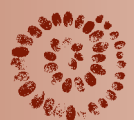
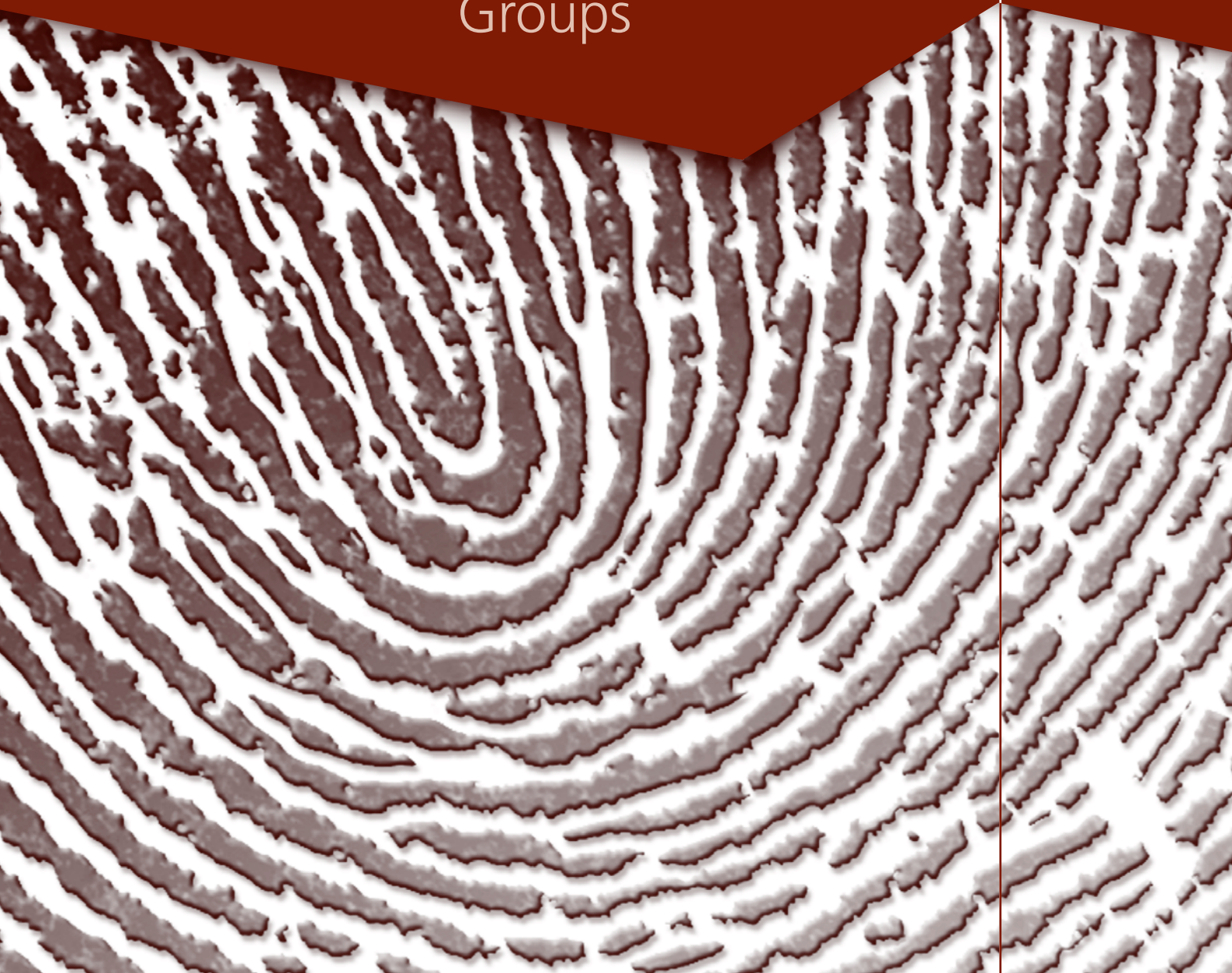


Why Preferential Policies Can Be Fair –

Achieving Equality
for Members of
Disadvantaged
Groups



Foreword

Inequalities continue to mark western democracies, including the United Kingdom. Inequalities, whether based on region, class or ethnicity, are often observed to divide people. At the same time, politicians seem to be having a harder time connecting to citizens, making these divisions potentially more dangerous throughout Europe and North America. One way these concerns have combined is to focus on a shared national culture, or a common sense of belonging, as a way to engage citizens in the political system and to encourage them to treat each other with equal concern and respect. The UK government's recognition of these twin concerns was demonstrated in its (2005) report *Improving Opportunities, Strengthening Society*.*

If at least some of the divide between individuals and groups stems from persistent inequality, governments will also have to confront these inequalities, using whatever policy measures are justifiable and effective. In the UK, there has been increased interest in developing policies as a means of improving the opportunities of those who are systematically disadvantaged. One policy that has attracted much attention, partly because of their implementation in the United States, is affirmative action, or what this paper refers to as preferential policies. When people think of the policy, the circumstances in the United States are often at the forefront and so circumstances there tend to colour their evaluation of the measures.

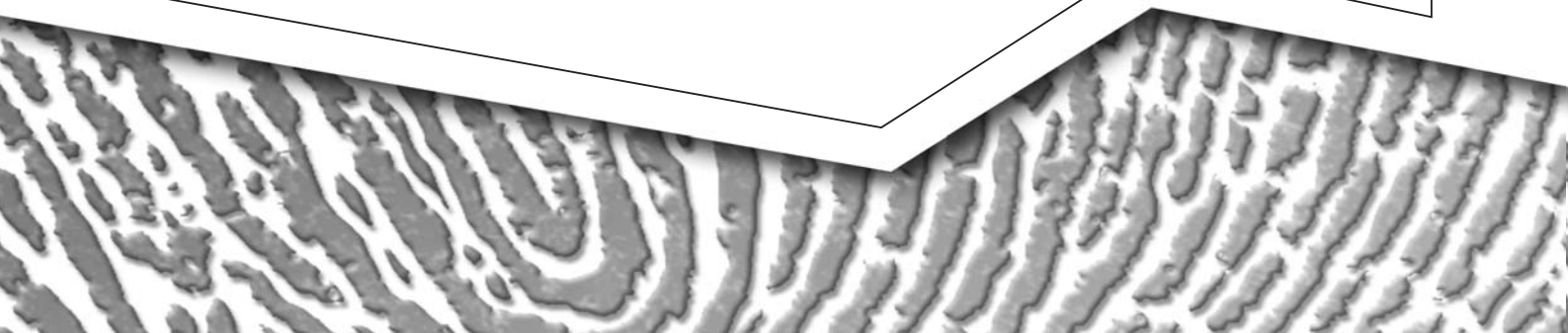
The particular circumstances in the US may of course influence our judgement of the benefits and disadvantages of such policies, but it is more important to be clear about the justice-based arguments in favour of preferential policies. To that end, this paper explores their implementation in India. Because observers probably have less understanding of and make fewer assumptions about the circumstances in India, and because the Indian model is perceived as a substantially different form of democracy, it is perhaps easier to evaluate the principles at stake in the idea of preferentially treating members of disadvantaged groups.

Recently there has been interest in the idea of using such policies in the UK, and while the somewhat atypical case of Catholics in Northern Ireland is the most prominent, there was an oblique reference to the idea by Trevor Phillips, chair of the CRE, among others. Perhaps more prominently, all major political parties have made some sort of pledge to increase the representation of women and minority ethnic candidates, although the *justification* of such measures – whether Labour's all-women shortlists or David Cameron's more recent statements – has usually been implicit or vague. However, if we are going to take seriously the idea of implementing more widespread policies of positive action, or develop related programmes, we need to be more than oblique in thinking about why they should be adopted. Not only will this ensure the policies fit the circumstances in the UK, but we will also be clearer about the aims of the policy. Furthermore, because it will be necessary to explain and justify preferential policies to the public and to evaluate their effects (good or bad), developing a sense of clarity about their ethical justification becomes crucial.

By examining the case of India, and explaining how principles of justice support preferential policies there, we can better begin to debate their implementation in Britain. Even the most illiberal and irresponsible regimes have always attended to the unmet needs of at least some of their citizens, but in a democracy it is crucial that all should be treated with equal concern and respect. Initiating a debate about important policies is part and parcel of democratic practice, and to offer justificatory reasons for one's position is an approved way of treating everyone as equals. It also helps create a shared public space where citizens discuss and decide important matters. An understanding of the reasons why preferential policies can be a tool to help improve opportunities and strengthen society will support us in evaluating whether or not such measures can help achieve those aims in Britain.

Michelynn Laflèche
Director of the Runnymede Trust

* Home Office (2005) and the Department for Community and Local Government's follow-up report one year later (2006).



Why Preferential Policies Can Be Fair

– Achieving Equality
for Members of
Disadvantaged Groups

Omar Khan

Abstract

Criticisms of preferential policies are widespread. Much of this criticism, however, stems from a confusion about why preferential policies can be justifiable in principle, whatever their consequences in practice. This paper is therefore careful to distinguish between three different justifications for preferential policies, based both on theoretical disputes about the meaning of justice and on the words and actions of political actors in India. These are termed communitarian, compensatory and democratic-distributive, and in discussing how each approach has been canvassed and implemented in India, comparisons are made with other societies in which preferential policies have either operated or been proposed.

The abstractions of this somewhat technical section give way to a discussion that links up with recent developments in the West, suggesting that those concerned with widespread disadvantage among certain communities can benefit from examining how Indian thinkers and policymakers have attempted to deal with the issue of preferential treatment. Those who are unsympathetic to one or more of the three accounts might discover another approach to be more palatable. And even those who find the idea of preferential policies for whole groups entirely objectionable might be interested to learn, or rediscover, how compensatory and democratic-distributive arguments have been employed to justify quotas and positive action in the world's largest and perhaps most diverse democracy.

Introduction

Although currently much noise is made about the need for 'cohesion' in diverse societies, it is obvious that inequality and discrimination are almost always spread through society in a non-random way. That is to say, certain groups of individuals are more likely to end up disadvantaged because of lack of opportunities and sometimes because of historic discrimination. Where such patterns are pervasive, not only is equality of opportunity a non-starter, but community cohesion will be impossible to achieve.

In countries such as the United States and South Africa, where one group of individuals has actively discriminated against another group, the resultant systematic disadvantage is usually acknowledged. As a result, policies of preferential treatment for such groups have been pursued and justified in the form of affirmative action or, occasionally, quotas. What is probably less well-known is that these policies are most highly developed in India, where quotas in representative bodies and in public employment ensure that up to 49% of all posts are reserved for former untouchables ('scheduled castes' or 'Dalits'), 'scheduled tribes' and 'other backward classes', who together constitute as much as three-quarters of Indian society (Table 1).

In general, such policies have been rejected in Europe, even where certain communities are disadvantaged. However, many have argued that the policy of meritocracy is failing to achieve equality of opportunity due to widespread inequalities of education, status or income for immigrants and

Table 1. Reservations in India

Group	Reserved (%) Population (%)	
Scheduled Castes (SC)	15.0	15.0
Scheduled Tribes (ST)	7.5	7.5
Other Backward Classes (OBC)	27.0	52.0*
Total	49.5	74.5

* Estimate from the Mandal Commission Report, 1990. This figure is somewhat controversial.

Preferential Policies Defined

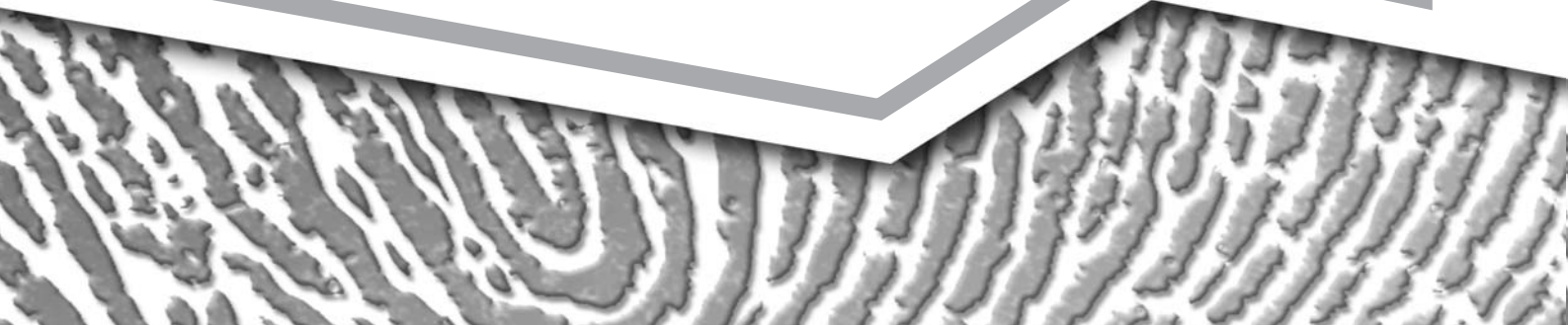
Although the term 'preferential policy' is not widely used in public debate, the variety of programmes that it describes are often discussed and implemented. The term is used in this paper to capture a wide range of policies that aim to remove group-based disadvantage by providing special treatment or benefits to individual members of specified groups. The form of the policy can range from quotas that reserve an exact percentage of places or jobs for the specified group members to milder measures such as widening applicant pools, special funding or additional training. While the differences between them may be substantial, the features they share mean that it is meaningful to consider the justifications that support the idea of preferentially treating members of disadvantaged groups.

In Britain and the rest of Europe quotas are almost never considered justifiable, though they may be the best way to conceive of policies to increase Catholic representation in the Police Service in Northern Ireland. However, given the strong objection to quotas, it may be helpful for the reader to ignore such instruments when evaluating the various justifications for preferential policies in section 3, especially because they are so rare outside of India and a few other polities.

What is called affirmative action in the United States in fact encompasses a wide range of policy measures, though it is extremely rare for quotas to be considered, especially since the Supreme Court has provided such a narrow constitutional defence for only slightly discrepant admissions standards in universities. Perhaps the most commonly supported policies are those that aim to increase the diversity of the candidates who apply for certain positions, though this does not ensure that such candidates are in fact offered these positions. Since affirmative action is pursued by a range of actors in a variety of institutional settings in the US, it is difficult to generalize further, though it is also common for institutions to provide targets, which are different from quotas in that they are not rigid and allow organizations a period of time to change policies where necessary.

The distinction most frequently made in the UK is between positive action and positive discrimination, with the former acceptable and the latter considered objectionable. Positive action is like those measures in the US that seek to increase the number of candidates for positions, and is relatively limited in terms of its application, though its use is increasing among some organizations and companies, many of whom are doing this voluntarily. The use of all-women shortlists, or the idea that constituencies ought to consider putting members of disadvantaged groups on their shortlists, is a perhaps unexpected way for political parties to take up the idea. On the other hand, positive discrimination is perceived to be unjustifiable because it discriminates against some candidates in order to favour others and is sometimes linked to the idea of quotas. The term positive discrimination is widely used in France as well, but it is important to remind critics that discrimination is not wrong unless it is done for unjust reasons.

In any event, since there is little shared agreement either about the form that such policies can take internationally or domestically, nor indeed on how the terminology should be understood, this essay uses the term preferential policies to capture all such policies. Ultimately policies are an instrument or a means to achieve a certain end, and the aim of this paper is to explain the ends that a state may justifiably pursue when it deploys preferential policies. For that reason, it is important to think through the ethical reasons for which we might consider treating preferentially those individuals who suffer unjust disadvantages before we think about what policies such a consideration implies. If and when the resultant policies are criticized, it may be because they have failed to instantiate the values originally provided for their justification rather than because the justification itself is bad. This suggests a point reiterated throughout this paper – the facts on the ground make a difference for whether the means pursued are likely to achieve a particular aim, whether that aim is compensatory justice, democratic equality or distributive justice.



their children (and even grandchildren), with the recent disturbances in France serving to bring these questions to the forefront. Some have therefore suggested one or another form of 'affirmative action' for ethnic groups as an appropriate response to systematic disadvantage.

Although the focus for many opinion-formers has been on the effects of widespread immigration on the 'national culture' of European countries, it is obvious that France is not the only country where immigrants and their descendants face widespread difficulties in the competition for qualifications and employment. Whether or not such policies would be recommended in Britain, it is worth exploring both their justification and consequences. To that end, this paper examines the history and debates surrounding such policies in India, especially since the practice of preferential treatment has been linked to the question of social justice in a diverse democracy, and because the policies are highly developed there, with visible consequences.

This paper is organized along the following lines:

- Section 1 briefly describes how these policies have been working in India;
- Section 2 turns to the historical background which shaped the particular structure and understanding of the policies in India today;
- Section 3 focuses on the moral questions surrounding preferential policies, namely whether they do or do not contravene justice, which provides the main argument of the paper. Here I identify three arguments employed in support of the policy – namely **communitarian, compensatory justice and democratic-distributive justifications**.
- Section 4 links these arguments to developments in the West, including Britain.

Appendices on caste and constitutional provisions in India both supplement the historical background and shed light on current debates around equality and social practices.

1. Explaining the Policy of Preferential Treatment in India

In its Constitution, ratified in 1950, India codified a systematic policy framework for achieving social

justice for disadvantaged communities. The policies have developed in three areas:

1. Education: scholarships for schooling (secondary and tertiary); guaranteed places in medical and engineering schools
2. Employment: guaranteed public employment
3. Politics: seats reserved in parliament and elected local institutions.

(Mendelsohn and Vicziany 1994: 94)¹

Scholarships and other measures to improve access to important educational and professional institutions can be seen as a form of what western observers would call positive or affirmative action. However, the other measures adopted by the Indian state are more reasonably viewed as quotas. Most prominent among these policies are the 'reservation' of seats in Parliament and job opportunities in the public sector for former Untouchables ('Scheduled Castes') and 'Scheduled Tribes' at their percentage of the population, currently 15% and 7.5% respectively.

- The 'Scheduled Castes' group (SCs) increasingly self-identifies as 'Dalit', a term meaning broken people in Marathi, which has gained currency through such organizations as the Dalit Panthers.
- The 'Scheduled Tribes' (STs) often refer to themselves as *adivasis*, or 'original inhabitants'.
- In 1990, reservations were extended to 'Other Backward Classes' (OBCs), though only in public employment, at an extra 27%.

In terms that Europeans or North Americans might be more familiar with, the state provides for quotas and not merely 'affirmative action'.

Although some in the West might view such a concession as being in conflict with liberal or democratic values, in India the policies were originally perceived as instantiating the ideals of equality and freedom in an extremely hierarchical society.

An overview of the historical background (section 2) explains how the idea that certain groups deserved special treatment was interpreted as a need for reserved places in public bodies and government employment. A crucial point to underline is that, unlike the practice of western democracies, preferential policies for the SCs and STs are explicitly constitutionally justified mainly because of the understanding of the consequences of caste in

¹ For an alternative typology see Galanter (1984: 43).

India, while there is substantial legal scope for their extension to OBCs as well.

Reservations

How, precisely, do these policies work? There are currently 79 seats reserved for Dalits (SCs) and 41 for *adivasis* (STs) in the national Parliament (Lok Sabha),² roughly proportionate to their population and an effective if somewhat controversial way of increasing their proportion. More recently, one-third of all seats in *panchayats*, or local village councils, have been reserved for women.³ In terms of job reservations, the numbers are obviously much larger. For example, Indian National Railways is the largest employer in the world (with the exception of the Chinese military), and with a total employment of at least 1.6 million, the 49% reservation for SCs, STs and OBCs amounts to roughly 800,000 jobs.⁴ Although this is a small figure relative to the number of total jobs in a country of India's population, the fact that such a large number of jobs are at stake indicates why many in India presuppose that the reservations are an important means of achieving social justice.

2. Historical Background

In order to explain how the policy reservations developed and have been understood in India, it is necessary to turn to pre-Independence politics, and in particular the trajectory of Muslim, Dalit and non-Brahmin political movements.

There are two historical sources for the policies of preferential treatment in India, both dating to

² This is out of a total of 543 seats. See the Election Commission of India's website and breakdown by state at <http://www.eci.gov.in/MiscStats/SeatofLokSabha.htm>. Numbers for State Assemblies are 570 SC and 532 ST members out of 4120 total members in India's 28 States and 7 Union Territories.

³ A bill to extend this reservation to Parliament has been held up over the past few years and the arguments contained herein, if suitably modified, could also be extended to justify such preferential treatment for women, especially if, as in India, their voice and their interests are rarely considered by male parliamentarians.

⁴ However, it is important to note that many of the reserved positions, particularly in higher education institutions, remain unfilled due either to lack of (qualified) applicants or to low retainment rates among SCs, STs and OBCs.

⁵ The Constituent Assembly met from 1946-1949, with the passage of the Constitution occurring in 1950. A copy of the debates is kept in the British Library. See also Shiva Rao (1968) and Austin (1966).

⁶ These were political reforms allowing some increased representation of Indians in colonial institutions. John Morley (1838-1923) was Secretary of State for India and one of the leading liberals of his day, having been a colleague and then a biographer of Gladstone. Minto was Viceroy of India.

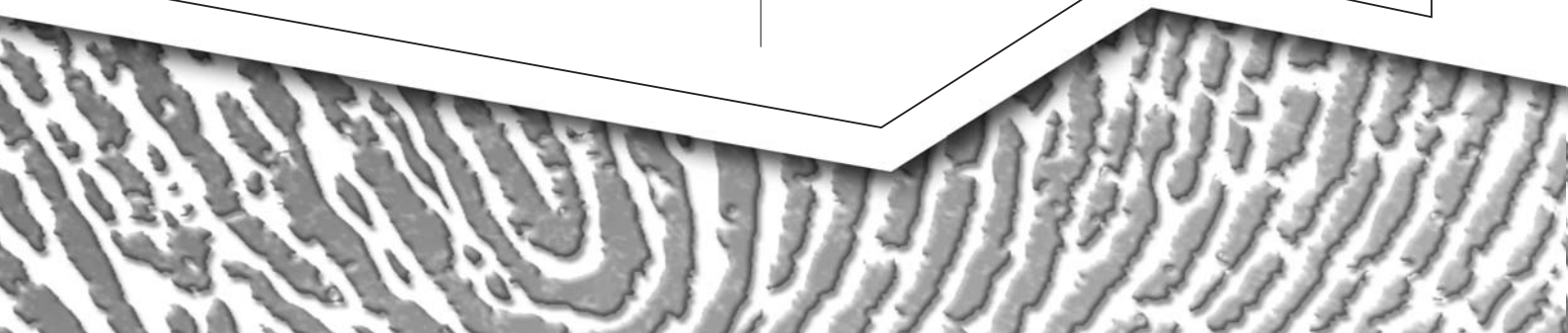
the colonial period: the first is the idea of 'safeguards' for minority groups against majority domination; and the second is job reservations for non-Brahmins in princely states and in British India, both of which developed over 100 years ago. To help develop an understanding of Indian attitudes towards preferential policies during the Constituent Assembly,⁵ and indeed today, this section provides a somewhat extended discussion of both.

2.1 Minority safeguards: separate electorates

The most prominent policy instrument to ensure 'safeguards' for minority groups was that of 'separate electorates' whereby certain communities, notably Muslims, were allowed exclusively to vote for their own community's candidates roughly in accordance with their proportion among the population. Interestingly, the British colonial state had first deployed such 'safeguards' for minority communities in the early 20th century through the Morley-Minto reforms of 1909.⁶ While many commentators have claimed that the concessions given to Indian Muslims were what led to the partition of the country into India and Pakistan, the argument put forward by some Muslim leaders and ultimately accepted by British officials was that they needed protection in order to safeguard their interests in the face of a potentially exclusionary Hindu majority.

Three things are notable about this policy decision.

- First is the idea that Indian Muslims as a *group* share certain interests that diverge from those of Hindus and other communities.
- Second, the concessions were not offered because of Muslims being disadvantaged or denied equal opportunities, but rather because they were a minority, a more communitarian claim regarding the importance of groups, a point that will be further explored in the next section.
- Finally, it suggests that communitarian thinking existed long before it was theorized, at least when 'liberal' British leaders considered the situation in India (and indeed other colonies such as Ireland and the various regions of the Middle East).



Muslim politics in British India

Evidence for these claims can be found in Indian politics prior to Independence. Muhammad Ali Jinnah (1875/6–1948), the leader of the Muslim League from the 1930s, insisted that the only party capable of representing the Muslim population of India was the Muslim League. Politicians such as Maulana Azad, one-time President of the Congress Party and the first Education Minister in independent India, were vilified for being traitors to their community. Based on the reasoning that the only possible Muslim representatives were those who put the interests of the community at the forefront, the Muslim League consistently petitioned the British to refuse to recognize Muslim members from any other party. This is because the Muslim League claimed non-Muslim Leaguers didn't appreciate the inherent separateness of Muslims in India, who constituted a separate nation with interests and an identity wholly different from that of Hindus.⁷

Significantly, Jinnah never claimed that Muslims were disadvantaged relative to Hindus. While it is indeed true today that Muslims are the second-worst-off community in India (after Dalits), much of this stems from the emigration of the Muslim elite to Pakistan in 1947. Prior to Partition, it would have been somewhat implausible to argue that Muslims were disadvantaged relative to Hindus, and not only did Jinnah not make such a claim, it was entirely irrelevant to his argument. For what mattered to Jinnah and supporters of the

7 See his Presidential Address to the Muslim League in 1940, a meeting at which the Lahore Resolution was adopted: 'it is a dream that the Hindus and Muslims can ever evolve a common nationality, and this misconception of one Indian nation has troubles and will lead India to destruction if we fail to revise our notions in time. The Hindus and Muslims belong to two different religious philosophies, social customs, literatures. They neither intermarry nor inter-dine together and, indeed, they belong to two different civilizations which are based mainly on conflicting ideas and conceptions. Their aspects on life and of life are different. It is quite clear that Hindus and Mussalmans derive their inspiration from different sources of history. They have different epics, different heroes, and different episodes. Very often the hero of one is a foe of the other and, likewise, their victories and defeats overlap. To yoke together two such nations under a single state, one as a numerical minority and the other as a majority, must lead to growing discontent and final destruction of any fabric that may be so built for the government of such a state.' [Official website, Nazaria-e-Pakistan Foundation]

8 See, e.g., note 7. Jinnah was inconsistent on this front, especially prior to the 1930s when he was known as a disciple of Gokhale and the 'Ambassador of Hindu-Muslim Unity', even until his death in 1948. As many have pointed out, in his Presidential Address to the Constituent Assembly on 11 August 1947, he stated: 'We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State... in due course of time, Hindus will cease to be Hindus and Muslims will cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.' [www.pakistan.gov.pk]

Muslim League was the distinctiveness of the Muslim community, and he occasionally went so far as to argue that Muslims had no obligations to Hindus.⁸ Whatever the merits of such an argument in this particular case, the idea that a certain group requires political autonomy because its identity is separate from a majority community is hardly unique.

The influence of the Muslim League on other parties

It is important to note that the Muslim League was successful first in its claim for separate electorates and ultimately in its demand for a separate state in the form of Pakistan. In fact, the British colonial state explicitly accepted such group-based arguments, with the result that other communities attempted to emulate the success of the Muslim League. For example, B. R. Ambedkar, the primary leader of the Untouchables or Dalits, often argued for the separateness of Untouchables from caste Hindus and so argued for them to be granted separate electorates. In so doing he attempted to get Untouchables officially declared a minority community, because statutory provisions in the colonial state allowed for preferential treatment once a community was granted such recognition.

Ambedkar ultimately failed in his aim, primarily because Gandhi initiated a fast in order to prevent the 'splintering' of the Hindu community. Two important consequences are worth noting.

First, Ambedkar's argument about the separateness of the Untouchable community was supplemented by a claim about their historic and current disadvantages perpetrated by the 'evils of the caste system', while Jinnah's arguments never made any link to the fact of disadvantage. However, while Jinnah achieved his aim, Ambedkar did not, and their discrepant achievement partly turned on whether the group was perceived as being different enough with a clear sense of its own value above the worth of any individual group members. The upshot is that arguments for preferential treatment based on *group identity* were more successful with the British authorities than arguments that stressed the fact of *disadvantage*.

Second, the ultimate impact of Gandhi's fast combined with the violence surrounding Partition was to take the idea of separate electorates completely off the table, making a commitment to a

socially cohesive Indian national identity much more central. While the original arguments in the Constituent Assembly considered the idea of separate electorates in 1946–7, following Partition these measures were completely abandoned, with very limited support being offered for them even by Ambedkar, at least in public debates of the period. At the same time, Pakistan ultimately discarded the idea of separate electorates in 1956,⁹ reinforcing the idea that the claim was for a separate political entity, and not linked to questions of social justice within a given existing state. This is not to say that such claims can never be matters of social justice, but rather that the group-based reasoning in support of them is not necessarily predicated on the idea that the individual members of the group are in any way disadvantaged.¹⁰

2.2 Job reservations

If the British colonial state was surprisingly open to group-based arguments and policy instruments, the development of affirmative action programmes by a princely ruler of Kolhapur, currently a district in the state of Maharashtra in western India, is perhaps even more astounding. Upon realizing the dominance of Brahmins in his civil service, Shahu Maharaj sought to increase the number of non-Brahmins in his administration. He therefore adopted a policy of reserving 50% of vacant positions for backward castes in 1902, perhaps the first example of the policy in the world and more than 60 years before affirmative action programmes were implemented in the United States.

Maharaj himself, coming from a relatively 'backward' caste of farmers, paid a great deal of attention to education by increasing literacy among lower castes, and also to backward caste politics – as when he funded Ambedkar's journal in 1920.¹¹ While Kolhapur was thus an early

example of reservation policy, the princely state of Mysore in southern India adopted even more comprehensive policies. Following a commission report, the ruler there implemented a policy reserving 50% of the highest government posts for backward castes. At the time, non-Brahmin movements were flourishing in south India, in particular the 'self-respect' movement in current Tamil Nadu, and the idea that a significant number of government jobs ought to be held by non-Brahmins was becoming much more widespread. This is more easily understood in a context where Brahmins usually constituted between 3–5% of local populations but often held the majority of important jobs.

The idea of job reservations therefore spread quite quickly throughout colonial India, particularly as the British accepted quotas for 'backward castes' in assemblies in Maharashtra. Given the animosity that modernists such as Nehru felt towards the caste system, it is perhaps not surprising that such policies were not overly contentious in pre-independence Indian politics. Perhaps more important was the eclipse of many other political issues by the Hindu–Muslim divide from the 1930s onward. As Gandhi's fast makes clear, while Congress was sceptical of separate electorates, they were willing to implement reservations as a way of improving the chances of members of socially disadvantaged groups, at least those discriminated against by the Hindu caste system. This judgement was to influence the way in which preferential policies were implemented in independent India, with job reservations ultimately accommodated and separate electorates rejected.

2.3 The Indian Constitution¹²

Gandhi's fast against the idea of separate electorates for Untouchables led to the Poona Pact (1932) with Ambedkar, whereby reservations in public bodies were agreed to as a compromise by the spiritual leader of the Congress and the lawyer advocate of the Untouchables. This compromise became the basis for the Constitution, with the idea of separate electorates further sullied by their perceived role in fostering Muslim 'separatism'. As this example makes clear, the idea of reservations was accepted as a means of achieving social justice in a hierarchical society.

9 Although the 1954 East Bengal elections were still held on this basis, East Bengal or East Pakistan (now Bangladesh) had a much higher proportion of Hindus than West Pakistan (now Pakistan), a proportion that has diminished substantially during and immediately following the war that led to Bangladesh's independence in 1971.

10 Indeed, the Muslim League petition to the Viceroy in 1906 consisted primarily of large Muslim landowners, including several Nawabs and other rulers.

11 This was the fortnightly newspaper, the *Mooknayak* (Leader of the Dumb).

12 See the reports of the subcommittee on minorities in the Constituent Assembly and the references in note 5.

Groups, equality and diversity in the Constituent Assembly

Among the members of the Constituent Assembly three related assumptions were widely shared, though alternately celebrated and bemoaned:

1. India was viewed as a deeply diverse country where group affiliation was constitutive of people's identity and thus a necessary consideration for designing democratic institutions.
2. Religion was considered a significant basis of that group affiliation among all communities in India.¹³
3. Some communities were perceived as being victims of unjust discriminatory treatment, and so in need of advancement.

Achieving social justice in India was therefore understood to require both individual and group-based measures, with the value of equality often placed alongside that of diversity in the sense that different group-based affiliations ought to be able to flourish. One result was that the Indian state recognized differential rules and standards for the various communities under its administration, as in its separate laws for marriage, divorce, inheritance and adoption for Hindus, Muslims, Christians and Parsis. This latter policy was probably allowed because of the concern that the large number of Muslims who remained in India, already traumatized by Partition, needed assurances that the Indian state would take its claims seriously.

Article 15

Article 15 of the Indian Constitution demonstrates the Indian response to group-based inequality as it

¹³ These two assumptions were reinforced by the Partition into India and Pakistan, in the process of which roughly 10–15 million people migrated, and 500,000, if not more, were killed.

¹⁴ See also Appendix 1. A number of other articles, including especially article 25, could be similarly interpreted.

¹⁵ For a breakdown of political reservations by state, see the reference in note 2 above.

¹⁶ The politics that led to the formation and delay of the Mandal Commission are significant. This was a controversial decision, especially since Singh's government was a minority coalition requiring outside support from the Hindu nationalist Bharatiya Janata Party (BJP). When the first Commission on the Backward Classes reported in 1955, it caused outrage and the chair distanced himself from the report. Nehru was publicly indifferent to and privately critical of its recommendations (see Galanter [1984] for a discussion; and Nehru [1946] for his thinking on caste). Congress governments consistently failed to consider the issue and it was only with the election of the Janata government in 1977 that a Backward Classes Commission was again convened. During the Congress governments of the 1980s, the recommendations languished. V. P. Singh was (and remains) committed to expanding reservations, but it was probably also a strategy to gain support from groups ignored by Congress and the BJP, especially given that the latter were attempting to forge a unified Hindu consciousness.

¹⁷ In *M. R. Balaji v State of Mysore*.

applies to the policy of preferential treatment for members of disadvantaged groups such as the former Untouchables or Dalits.¹⁴ While it follows the standard liberal practice of outlawing discrimination on various grounds, it also rejects exclusionary practices by high-caste Hindus and allows the state to make 'special provisions' for women, children and 'any socially and educationally backward classes of citizens or for the Scheduled Castes [SCs] and Scheduled Tribes [STs]'. In the course of Article 15, the state asserts its commitment to non-discrimination, but specifically allows it to assist those who might require differential treatment to achieve social equality. This notably includes not only SCs and STs, but also 'other backward classes' (OBCs), a point that has been much debated in Indian politics as the policies of reservation approach or occasionally even surpass 50%. Precise numbers vary because India has a federal structure with substantial powers for states, meaning that different states compile different lists on the basis of their particular caste populations.¹⁵

Other Backward Classes: the politics of reservations since 1990

Unlike the explicit provisions granted to the SCs and STs, the status of 'other backward classes' is more ambiguous in the Constitution. Under Article 340, the Government is charged with appointing a Commission to consider the issues, which it did first in the 1950s and then more recently and influentially with the Mandal Commission report of 1980. In 1990 Prime Minister V. P. Singh announced he would implement the recommendations of the Mandal Commission,¹⁶ thus extending preferential policies to the OBCs at 27%. Though the Mandal report suggested that as many as 52% of all Indians were OBCs, reservations were pegged at 27% because the Supreme Court had decided in 1963¹⁷ that no more than 50% of all positions could be reserved in central government.

Given that the SCs and STs already received a 22.5% reservation, the implementation of a further 27% quota for the OBCs was as high as legally possible. The Commission established which communities belonged in the OBC category and ultimately included lists of thousands of

castes in its report.¹⁸ While many objected to the over-inclusivity of the list,¹⁹ the principle of extending preferences was the main cause of the tensions that followed. In 1990, the protests became unexpectedly violent when 63 upper-caste students died through the act of self-immolation and scores more were injured. A repetition of this same tactic was threatened in May 2006 with the announcement of the extension of quotas to professional schools and the issue has again come to the forefront of Indian politics.

The result is that OBCs now have posts reserved for them in the public service and public educational institutions, and it is extremely unlikely that such measures will be dissolved any time soon. One main reason is that OBCs are such a large group in society, and their representation has increased dramatically since the implementation of Mandal. Politicians such as Lalu Prasad Yadav, Mulayam Singh Yadav and Mayawati now seem in control of politics in North India, whereas before the region was dominated by upper-caste politicians. Democratic calculi have therefore changed considerably, with all parties requiring OBC support to remain in government, as evidenced by the BJP's tie-up with a lower-caste politician formerly aligned with V. P. Singh in the important state of Bihar and the Congress Party's alliance with Lalu Yadav in the same state and at the centre. Indeed, such is the entrenchment of preferential policies that the Minister for Human Resource Development (HRD) Arjun Singh recommended their further extension into prestigious tertiary institutions in May 2006. This led to considerable protests and further discussion of the issue, though recently the furore has lessened.

*From explaining to
justifying preferential policies in India*

While separate electorates lost their support following Partition in 1947, the idea that backward castes require positive action if not quotas contin-

ues to have strong support over 100 years after it was first implemented by a Maharajah in western India. Following this overview of and background to the policies in India as they exist, it is instructive to examine the various arguments that support and criticize preferential policies such as quotas and affirmative action. Whatever their effects, it is important to understand how people have believed that justice allows or requires such policies. It is also worth emphasizing that there are different provisions for SCs and STs than for OBCs, and this is probably not just a matter of political expediency, but at least partly because of differing views on their experience of disadvantage and their resulting claims for preferential treatment. In the following section, I examine three different sorts of arguments that could be made in support of the policies, arguments that have been put forward by different actors in India but that have different theoretical and normative foundations.

3. Justifications of Preferential Policies

Neither defenders nor critics of preferential policies have been consistently clear enough about what they see as their various strengths and weaknesses. Even if our ultimate evaluation of any policy will be in response to its real-world consequences, one way of making the various claims and counterclaims clearer is by providing theoretical support for the arguments in question. When we try to do so, it becomes clear that there are a number of different conceptions of justice, an idea we can accept even if we find ourselves more persuaded by one account than another. If we acknowledge that there are a number of conceptions of justice, it then follows that there are different ways of justifying preferential policies.

Based both on the theoretical literature on justice and on the real-world statements made by politicians and other actors, there are three main ways of justifying preferential policies in India. Although these arguments are sometimes mixed together or separately affirmed, distinguishing between these sorts of claims provides necessary clarity but also helps us to think through whether

18 The Mandal Commission also recommended reservations for some Buddhist, Christian and Muslim communities.

19 Varshney has characterized the Hindu OBCs as the Sudra *varna* minus dominant castes such as *Jats* and *Marathas*, a classification that overlaps almost precisely with the view presented in the Mandal report (Varshney 2000). Dominant castes are characterized as the largest single caste in a particular locality and are often the largest landholders. However, they often derive from the Shudra *varna* (see Srinivas 1994).

and how justifications for preferential policies might be considered in Britain and elsewhere. The three justifications referred to below are termed **communitarian**, **compensatory** and **democratic-distributive**. Their strengths and weaknesses are examined in turn, using the Indian situation as an illustration.

3.1 Communitarian arguments

As mentioned above, group-based thinking has been and continues to be quite common in India – from caste-based to religious-based affiliation. For example, Ambedkar returned to public support for the idea of separate electorates in the 1950s, partly on the basis that Dalits were a minority, separate from caste Hindus and with an entirely different identity and set of interests. Although the policy of separate electorates was rejected by the Congress majority in the Constituent Assembly, communitarian arguments have often been popular, especially because Indian society and even Indian morality are perceived as less individualistic and more group-based than the liberal societies of the West.

For example, the caste system is partly based on the idea that duties and obligations are owed primarily to members of one's caste, with different treatment of other castes being not only acceptable, but often morally justifiable. As many have argued, the basic unit of Hindu morality was historically not the individual, but the endogamous caste grouping, a conception justified by the belief that members of low-ranking castes had done something egregious in their previous life and so deserved their lowly station. It has also been argued that the Muslim conception of the *ummah* as the community of believers makes Islam a more group-oriented ethical system, a tendency reinforced in South Asia by the existing social custom of endogamy, though there is also a strong emphasis on individual salvation in Islamic ethics.

Whatever the moral underpinnings of the caste system or Islam, it is necessary to elaborate on how group-based thinking might justify preferen-

tial policies. Assume that groups are important actors in the world, and that their continued flourishing is a worthy aim. If this is true, and some groups are in danger of losing their identity, there is an obligation to redress the imbalance by giving the group benefits. Indeed, since only some members of a group are beneficiaries of preferential policies, this seems like a plausible interpretation. On communitarian reasoning, preferential policies are just because they ensure that groups under pressure are able to continue to flourish. This can be done through giving advantages to certain members of the group on the assumption that the well-being of such individuals will contribute to the well-being of the group.

In fact, as the case of separate electorates makes clear, such an argument need not assume that the group in question is necessarily disadvantaged. This then relates to an important dispute about the justification of preferential policies in the Constitution and their justification in the Mandal Commission report. According to many readers of the Constituent Assembly debates, the justification of preferential policies was originally limited to Dalits/SCs and *adivasis*/STs because of the extreme discrimination that they continued to face as a result of their low social position. And since Nehru and other Congress politicians rejected the extension of preferential policies to OBCs, they apparently did not accept that a similar reasoning applied to these groups.²⁰

The idea is that whatever disadvantages OBCs suffer, it is not because of the historic wrongs of the caste system, with many insisting that they face no current caste prejudice at all. Some have therefore concluded that the increased support for reservations by 'backward caste' politicians is evidence of group-based thinking without any consideration for their past suffering or current disadvantage.²¹ Whatever the political impact of Mandal, such observers insist that it and the politics that have followed contain a different ideal of justice from the one displayed in the Constitution. This interpretation has been reinforced by the fact that lower-caste politicians now control much of the political scene through parties that appeal directly to their caste members, but such politicians have been poor at adopting redistributive policies when they are elected.

20 Nehru and his Home Minister G. B. Pant rejected the first Backward Classes Commission report, known as the Kalelkar Commission, which reported in 1956 and suggested widespread preferential policies for OBCs.

21 See Mahajan (1998) for a more sophisticated version of this claim. The idea that OBCs are not disadvantaged is widely affirmed in English-language newspapers such as the *Times of India*, the *Hindustan Times*, *The Express* and *The Hindu*, all of which are available on the internet.

As a result, authors such as Mahajan suggest that OBC reservations are based on a crude model of group-based justice without any consideration of their past suffering or current disadvantage. In contrast, it is argued that Dalits/SCs and adivasis/STs not only suffer current disadvantage, but were egregiously discriminated against in the past and so deserve recompense, an argument on which the following section focuses. But whatever the merits of communitarian conceptions of justice, their defence of the idea of group flourishing suggests that they would not limit the application of preferential policies to disadvantaged groups, and so in the Indian case might justify the policies not merely for SCs, STs and OBCs, but perhaps for Muslims or women or indeed for any group. Before moving on to compensatory arguments, it is worth pointing out that while in India the idea that members of a group uniformly vote in a particular way – often for a co-member as their representative – is often criticized and referred to as ‘vote bank’ politics, a similar phenomenon has also been criticized by some in the West under the concept of ‘identity politics’.

3.2 Compensatory justice

The communitarian argument that different groups have different interests and therefore deserve safeguards is not the only or the most popular argument in favour of preferential treatment for members of disadvantaged groups. In fact, the two most common arguments in India and elsewhere are based more firmly in mainstream liberal arguments premised on the importance of justice. These have been divided into ‘backward’ and ‘forward’-looking arguments.

Backward-looking arguments rely on the idea of *compensatory* justice – namely that individuals or groups who have been harmed ought to be compensated – and have historically been quite popular, especially in the reparations literature. The idea of compensatory justice has long been considered an important part of ethics, with Aristotle being perhaps the first to distinguish it from distributive claims. As an ideal compensation is both

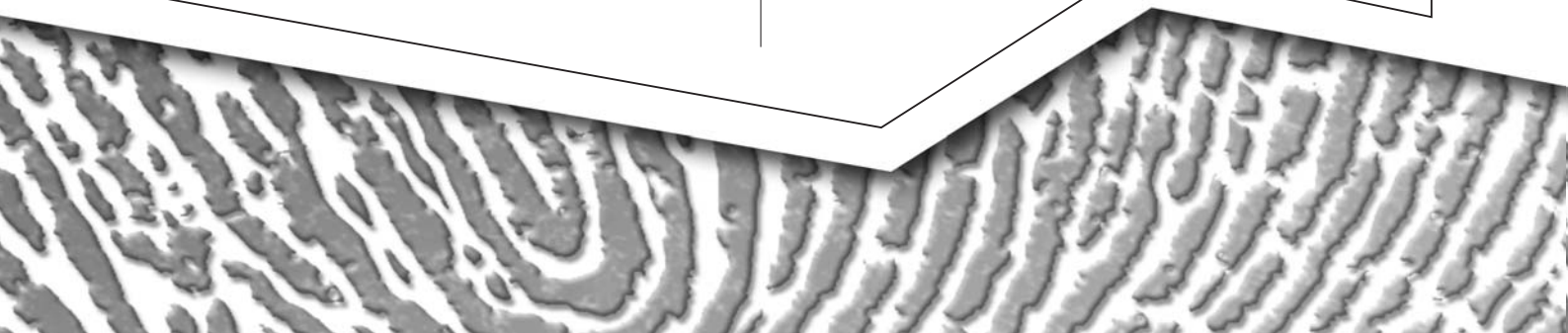
simple and intuitive: the wronged party is owed some recompense from the wrongdoer, whether or not this compensation can be in the form of the harm caused (say by returning a stolen good), or whether some alternative form of compensation (such as money) is suggested.

Today, compensatory justifications for preferential policies are less popular for at least two reasons. First, many object that preferential policies assume that wrongs can be inherited, a claim that is not typical of most claims for compensation. If it doesn’t make sense for the son of a murderer to be put in jail, why does it make sense to punish the great-great-great-grandson of a slave-owner? Second, even if the inheritance argument is accepted, many argue that the beneficiaries of the policies are often the least deserving, or those least wronged. So, for example, when places are reserved at universities or in public-sector jobs, those best placed to take advantage of the benefits are likely to be those who are least disadvantaged in the community.²² At the same time, the truly advantaged among the dominant group are least likely to be adversely affected by preferential treatment.

Interestingly, the relevance of the compensatory justification partly hinges on how recent and pervasive the historic wrong in question actually is. For example, while in the United States some whites may be able to claim that they are in no way connected to the wrong of slavery which ended in the 1860s, similar claims by South African whites have been given short shrift. This is probably because it is hard, if not impossible, for a white South African not to have benefited from apartheid, and equally implausible to suggest that black South Africans were not harmed.

India is perhaps a middle case – while the greatest evil of the caste system, untouchability, was abolished by the Constitution in 1950, caste prejudice continues to exert some sway on the interactions between Indian citizens. Given such a situation on the ground, compensatory arguments seem to have plausibility for former Untouchables, or Dalits, in India. However, because the extent of historical discrimination suffered by OBCs is disputed, a compensatory justification for extending preferential policies to such groups is far more contentious.

22 This is known as the ‘creamy layer’ argument in India, and has led to some economic criteria being adopted as recommended by the Supreme Court in *Indira Sawhney v Union of India* (1992).



3.3 Distributive justice and democratic equality

Because of the perceived flaws of compensatory arguments, ‘forward’-looking arguments are more common in India and the US. The idea is that *current* disadvantage is structured in a clearly unjust manner. In this section, I examine three such arguments, either appealing directly to distributive justice or to the importance of equal respect for individuals participating in a democracy.

Equality of opportunity

If current disadvantage is patterned in an obviously unjust group-based manner, equality of opportunity, the foundational principle of liberal theories of justice, is simply a non-starter. Given the role of the state in ensuring equality of opportunity, it then has an obligation to ensure that individuals who suffer disadvantage are benefited in some way, much as the poor receive transfer payments or housing to assist them in participating as equals in democratic society.

Such an argument does not rely on the communitarian claim that groups have interests or that they ought to be treated differently simply because they are groups. This is deemed problematic because it suggests that the rights of individuals can be overridden by groups and doesn’t seem to explain which sorts of groups are the legitimate subject of such a concern. Instead, forward-looking claims insist that when there is unjust disadvantage, basic principles of justice, including equal opportunity, are violated. In response, those who have been unjustly disadvantaged ought to be given preferential treatment.

In the case of India, such an argument is relatively straightforward. The ills of the caste system result in systematic disadvantage for the lower castes and especially Dalits. Equal opportunity is required not merely for the efficiency that makes market economies work, but also because good democratic government requires that positions are open to all, an ideal widely accepted as the first requirement for fairness in employment.

Democratic equality – epistemic

In India, the idea that there ought to be reserved quotas for Dalits, *adivasis* and even OBCs is considered particularly powerful in the public sector, because the ideal of democracy requires that its institutions should be broadly representative of the

people and that power is not exclusively exercised by one or a few classes of people. While the distributive requirement of equal opportunity is particularly foundational for democratic governments, there are two slightly different arguments from democracy that have been employed to justify preferential policies, arguments I term ‘epistemic’ and ‘participatory’.

While democratic theory has always focused on institutional design, there has recently been a new-found interest in what is called ‘deliberative democracy’. This is the idea that in a functioning democracy citizens ought to engage in the public sphere. While this is obviously a claim about how democracy best works in the real world, this sort of argument has also been used to ease concerns in the philosophical field of epistemology.

Epistemology broadly speaking is the study of knowledge: what can we know, how can we know it, and what is required of us when we come across knowledge that disturbs some of our deepest convictions?

Many of the problems in epistemology that concern political philosophy and indeed real-world issues stem from two facts about the social world: first, individuals hold a wide spread of considered convictions; and, second, we can have various ‘failings’ both in our assessment of knowledge and in our desire to seek out information that contradicts what we already believe. What, then, happens when we disagree and how do we justify imposing policies on others when they disagree with us, especially if we assume that we too might be wrong in our assessment of the facts?

This is where democracy has been proposed as a solution: it allows individuals to deliberate in public and calibrate their views based on the reasoning of others. This obviously assumes an engaged and reasonable public, which has led some to question the empirical and ethical assumptions of deliberative democracy. Whether we disagree with such a view or not, it is important to understand why democracy has been proposed as an institutional solution to epistemic problems because it is the most likely way that the ‘best’ answer will be found.

What does this have to do with preferential policies? Many have argued that people from majority ethnic groups simply don’t know what it is like to be a member of a minority that is system-

atically discriminated against. Significantly, the argument is *not* that majorities can never understand the interests of minorities, but rather that because of epistemic problems – related to the fact that there are usually limits to our knowledge and that we tend to rely overmuch on our own experience – majorities have a hard time getting at certain types of knowledge.

Elizabeth Anderson has made an influential argument along these lines, suggesting that African-Americans and possibly women have a good case for special representation.²³ Some have argued that such ‘mirror’ representation implies that only Dalits can represent Dalits, or only women represent women, and so have criticized this stance for denying that it is even possible to understand what it is like to be someone else or indeed to find an impartial public viewpoint. One response, offered by Anderson, is to point to the difficulty elites face when trying to get hold of information about the needs and interests of extremely marginalized groups, with the idea that the quotas will ultimately be abandoned once society is not so divided and certain groups suffer less disadvantage.

Anderson marshals good evidence about the failings of white male lawmakers and policymakers in the United States, but it is important to emphasize that she sees the representation of African-Americans and women as having the ‘epistemic’ advantage of pointing out the *universal* interests of a democratic society. That is to say, she insists that African-Americans and women don’t have narrow interests regarding their identity, but rather that all of American society can accept the requirement of equal opportunity in education or fair child-rearing practices. The fact that lawmakers lack certain knowledge is based in large measure on the fact of their *partial* viewpoint of America, where they aren’t always able to consider what is in the interest of all or what are the most pressing needs. This is why she sees preferential policies as a way of instantiating the value of what she calls ‘democratic equality’.

23 See Anderson (2002, 2003).

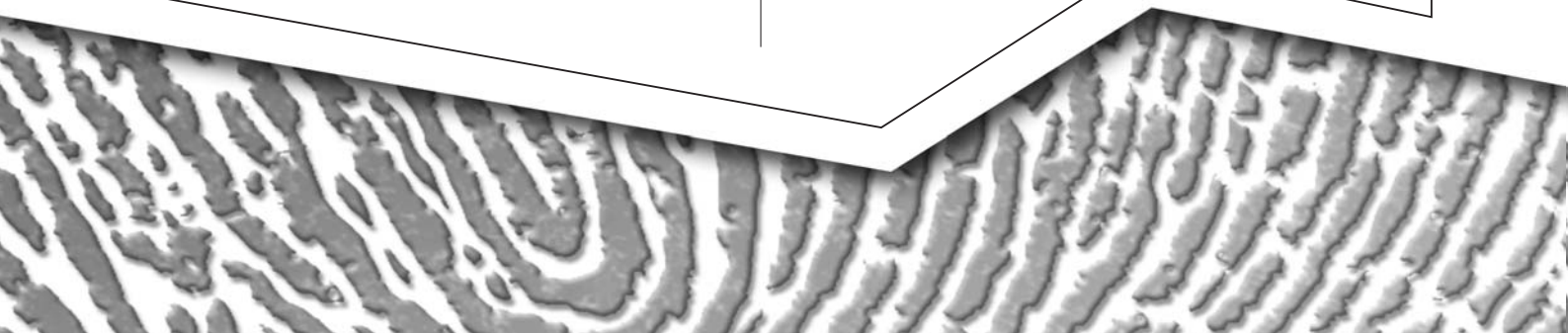
Democratic equality – participatory

Anderson’s argument is perhaps more difficult to follow than a more straightforward interpretation of democratic equality. An alternative ‘participatory’ argument flows from the idea that all should be treated with equal concern and respect by the state. Especially in the public sphere, this requires that every individual is able to participate as an equal, a requirement that is the foundation for democratic governance and is perhaps the clearest distinction between democracy and other forms of government.

Such an argument can justify preferential policies only if certain conditions are in fact met. For example, a certain group may be so badly perceived by others that no individual member of the group is able to participate as an equal in public debate. In such circumstances, even those who wish to dissociate from their group or who indeed dislike their group will be unable to feel respected because of the prejudicial attitudes of individuals in the majority or more powerful groups in society. Here the issue is that people of a certain group are unable to participate as equals because *others* fail to respect any member of their group.

Respect also has a more subjective or self-directed aspect. It is a much observed facet of human psychology that our well-being and indeed our ability to take advantage of opportunities are impacted by our sense of self-respect. In societies where every member of a disadvantaged group is both publicly and privately treated with contempt, it is not surprising if such individuals find it difficult to experience a sense of worth or self-respect. It may seem less acceptable to base public policy on individuals’ self-judgements but in situations where a group is egregiously treated, it is rash to dismiss such claims as merely subjective. In any case, the history of groups treating others with contempt buttresses the argument that how citizens view each other is an important indicator of whether or not each citizen can participate in public as an equal.

How can preferential policies help achieve this aim? The first point to underscore is that the policies are typically only deployed in public institutions. In India, for example, the quotas and reser-



vations are either in representative bodies, public employment, or in tertiary higher education bodies. In all cases, a participatory argument emphasizes the role that such institutions²⁴ play in a democratic public life. Education is in this way not just a way of increasing individual opportunities, but for providing citizens of all groups with the means to participate fully in democratic institutions.

The above claims link to the idea of respect in the following way. When a member of a severely disadvantaged group gains educational opportunities or public employment, others no longer look upon every member of the group disrespectfully. There are two ways to understand this argument, linked to the discussion of respect above. First, when preferential policies ensure some representation of disadvantaged groups, there is an important way in which at least some important non-group members experience increased respect, namely public officials. Whether or not everyone in majority or advantaged groups will also feel increased respect is obviously debatable, but the most important aim of the policy is to raise the status of disadvantaged groups and having increased representation in public institutions is an obvious contribution to this goal.

As referred to above, respect has a self-regarding aspect, and preferential policies can also raise my own view of myself when I see people like me doing well. This is perhaps a more contentious claim, but the idea that I derive some real or vicarious benefit when a co-member achieves success is common enough in instances such as the family or indeed the nation when it comes to football, international awards, and other such pursuits.

24 Although there is some discussion of extending reservations in the private sector, the argument is perhaps weaker in that such institutions do not play the democratic role demanded of public institutions. But where public institutions are themselves degraded and private employment seen as the true measure of success, a participatory, respect-based argument can be extended to the private sector too. See the contributions to the special issue (no. 549) of the journal *Seminar* in June 2005.

25 With the rise of lower-caste politicians in the populous states of north India, the monopoly of upper-caste Hindus in positions of political power has ended (Jaffrelot 2003). All political parties have been forced to alter their strategies in this new environment, and the clientelistic politics described in earlier texts (Kothari 1970; Morris-Jones 1971) can no longer ensure a government majority. As a result, there are increasing numbers of OBC members in every party: 'The percentage of OBC MPs increased after the Congress lost power in 1989, doubling from 11.1% in 1984 to 20.9% in 1989, when the share of upper-caste MPs fell below 40% for the first time, largely because the Janata Dal, the winner of the ninth general elections, had given tickets to a considerable number of OBC candidates. Interestingly enough, the proportion of the OBC MPs continued to grow in 1991, in spite of the Congress party's comeback in 1996, when the BJP became the largest party in the Lok Sabha and in 1998 when the coalition it was leading was able to form the government. This evolution was continuously pursued at the expense of the upper castes. Most political parties, it would appear, had started giving a larger number of tickets to OBC candidates' (Jaffrelot 2003: 98).

These sorts of democratic-participatory arguments are in fact very common in India, particularly in the discourse surrounding the passage of an additional reservation for OBCs in the early 1990s. For example, Yogendra Yadav has pointed to the implementation of the recommendations as leading to the 'second democratic upsurge' (Yadav 2000) in Indian politics,²⁵ a judgement reinforced by Christophe Jaffrelot's work on the increasing caste diversity of members of parliament and other representative bodies. As demonstrated by such empirical studies, the language of dignity and respect is at the heart of lower-caste politics, based on the idea that in order to participate as an equal, members of some groups require preferential policies to increase their representation.

4. Justifications in India and Justifications in the West

The abstractions of the previous section serve an important purpose in laying out the principled arguments in favour of preferential policies. Whether or not the three arguments seem acceptable, it is important to indicate how the policies do not obviously contradict important principles of justice. At the same time, however, it is obvious that the facts on the ground make a difference in all such justifications. For example, while compensatory arguments might allow preferential policies for Dalits in India or blacks in South Africa, they seem less likely to be acceptable in the case of OBCs or perhaps minority and immigrant groups in Europe. It is therefore worth examining how these arguments work both in the case of India and how they might be extended to the West.

4.1 Disadvantage and diversity in India

India is famously diverse in its ethnic, religious, caste, regional and linguistic variety. What helps to explain the existence of a pervasive policy of quotas for such a large proportion of society is the dominance of a relatively small segment of that population in the institutions of power in Indian society. In its ideal (and perhaps idealized) form, the Brahmins (priests), Kshatriyas (warriors) and Vaisyas (merchants) were all considered upper caste and received substantial privileges as a result. During the British period, their educational

advance meant that Brahmins in particular were able to garner a large proportion of government jobs, although they rarely achieved a 5% representation of the population of any region. Conversely, Dalits were almost completely absent from public employment other than as sweepers, with the large labouring class (mainly Sudras) barely represented either.

Indian society is considerably complicated by the existence of large minority religions, especially Muslims but also Sikhs, Christians, Jains, Parsis and Jews. Although Partition reduced the size of the Muslim population considerably, India remains a country of proverbial diversity. But as mentioned above, this diversity also encompassed a marked hierarchical social order, in which each group was superior to the ones below it,²⁶ and where rights and responsibilities attached not to individuals themselves but to the caste into which they were born.

In this context, with a relatively small percentage of the population dominating the rest in a way that was often sanctioned by the moral order, widespread quotas were considered the only way to bring about the democratic ideals of equal dignity and equal opportunity. These are the principles explored in section 3.3 above and provide perhaps the firmest ground for justifying preferential policies in India. Not only do such arguments pick out an important principle of democratic justice, but they also provide a way of selecting the appropriate beneficiaries, which in the Indian case are (minimally) Dalits/SCs, *adivasis*/STs and probably OBCs and women.

If such democratic ideals can be applied to most lower castes in India, the communitarian and compensatory arguments suggested in sections 3.1 and 3.2 have also been popular in India. In general, communitarian reasoning is more common in India, but there is increasing discontent about its potential consequence of fostering narrowly group-based political parties and weakening support for universal policies. Whatever the merits of such a claim, communitarian premises can straightforwardly recommend preferential policies, although they might allow the extension of quotas and affirmative action to groups who are not

obviously disadvantaged.

Compensatory arguments are perhaps notable for the opposite tendency: to allow only those groups who have been historically and systematically discriminated against to receive preferential policies. In India, those who focus on such compensatory or backward-looking claims usually limit their concern to the case of Dalits (also known as Scheduled Caste – SCs).

4.2 Disadvantage and diversity in the West

What can this deliberation on justifications of preferential policy and on Indian society and democracy reveal about policies in the West? As western societies become more diverse, but as long as that diversity continues to be coterminous with differential opportunities and outcomes, the issue of preferential treatment for groups will be worth exploring. Examining the case of India also helps indicate how such policies can be compatible with or contradict democratic politics.

Significantly, policies of preferential treatment are often defended from the perspective of justice, and not merely pragmatic expediency. However, as the case of India demonstrates, preferential policies can be justified on a number of different grounds. While communitarians might insist on preferential policies on the basis that the well-being of groups themselves matters, some liberals will be more attracted to compensatory arguments deriving from historical discrimination. Probably even more popular will be distributive justice arguments that focus on the importance of equal dignity and equal opportunity.

In order for a democracy to be effective, it is necessary for its institutions to be as far as possible fair. Where belonging to a certain community significantly worsens your likelihood of participating in democratic institutions, the legitimacy of the government is undermined. Preferential policies therefore do not require a notion of ‘equal results’ or group-based equality of outcome, though they can of course be defended by such arguments. If arguments for preferential policies are to succeed in western liberal democracies, they will probably need to be grounded in more standard views on justice and fairness, views that stress the impor-

²⁶ Ambedkar referred to this phenomenon as ‘graded inequality’.

tance of equal concern and respect especially in a democratic public sphere. And since such disadvantage is not as historically overwhelming as in the case of India, a policy of quotas will seem less justifiable than a consideration of something more like positive or affirmative action.

While liberal predilections for such arguments may not be shared by all observers, the above analysis may be complemented by an evaluation of how disadvantage is structured in the West. For example, in the case of Europe and North America, communitarian arguments will probably find less support than in India due to the greater individualism, both moral and self-interested, that is a more widespread feature of western politics and ethics. Compensatory claims in Europe in particular will probably seem even less persuasive than in the case of India or even the United States, though of course the wrong of colonialism will be considered as a relevant justification by some observers.

Democratic equality and preferential policies in the West

If the extended discussion of Indian society and politics has demonstrated how and why preferential policies have been recommended, the arguments surrounding democratic equality point out how important principles can be realized through a policy of quotas or, more plausibly, affirmative action. As many now acknowledge, such ideals have not been fully realized even in the West, and as much as the value of community cohesion will help foster a shared democratic space, members of disadvantaged groups will also continue to have claims that ought to be taken seriously by all of those committed to a functioning and fair democracy.

The ideal of equal concern and respect can be achieved, for one thing, by pointing out how preferential policies can be an effective way of instantiating the signal importance of equal participation in democratic institutions as well as the important principle of equal opportunity. Significantly, this suggests that only truly disadvantaged groups can be appropriate beneficiaries of such a policy, and

therefore that the policy will need to be adapted to fit the particular circumstances. Whether or not recent immigrant groups or more regionally based groups such as Scots or Basques are appropriate beneficiaries is a matter for empirical analysis, but such an analysis will have to reference the arguments in section three if they are to be persuasive.

It is important to concede that the idea of group membership has a role to play even in democratic justifications for preferential policies, but that this does not have to imply the independent moral importance of groups.²⁷ Instead, the idea is that where a group is sufficiently lacking in public esteem, this disadvantage has an effect on each group member. In such circumstances, even those who find their group membership lacks value for them, or who aim to dissociate themselves from the group, suffer a disadvantage – they are treated badly by others simply because they are perceived to be a member of a disrespected group. Examples might be secular Muslims or those culturally European black citizens of African descent who are unable to escape group-based prejudice directed at them, even when they achieve relative success in employment or education.

As the ultimate justification for preferential policies is democratic equality and equality of opportunity, an important question is: can the policy in fact achieve this aim? This is a practical and not a justice-based consideration. Where the groups in question no longer suffer from disadvantage, a policy of preferential treatment loses its justification because the members will have achieved the opportunity for equal participation in democratic institutions. At the outset this cannot be given a clear timeline. The standing of group members would have to be monitored to ensure that the justice-based reasons for the policies are in fact applicable.

4.3 Linking the justifications to strengthening opportunities and cohesion in the UK

Before concluding, it is worth linking this discussion to current thinking on disadvantage and opportunities in Britain. While the policy of quotas for Catholics in Northern Ireland is perhaps an anomaly, commentators are increasingly interested in developing programmes of positive action to improve the opportunities for black and minority

27 If groups are independently morally important, then their well-being becomes a significant question even if no individuals are benefited as a result. The more plausible alternative is that groups are *derivatively* important in morality, because the well-being of individuals is what ultimately matters, and most individuals derive at least some well-being from their membership in groups (see Khan 2005).

ethnic Britons. The Government's strategy on race equality and community cohesion is perhaps a good place to start this discussion.

According to the Home Office's 2005 report *Improving Opportunity, Strengthening Society*, the following six aims flesh out the Government's vision for:

'inclusive British citizenship, supported by a society in which:

1. young people from different communities grow up with a sense of common belonging;
2. new immigrants rapidly integrate;
3. people have opportunities to gain an understanding of the range of cultures that contribute to our strength as a country;
4. people from all backgrounds participate in civic society;
5. racism is unacceptable; and
6. extremists who promote hatred are marginalised.'

(p. 21)

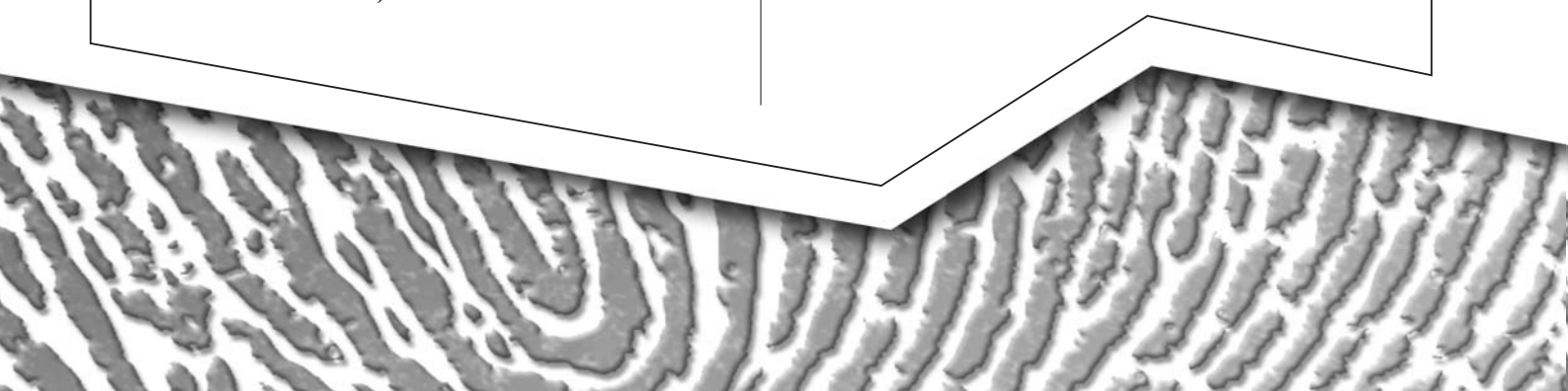
The document splits these aims into two main chapters it sees as interrelated, namely 'Improving life chances for all' and 'Building community cohesion'. While it is beyond the scope of this paper to comment on all of these aims, it is important to flag the potential role of preferential policies, or positive action, in achieving at least some of them. This is not to say that other aims and strategies are less important, just that the policy examined in this paper has specific goals in pursuit of a more just society.

As explained in section 3.3 above, preferential policies can be an obvious way of improving the life chances of all, by ensuring that those from disadvantaged backgrounds have increased opportunities in education and the labour market. The document recognizes the perception of 'racial discrimination by key institutions and in the labour market' while proposing an increased 'employment rate of minority ethnic groups' (p. 24). Specific measures in education and employment are recommended in pursuit of these goals, as well as in health, housing and the criminal justice system. The Government is right to view these aims as being important mechanisms for 'improving life chances for all' and thus placing them firmly within standard views of justice and fairness. One of

the major points of this paper has been to try to demonstrate how preferential policies can also achieve the central aim of equality of opportunity, even if the policy will have to be appropriately tailored to meet the needs of a particular country or region, needs that must be based on the fact of unjust disadvantage.

While this paper has not focused on cohesion directly, some of what is said in the government's document raises an important point for democratic politics today. As stated there, 'ensuring life chances for all is a fundamental element of building a cohesive society. Lack of opportunities and poverty undermine people's sense of having a stake in society and can fuel resentment of others' (p. 42). It is probably true that a sense of cohesion helps citizens 'come together to make progress across a range of social and economic challenges' (p. 42), and this paper has focused particularly on the importance of delivering equality in *public* institutions. The value of democracy lies in no small part in the opportunity for all to participate equally in the public sphere and to debate important issues.

Cohesion may indeed be a necessary part of providing the background in which people can participate as equals, but the reverse is also true. That is to say, all citizens must be afforded the opportunity to participate as equals in public discourse, not only for democracy to be effective but also for cohesion to have a positive resonance. Requiring cohesion but not aiming to remove unjust disadvantage is an ambition no democratic polity can pursue for long, unless it wishes to deny basic rights and justice to a section of its citizens. For this reason, a policy of preferential treatment, say positive action, is probably more justifiable in those institutions that ensure or instantiate the value of democratic equality. This minimally includes public bodies, a point that perhaps deserves stronger emphasis in the Government's own paper, but also extends to whatever sphere, most likely the labour market, where minimal success is required for mutual respect and tolerance to be expressed genuinely by all citizens.



Conclusion

Although recent events have highlighted the plight of immigrants in France's *banlieues*, those concerned with justice will always need to respond to structured disadvantage. Indeed, there is now some tinkering with the meritocratic entrance exams to the elite French tertiary institution Science-Po, although economic disadvantage is being used as a proxy for race or religion.²⁸ Whether or not European democracies recommend the preferential policies adopted in India, it should be obvious that policies such as affirmative action and even quotas do not necessarily violate principles of justice, at least in particular circumstances.

At present some would contend that no group in Europe is as disadvantaged as Dalits or perhaps even OBCs in India, and so the arguments offered in favour of preferential policies are probably more contestable. On this point it is important to concede that justice-based arguments can do only so much work in providing a justification for any public policy. Public policies will always need to be justifiable, but part of their suitability derives from the empirical needs of a given society. For example, if social solidarity is so weakened as to make the redistribution of resources impossible, preferential policies will probably do more harm than good. But, again, this is an empirical question: the value of cohesion cannot be wholly separated from that of justice and equal rights (racist societies may be cohesive, but not *better* for having such cohesion). Cohesion may be either furthered or hindered by positive action but we must ensure that our evaluation of the policy's benefits and disadvantages uses the standard of fairness, a standard that positive action does not necessarily violate and that cohesion does not necessarily ensure.

In addition, it is important to point out that such needs will always be divergent for different citizens or regions of any state. Policies of tax transfer or the development of public transport systems always target particular areas, but are rarely criticized for being unfair in so doing. The fact that public housing is built in areas where there is a need for it or that subway systems are built in urban areas is never invoked as a criticism of a policy, because it is obvious that the justification of the policy necessarily implies that a particular region or group of people be targeted.

This paper has set out three different arguments for preferential policies in India, namely communitarian, compensatory justice and distributive or democratic justice. While it has ultimately endorsed the latter argument, readers may find the other arguments more convincing, or indeed find the entire idea of preferential treatment implausible. Yet in general it is extremely unlikely that the mere fact of targeting a particular group or area necessarily violates principles of fairness. At the same time, our analysis of the circumstances on the ground will affect our views on the justifiability of any public policy as much as our interpretation of justice. If the debate in India is often about whether or not a particular group is in fact disadvantaged, the same disagreement is already present in Europe and North America. Since there are good justice-based reasons for supporting preferential policies in democracies, our judgement concerning the particular circumstances of immigrant or other groups in Europe will probably determine whether or not we think they are a good idea here.

28 For an analysis in English, see Franchi (2004) and the documents cited therein, particularly the Priority Education Conventions (CEP) of Science-Po at <http://www.sciences-po.fr/presse/zep/cep.pdf>. 'Positive discrimination' as it is referred to in France has become something of a hot issue, with de Villepin denying any difference between himself and Sarkozy following the riots in 2005: 'Equal opportunities or positive discrimination: that's just an argument over words. We are in agreement in refusing special treatment to people on the grounds of race or religion while according such treatment only on the grounds of residentially defined spaces' (*Le Monde*, 19 November 2005).

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Appendix 1:

Caste in India

Broadly speaking, there are four categories of caste Hindus: the Brahmins, Kshatriyas, Vaisyas and Sudras. Each category in its ideal corresponds to certain functions or employment, namely priestly duties for Brahmins, warrior and ruling responsibilities for Kshatriyas, merchant activity for Vaisyas and the labour required by society for Sudras. The first three groups, often referred to as the 'upper' or 'forward' castes, are considered 'twice born', meaning that they are viewed as ritually superior to the Sudras. It is important to remember that each of these categories refers to an ideal, and that each is further divided into hundreds if not thousands of jatis.²⁹ In fact, *jatis*, defined as much smaller local endogamous communities but also translated as 'castes' in English, are probably more significant in describing how caste works socially and politically in India.

Untouchables stand outside the four-fold classification (*chaturvarna*) explained above. The English word 'untouchable' indicates their social and physical isolation, but other words are now more frequently used in the Indian context.³⁰ British administrators referred to them as Scheduled Castes (SCs),³¹ and this phrase has made its way into post-independence legislation, including the Constitution. The current term most frequently used in the political sphere is *dalit*, originally a Marathi word meaning 'broken' (or 'broken people') but now extended throughout India to refer to castes outside the Hindu *chaturvarna* social order.

29 One frequently cited estimate for the total number of jatis is 3500–4000, based on Hutton (1946).

30 Other words besides those mentioned in the text have included *panchama*, *antyaja* and *pariah*. While Gandhi referred to untouchables as *Harijans* (literally 'children of god'), this name was rejected by many leaders of the community, most significantly B. R. Ambedkar.

31 The word was coined in the drafting of the list or 'schedule' of specific caste communities who would be included in 1928 and was important in the 1931 census organized by J. H. Hutton.

32 A well-known account can be found in the writings of B. R. Ambedkar and also in Rajendran (1974). For a recent evaluation of the status of dalits that makes for some depressing reading, see Human Rights Watch (1999) at: <http://www.hrw.org/reports/1999/india/index.htm#TopOfPage>. There are also a number of websites devoted to dalit issues, including www.dalitstan.org.

Dalits have historically performed the most socially despised tasks, such as cleaning latrines, sweeping floors and working with leather. In addition to the rigid labour segmentation, ill-treatment against dalits is also justified in Hindu scripture, though some of this is also applied to Sudras. Systems of punishment and reward were explicitly biased against dalits,³² and social practices were often deeply humiliating towards them. There is a vast literature detailing the extremity of suffering by dalits, but for the purposes of this essay it is sufficient to note that discrimination against them has not only been historic, but also unique in its extent and doctrinal justification. Exegetically, their inferiority has been justified as 'deserved' based on sins committed in a previous life. Although many Indians no doubt rejected this system, the social impact was undeniably real and particularly brutal.

When participants in the Constituent Assembly considered the institutions necessary to create a just and democratic India, the status of the dalits was foremost in their minds. While many would have viewed the caste system as contrary to democracy, the immediate concern was with the socially disadvantaged status of dalits. In addition, attention focused on the 'Scheduled Tribes' (STs), generally pastoral tribal groups living in isolated hill and forest areas. Their relative lack of interaction with caste Hindus perhaps made them less vulnerable to overt discrimination compared to dalits, but Scheduled Tribes were if anything more disadvantaged in terms of educational attainment and other indicators of well-being. Almost no members of the assembly objected to preferential treatment for these two groups in the drafting of the Indian Constitution, with the only real question being how these preferences would take shape.

Appendix 2: Constitutional Provisions

Articles in the Indian Constitution grant special provisions to 'Scheduled Castes' and 'Scheduled Tribes'. Over 1000 pages in length, the Constitution is divided into numerous sections, schedules and appendices, with the sections on 'Fundamental Principles' (section III, articles 12–35) and 'Special Provisions Relating to Certain Clauses' (section XVI, articles 330–42) most relevant for our purposes. Article 17 abolishes the practice of 'untouchability', but this has arguably had less influence than other provisions. Articles 15 and 16, and to a lesser extent 29, have been frequently cited by academics and the Supreme Court in considering disadvantages and discrimination.

Article 15 outlaws discrimination based on 'religion, race, caste, sex, place of birth', and also contains specific provisions that clearly refer to particular social practices in India. For example, it explicitly prohibits discrimination with regard to 'access to shops, public restaurants, hotels and places of public entertainment' (15(2a)) and in 'the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public' (15(2b)). Although limited to the public sphere, article 16's guarantee of 'equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State' is similarly wide-ranging. Article 29 extends the general concern for equality in article 15 to the specific area of education; between them, articles 16 and 29 provide much of the justification for preferential policies in the crucial areas of employment and education.

³³ The interpretation of this provision as allowing preferences is indisputable since it was added to override the 1951 decision ('State of Madras vs. Champakam Dorairajan') to reject preferences in education as unconstitutional.

³⁴ Article 46 of the Directive Principles of State Policy (non-binding principles to guide future state action, partially to prevent an interventionary Supreme Court) is even more expansive: 'The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.'

³⁵ Another community frequently mentioned in this section is the Anglo-Indian.

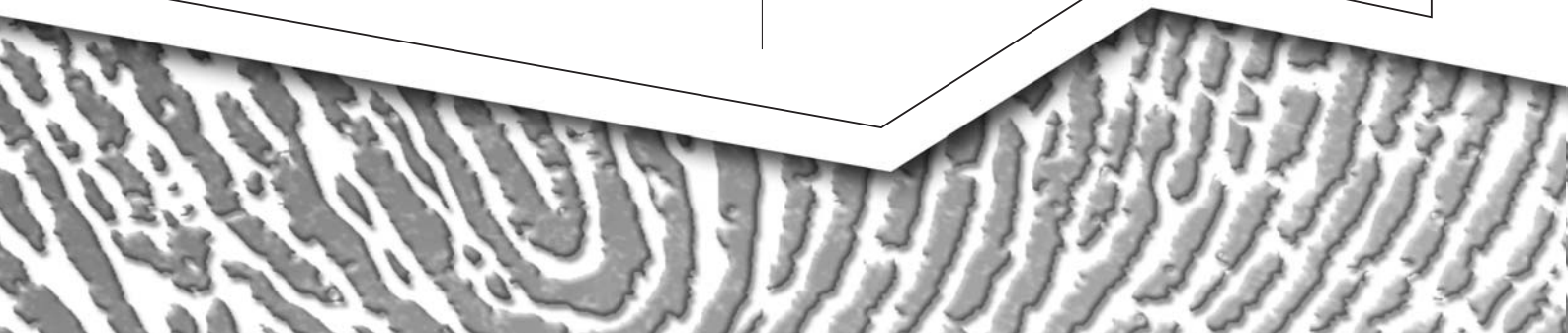
The Constitution does not provide merely a negative strategy for equality, but explicitly permits state intervention. Consider articles 15(4) and 16(4) for their defence of state action and how it can be targeted at specific groups:

Art. 15. (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.³³

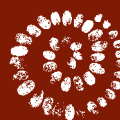
Art. 16. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

It is important to note two features of these articles and others in the Constitution.³⁴ First, while they *permit* the State to act to remedy disadvantage, the wording of the articles ('nothing...shall prevent the State from making any [special] provision') makes it clear that state intervention is often not *required*, a point taken up in a number of High Court and Supreme Court decisions. Second, the beneficiaries mentioned include the Scheduled Castes and Scheduled Tribes, but extend to the more nebulous category of 'any [socially and educationally] backward class of citizens'. The imprecision of this phrase, and the likelihood that the majority of Indian citizens would belong to such a category, has led to various attempts to specify and classify groups belonging to 'other backward classes', mostly notably by the Mandal Commission.

Although there are now several policies advantaging the 'other backward classes', the original framers of the Constitution only made explicit reservations for the Scheduled Castes and Scheduled Tribes.³⁵ These occur in section XIV ('Special Provisions Relating to Certain Clauses', articles 330–42), and demonstrate the special status of Scheduled Castes and Scheduled Tribes. For example, Article 330 states 'Seats shall be reserved in the House of the People for – (a) the Scheduled Castes; (b) the Scheduled Tribes'; and Article 332 extends this reservation to the legislative assembly of every state.



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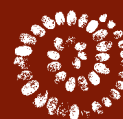
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Runnymede researcher Omar Khan was recently in India for three months researching his doctoral dissertation on the Justification of Preferential Policies in India. In this brief report he first explains the form and extent of preferential policies and the historical background that led to their particular structure, before turning to their justification.

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