.[136]

Formal equality should be limited to cases where the relevant parties are employed in similar positions and are similarly situated in terms of their relative advantage or disadvantage. In a hierarchical employment context in which women and members of the scheduled and backward classes are routinely assigned subordinate positions and inferior terms of employment, it may well be that members of these groups are not similarly situated relative to more-advantaged employees such that application of formal equality would yield satisfactory results.

6. CONCLUSION

India's approach to substantive equality has only been modestly successful in alleviating the deep-seated structural problems that facilitate discrimination in employment. The existing system addresses only isolated aspects of the problem because it primarily rests on a system of quotas that pertain only to the public sector and because it does not incorporate a comprehensive statutory scheme that addresses intended and unintended discrimination in its various forms and against a full range of disadvantaged groups.

The Legislature's failure to take decisive action to address discrimination in the workplace has exacerbated the problem. The employment discrimination framework remains extremely

[136] For an analysis of the inadequate consideration given by trade unions to the interests of women and other disadvantaged groups, see Hensman, *supra* note 108.

fractured, and the rights of the scheduled and backward castes and women are neglected. This inaction has forced the judiciary to take on an extremely activist posture to protect the rights of the disadvantaged, a circumstance that could prove problematic in certain situations.[137] However, in the absence of effective legislative policy, the judiciary should continue to further the cause of substantive equality in the manner employed in *Vishaka*.[138] This kind of activism on the part of the Court may provide interim relief and serve the purpose of prodding the legislature into fulfilling its part in upholding substantive equality.

In interpreting the State's guarantees of equality, the judiciary should apply a primarily substantive approach that is free from the regressive effects of traditional values and norms. Formal equality should be applied as a secondary framework, after establishing that the relevant parties are similarly situated in terms of their levels of (dis)advantage, such that the application of formal equality principles will not perpetuate existing social hierarchies. A more robust substantive equality of opportunity will, hopefully, be a step towards eradicating the structures of subordination that operate as barriers to advancement in all spheres of life.

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[137] *See* Sood, *supra* note 17, at 847–48 (highlighting the dangers of judicial overreaching, including lack of accountability on the part of judges and the potential loss of credibility that could result from the judiciary venturing into policy matters beyond its competence).

[138] *Id.* at 846 (underscoring the importance of judicial activism in India, given the severity of inequality in this context and the possibility that people may resort to extra-legal remedies in the absence of judicial recourse).