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Sub-classification and the Future of Reservations

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Although the majority of judges in *Davinder Singh v State of Punjab* held that sub-classification among Scheduled Castes and Scheduled Tribes for reservations in jobs is constitutionally permissible, even within the majority, there is a difference in how the judges view reservations. One finds them as an essential tool for inclusivity and social justice whereas the other sees them as a societal pacifier. The latter might become the dominant one soon.

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There has been a sharp divide in the responses to the Supreme Court's seven judge bench decision in *Davinder Singh v State of Punjab*[1] holding sub-classification in reservations in government jobs for Scheduled Castes (SCs) and Scheduled Tribes (STs) to be constitutionally valid. Some have welcomed the verdict as a way to ensure greater representation for those among Dalit and Adivasi communities who face discrimination even among SCs and STs (*Hindu Bureau* 2024; Waghmare and Mogha 2024). It has also been criticised for creating further divides among Dalit and Adivasi communities and standing in the way of building solidarity among India's marginalised (Teltumbde 2024). It has also received much criticism for highlighting the need to cut out the "creamy layer" among Dalits and Adivasis from getting reservations (Narrain 2024).

Some of the praise and criticism comes from a place of misunderstanding of the judgment and what it actually said.

First, it does not direct the union or state government to actually sub-classify SCs and STs for the purposes of reservations. All it does is overturn the previous judgment in *E V Chinnaiah v State of Andhra Pradesh* (2005)[2] which had held that such sub-classification is not permitted under the Constitution. As I have written earlier, the Chinnaiah judgment was very poorly reasoned and its overturning was long overdue (Kumar 2024).

Second, it imposes limits on how and to what extent sub-classification can be made among SCs and STs for the purposes of reservation. Any government seeking to sub-classify should show that such sub-classification is based on data justifying the need for such sub-classification in favour of one or more communities within the SC or ST list. Further, sub-classification cannot give preference to only one community among SCs or STs over all others.

Third, while speaking about the "creamy layer" among SCs and STs the Court does not mandate that well-off members of SC or ST communities have to be excluded from reservations (as with "Other Backward Classes") but leaves it to the government to take a decision. The issue of the "creamy layer" was not something the Court was called to decide upon, so none of what the Court says on this is binding on the government (Surendranath 2024).

That said, a close reading of the majority opinions in the Davinder Singh judgment brings out two significantly different ideas on the purpose of reservations. The judgment, authored by Chief Justice of India (CJI) D Y Chandrachud on behalf of himself and Justice Manoj Mishra,[3] I argue, adheres to the "reservations for parity" school of thought. In contrast, the judgments authored by Justices Gavai, Vikram Nath, Pankaj Mithal, and Satish Chandra Sharma adhere to the "reservations for charity" school of thought. In a previous article (Kumar 2022), I had outlined the difference between the two approaches in the context of the Supreme Court's judgment upholding economically weaker section (EWS) reservations. These two approaches are not easily reconcilable and the future of reservations and social justice in India depends on which school of thought prevails going forward.

In this column, I will be discussing why I think even though it did not change the outcome, the differences in the judges' approach are significant. The first part of this column will focus on the opinion of CJI Chandrachud, and the second part on the opinion of Justice Gavai. These are also the two most elaborately reasoned, of the majority opinions, and referred to by the other three opinions as well. In the final part, I will talk about the implications of taking one approach over the other in the context of reservation jurisprudence in India.

Reservations as Parity

In holding sub-classification constitutionally permissible, CJI Chandrachud's

opinion highlights the link between substantive equality in the Constitution and reservations in public offices in the Constitution. Whereas the Supreme Court earlier saw reservations as an exception to the idea of equality in opportunity, in the *State of Kerala v N M Thomas* (1976),[4] the Court took a new direction in seeing reservations as an aspect of substantive equality guaranteed under the Constitution. This relationship between substantive equality and reservations was solidified in the *Indra Sawhney v Union of India* (1992) [5] but the implications on different aspects of reservations have been uneven. For instance, while the Court in the N M Thomas case held reservations in the promotion to be constitutionally permissible, in the Indra Sawhney case, it was held unconstitutional—a finding which was itself overturned by the 77th amendment to the Constitution.

The link to the N M Thomas case and substantive equality made in CJI Chandrachud's opinion in the context of sub-classification is important. What this does is change the focus from "who is benefiting" to "what is the desired outcome." If the desired outcome is substantive equality, where everyone has genuine equality of opportunity,[6] the question that arises is: Why is the existing reservation system not allowing for this substantive equality to emerge? The answer, CJI Chandrachud argues, is that even among SCs and STs, some communities are more backward than others, and therefore, unable to take the benefit of reservations. Hence, additional measures are perhaps needed to ensure that equality of opportunity is extended even to them.

This also informs the limits that are placed on sub-classification—that there should be material to show that the members of a certain SC community are not getting the benefits of reservations due to backwardness. How and in what manner this test will be applied, will be later decided by the Court when the specific legislations passed by the states will be adjudicated upon, but the internal logic is consistent to that extent—the larger goal is substantive equality among individuals or parity.

However, this is not the approach taken by Justice Gavai even though he agrees that sub-classification is constitutionally permissible.

Reservations as Charity

While six of the seven judges fundamentally agree on the constitutionality of sub-classification, the other four judges approach the question very differently from CJI Chandrachud. Justice Gavai has the most elaborate reasoning and it is his judgment that this section engages with. Justice Gavai frames the issue of sub-classification as one of representation of certain castes. At the beginning of his judgment this is how he frames the question before the Court:

> This quest of the underprivileged for more preferential treatment as compared to the more advantageous in the larger group falls for consideration in the present reference.[7]

Justice Gavai therefore sees this not as a question of the larger representation of SCs or STs in government jobs but as how the existing reservations have been distributed among SCs and STs, respectively.

After a long and elaborate discussion on the history of reservations and identification of SCs and STs, Justice Gavai once again reiterates the representation aspect through a slightly different framing.[8] Sub-classification, in his view, is an attempt of the state to give greater representation to those sub-castes which have not been "adequately represented." Even when he places limits on how the state may undertake sub-classification, the focus is on disadvantage and representation. For Justice Gavai, the purpose of sub-classification is "real equality among all the sub-groups in the larger group"—effectively, equality between SCs and STs.

This then leads to and informs his discussion of applying the "creamy layer" test to SCs and STs. He is not the first Supreme Court judge to opine on this issue in a judgment but his approach here is quite different from the earlier part of the judgment. It is now no more about which castes or groups should benefit but which individuals should. The usual trope of children of Dalit IAS officers pitted against Dalit children in rural areas is trotted out. The underlying assumption of this trope—that reservation is a charity being done to India's excluded communities—is not seriously examined.

Conclusions

The concurrence on conclusion apart, there is a significant divergence between the judges in the majority in how they approach sub-classification in reservations.

In CJI Chandrachud's approach, it is a way of ensuring substantive equality guaranteed under the Constitution. Reservations are after all a tool to ensure substantial equality and if the tool needs to be fine-tuned to achieve that goal, then it must be. The constitutional goal of substantive equality does not prescribe exactly one method of attaining substantive equality, though it is undeniable that reservations have helped to a great extent.

In Justice Gavai's approach, the purpose of reservations is to ensure adequate representation. While he uses the elaborate metaphor of certain groups of people dominating certain sections of the general compartment of a train to explain his thinking,[9] he does not question why people are struggling to get into the general compartment in the first place. His approach makes no account for the limitation in resources or the inherited privilege of certain sections but just requires that resources allocated for Dalits be shared better among them.

This difference has two implications. First, subsequent courts will need to reconcile two different approaches and standards in assessing the constitutionality of sub-classification by states. Applying the standard laid down by CJI Chandrachud, they will have to see if the community getting a quota within a quota is more backward and, therefore, meriting the quota. Applying the standard laid down by Justice Gavai, they will just have to see the level of representation and see if it meets the test of "adequacy." This dichotomy will have to be resolved by a later court, at some point, but this means that the issue of sub-classification is not settled, yet.

Second, the future course of reservations jurisprudence will be determined by whether the "parity" approach of CJI Chandrachud will prevail over the "charity" approach of Justice Gavai. While the imposition of a "creamy layer" test to exclude SCs and STs from reservations is still left in the hands of the government, it is quite likely to slowly seep into equality jurisprudence in the coming years, bit by bit.

NOTES

1 *Davinder Singh v State of Punjab* (2024) INSC 562, viewed on 18 September 2024, https://indiankanoon.org/doc/155595286/. Since there are no running page or paragraph numbers, I will be using the paragraph numbers for each specific opinion as required.
2 *E V Chinnaiah v State of Andhra Pradesh* (2005) 1 SCC 394.
3 For short I will be referring to this, as CJI Chandrachud's opinion.
4 *State of Kerala v N M Thomas* (1976) 2 SCC 310.
5 *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217.
6 Davinder Singh, para 149 (CJI Chandrachud).
7 Davinder Singh, para 6 (Justice Gavai).
8 Davinder Singh, para 258 (Justice Gavai).
9 Davinder Singh, para 268 (Justice Gavai).

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