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COURTING SUBSTANTIVE EQUALITY: EMPLOYMENT DISCRIMINATION LAW IN INDIA

Deepti Shenoy¹

*Learned men see with an equal eye
a scholarly and dignified priest,
a cow, an elephant, a dog,
and even an outcaste scavenger.*²

1. INTRODUCTION

Inequality in India is made particularly pervasive by the fact that India's rigid social hierarchies are intertwined with longstanding quasi-religious principles.³ Notwithstanding the fact that equality, based on the intrinsic divinity of all beings, is a principle inherent to Hinduism,⁴ India has long been defined by a strict system of social stratification legitimated by perceived cultural and religious principles.⁵

The hierarchies that define Indian society bear upon every aspect of life.⁶ In the realm of employment, hierarchical norms define the types of occupations into which a person might enter, as well as the conditions of employment she may expect to encounter.⁷ Many industries remain

¹ J.D. Candidate, University of Pennsylvania Law School, 2013; B.A. Santa Clara University, 2009. I would like to express my gratitude to Professor Aditi Bagchi at the University of Pennsylvania Law School for her encouragement and insights. I would also like to thank my parents, Sushma and Pradeep Shenoy, for their support and assistance, and fellow recipient of the Louis Jackson Memorial Prize, Jon Dueltgen, for his perspective on American labor law. All remaining shortcomings are attributable to me alone.

² THE BHAGAVAD-GITA: KRISHNA'S COUNSEL IN TIME OF WAR 59 (Barbara Stoler Miller & Barry Moser trans., Columbia University Press 1986).

³ Vikraman Nair, *The Search for Equality Through Constitutional Process: the Indian Experience*, 2011 ACTA JURIDICA 255, 256 (2011).

⁴ Nair, *supra* note 3, at 255. *See also* THE BHAGAVAD-GITA, *supra* note 2, at 67 ("I exist in all creatures, so the disciplined man devoted to me grasps the oneness of life...").

⁵ Nair, *supra* note 3, at 256.

⁶ CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, CASTE DISCRIMINATION AGAINST DALITS OR SO-CALLED UNTOUCHABLES IN INDIA 54 (2007), available at www2.ohchr.org/english/bodies/cehd/docs/ngos/chrhj-hrw.pdf; Sumita Ray, Note, *The Women's Reservation Bill of India: A Political Movement Towards Equality for Women*, 13 TEMP. INT'L & COMP. L.J. 55, 55 (1999).

⁷ CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 55; SURINDER MEDIRATTA, OXFORD HANDBOOK OF LAW, WOMEN, AND EMPLOYMENT: POLICIES, ISSUES, LEGISLATION, AND CASE LAW 2 (2009).

de facto segregated by caste and gender.⁸ Prejudice often operates at a surface level, and a certain level of classification by social status is the norm rather than the exception.⁹

Since employment discrimination in India is primarily the result of structural inequalities that assign a subordinate social status to women and disadvantaged minority groups, the problem is best addressed through a systemic approach that attacks the underlying hierarchies directly.¹⁰ A substantive conception of equality is enshrined in India's constitution, which directs the state to take affirmative action to empower women and disadvantaged minorities to compete on more equal terms with members of more privileged social groups.¹¹ The government has been guided by this constitutionally sanctioned substantive impetus, and it has implemented a system of "compensatory discrimination" in the form of quotas for women and members of disadvantaged castes in government jobs.¹² In taking a primarily substantive, rather than formal, approach to equality, India rightly recognizes that neutral application of laws and policies will perpetuate the subordination of already disadvantaged groups.¹³ Given the salience of social hierarchies in the Indian context, disadvantaged minorities contend with near insurmountable barriers to availing themselves of opportunity.

⁸ CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 55; *see also* MEDIRATTA, *supra* note 7, at 17 (observing that female mobility into managerial positions is extremely limited).

⁹ Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L. L.J. 255, 260 (2008).

¹⁰ Sean Pager, *Anti-Subordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 329 (2007).

¹¹ M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV. 101, 105-07 (1992). *See also* INDIA CONST. art. 16(4) ("Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.").

¹² Nair, *supra* note 3, at 258. Compensatory discrimination is "a daring attempt to remedy past injustices suffered by those who are at the lower levels of India's four-tier caste hierarchy." E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L. L. 63, 65-66 (1996).

¹³ *See* Manuela Tomei, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT'L. LAB. REV. 401, 411 (2003) ("[C]onsistent treatment of different people may produce unequal results."); *see also* Narula, *supra* note 9, at 314 (observing that "there are no objective standards of merit applicable to all groups within society, given that dominant groups shape traditions within which they make judgments of merit").

Despite its commitment to substantive equality, however, India's existing approach to employment discrimination has fallen short of its egalitarian ideals.¹⁴ One explanation for this shortfall is the lack of a comprehensive employment discrimination framework that adequately addresses the myriad ways in which discrimination operates. The existing legal protections against such discrimination include constitutional provisions mandating equality¹⁵ and a handful of scattered criminal statutes. There is no umbrella employment discrimination statute to regulate private sector workplaces in India.¹⁶ Reservations, which constitute the primary means by which the government addresses employment discrimination, do not extend to the private or agricultural sectors. This is highly problematic, given the fact that these sectors together encompass nearly eighty percent of the workforce.¹⁷ The existing statutory provisions provide some measure of protection to women in the private sector workforce, but many of these protections do not address discrimination on the basis of caste.

The social affliction engendered by entrenched hierarchies is exacerbated by the hesitance of the legislative and executive branches of government to take action, beyond the existing system of quotas, to benefit disadvantaged minorities.¹⁸ Compensatory discrimination has become a highly politicized endeavor, with various political parties vying for the support of

¹⁴ See Takahiro Ito, *Caste Discrimination and Transaction Costs in the Labor Market: Evidence From Rural North India*, 88 JOURNAL OF DEVELOPMENT ECONOMICS 292, 299 (observing that India's reservation-based approach to employment discrimination has only had a limited impact). See also Sukhadeo Thorat & Paul Attewell, *The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, 42 ECONOMIC AND POLITICAL WEEKLY 4141, 4144 (highlighting the high incidence of caste discrimination in the relatively unregulated private sector); Geeta Gandhi Kingdon & Jeemol Unni, *Education and Women's Labour Market Outcomes in India*, 9 EDUCATION ECONOMICS 173, 194(2000)("[W]omen suffer high levels of wage discrimination in the Indian urban labour market...").

¹⁵ INDIA CONST. art. 14, 15, 16.

¹⁶ See *Anti-Discrimination/Sex Equality*, LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/womens-rights-initiative/anti-discriminationsex-equality.html> (last visited Jan. 11, 2012) ("There is no comprehensive anti-discrimination code in India although there are laws that address specific aspects related to equality.").

¹⁷ Narula, *supra* note 9, at 319.

¹⁸ Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies From India*, 41 VAND. J. TRANSNAT'L. L. 833, 845 (2008).

caste-based interest groups.¹⁹ In the process, influential members of nominally disadvantaged groups are unfairly benefited and the interests of the genuinely underprivileged are neglected.²⁰

The Indian Supreme Court has attempted to fill the void created by the legislature's abdication of responsibility.²¹ Since the late 1970s, the Court has adopted an increasingly activist posture in an effort to uphold the rights of the disadvantaged.²² Despite the Court's commitment to substantive equality, however, it has not been wholly immune from the regressive, traditional norms that pervade the rest of Indian society.²³ The Court has also selectively superimposed formal equality principles on a vision of substantive equality colored by traditional norms, an approach that has at times yielded unsatisfactory results.²⁴ The Court's occasional reliance on traditional stereotypes has sometimes had the effect of calcifying social hierarchies.²⁵

While the entrenched hierarchies that undergird Indian society necessitate a substantive approach to equality that takes into account the painfully real social differences that limit access to opportunity for certain groups, India's substantive approach has hitherto failed to generate the anticipated results. The deficiencies in India's approach to substantive equality are the lack of a comprehensive framework addressing employment discrimination in its various forms and the selective intermingling of formal and substantive equality with traditional norms. This article

¹⁹ Pager, *supra* note 10, at 338.

²⁰ *Id.*

²¹ Sood, *supra* note 18, at 844.

²² *Id.*, at 837.

²³ See Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups From Discrimination at the Domestic and International Levels*, 41 GEO. WASH. INT'L. L. REV. 541, 558-59 (2010) (describing the Indian Supreme Court's reliance on traditional caste identities in reaching certain of its judgments).

²⁴ See, e.g., *Javed v. State of Haryana*, AIR 2003 S.C. 3057 (India) (upholding, on the basis that it was not "arbitrary, unreasonable, or discriminatory," a law that prevented men and women who had more than two children from serving in municipal governments, despite clear evidence that this disproportionately burdened and disqualified women); see also Sood, *supra* note 18, at 888 (quoting Supreme Court Justice Ruma Pal as observing, "[t]he most frequent judicial failures to conceptualize the offence arise when the Court approaches the issue with certain judicial predispositions, based on either class or gender").

²⁵ Kalpana Kannabiran, *Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India*, 44 REVIEW OF WOMEN'S STUDIES 88, 90 (2009).

argues, therefore, that India's commitment to equality in employment would be better realized through (1) a comprehensive employment discrimination framework, which would ease the litigation burden on disadvantaged victims, offer a wider range of remedies than those currently available under the constitution and criminal laws, and extend the protections of employment equality further than the limited sphere to which they currently apply and (2) a strong commitment to a primarily substantive approach, disentangled from formal equality and free from the regressive effects of traditional stereotypes.

2. HIERARCHIES

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

²⁶ Sarkin & Koenig, *supra* note 23.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy*, 6 ASIAN L.J. 99, 102 (1999).

³⁰ Narula, *supra* note 9, at 277.

of the incentive it provides at each level to maintain the status quo.³¹ Thus certain *jatis* among the *Dalits*, for instance those involved in the practice of manual scavenging, or the cleaning of dry latrines, are viewed as untouchables even among the *Dalits*.³²

No less significant in Indian society is the hierarchy that separates men from women and draws for legitimacy upon gendered cultural values purportedly rooted in religious doctrine.³³ Traditional conceptions of women as being primarily suited to domestic roles have restricted the roles that women, in particular those of the upper castes, have played in the public sphere.³⁴ Women who enter the workforce have to overcome significant hurdles at every step of the way, from contending with familial and societal expectations that they remain in the domestic sphere to facing discrimination in all aspects of employment.³⁵ Women of the lower castes are particularly vulnerable due to their position at the intersection of caste and sex discrimination.³⁶ These women account for the majority of those engaged in what are viewed as the most dangerous and degrading occupations and face significant opposition to any attempts on their part to empower themselves.³⁷

³¹ *Id.*, at 260.

³² CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 56.

³³ See A.P. THAKUR, SUNIL PANDEY & KAVITA KRISHNAMURTHI, 21ST CENTURY INDIA: VIEW AND VISION 132 (2009) (observing that, in the Indian social structure, “men outrank women of the same or similar age”). For an example of the ways in which religious gender hierarchies bear upon the Indian system of laws, see Kamala Sankaran, *Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution*, 23 S. AFR. J. HUM. RTS. 277, 285 (2007) (describing the practice on the part of the Courts of upholding sex discrimination that falls under the purview of so-called religious personal laws).

³⁴ Karin Kapadia, *Translocal Modernities and Transformations of Gender and Caste*, in THE VIOLENCE OF DEVELOPMENT: THE POLITICS OF IDENTITY, GENDER AND SOCIAL INEQUALITIES IN INDIA 167 (2002); see also Wendy Olsen & Smita Mehta, *Female Labour Participation in Rural and Urban India: Does Housewives’ Work Count?*, 93 RADSTATS J. (2006) (underscoring the perceived desirability of the status of a housewife in areas of the country significantly influenced by Hindu Brahminical norms, particularly in rural households where women are compelled of necessity to work outside the home).

³⁵ ANIL DUTTA MISHRA, PROBLEMS AND PROSPECTS OF WORKING WOMEN IN URBAN INDIA 59 (1994).

³⁶ See Narula, *supra* note 9, at 277-78 (noting that Dalit women are uniquely oppressed due to their vulnerability to violence, their unequal access to services, employment opportunities, and education, and the fact that government development programs tend to prioritize initiatives that benefit Dalit men).

³⁷ Sesha Kethineni & Gayle Diane Humiston, *Dalits, the “Oppressed People” of India: How are Their Social, Economic, and Human Rights Addressed?*, 4 WAR CRIMES, GENOCIDE, & CRIMES AGAINST HUMANITY 99, 104-05 (2010); see also Shuriah Niazi, *Madhya Pradesh’s Manual Scavengers Caste in a Trap*, WOMEN’S FEATURE

Inequality in India is particularly problematic because of the scale on which it occurs and its tendency to dominate all aspects of people's lives.³⁸ As Smita Narula notes, "India is an example of injustice in the extreme: the numbers affected are greater, the poverty is deeper, the atrocities are an every day affair, and enforced servitude and segregation is the norm."³⁹ Pervasive *de facto* occupational segregation creates immediately apparent social division and limits the ability of members of disadvantaged groups to better their social position. Due to intensely discriminatory attitudes on the part of employers, skewed distribution of resources, and historical patterns of disadvantage, *Dalits* and the so-called backward classes (certain of the extremely disadvantaged *Shudra* subcastes) and women are often relegated to menial and/or undesirable areas of employment.⁴⁰ The ingrained structures of inequality that constitute the framework of Indian society necessitate an approach to equality that takes into account the insurmountable barriers that prevent certain sections of society from availing themselves of opportunity.

3. INDIA'S APPROACH TO EMPLOYMENT DISCRIMINATION

The Indian government has primarily taken a substantive view of equality, with formal equality principles selectively applied in certain cases.⁴¹ In line with this substantive emphasis, the focus of the government's efforts has been to compensate for and remedy existing social hierarchies.⁴² Substantive equality recognizes the existence of social classifications, and seeks to target those social structures that contribute to the subordination of historically disadvantaged

SERVICE, Jan. 5, 2009, *available at* <http://www.newstrackindia.com/newsdetails/64125> (describing the occupation of manual scavenging, or the cleaning of non-flushing latrines, which has been outlawed in India but into which many lower-caste and marginalized women are nevertheless compelled to enter).

³⁸ Narula, *supra* note 9, at 260.

³⁹ *Id.*

⁴⁰ CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 55; MEDIRATTA, *supra* note 7, at 17.

⁴¹ Chandola, *supra* note 11, at 110.

⁴² Sridharan, *supra* note 29, at 99-100.

groups.⁴³ Formal equality, in contrast, overlooks social classifications and attempts to ensure neutral application of laws and policies and non-discrimination among individuals.⁴⁴ While substantive equality, with its recognition of real social differences between groups, embraces affirmative action in favor of disadvantaged groups as being in itself an essential part of equality, formal equality views affirmative action as an exception to equality to be avoided if at all possible.⁴⁵

The Indian Constitution contains both formal and substantive equality provisions, suggesting recognition on the part of the founders that uniformly applied formal equality would perpetuate the existing structural inequalities.⁴⁶ Although the Constitution mandates equality under the laws and prescribes a merit-based regime of advancement in government employment, it also expressly endorses a vision of substantive equality that is anchored in affirmative action to empower minorities to compete on more equal terms with members of more privileged groups.⁴⁷ That the state has embraced this constitutional directive is evident in the fact that the primary approach the government has taken to eradicating employment discrimination is a system of compensatory discrimination in the form of quotas.⁴⁸ Under this system, 49.5 percent of positions in higher education and government employment are reserved for members of the scheduled and backward classes.⁴⁹ The reservation system for women is less comprehensive, but nevertheless sets aside one third of the seats in municipal (local) governments for female

⁴³ Claire McHugh, *The Equality Principle in E.U. Law: Taking a Human Rights Approach?*, 14 IRISH STUDENT L. REV. 31, 34 (2006).

⁴⁴ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY AND PUBLIC AFFAIRS 107 (1976) (describing the formal-equality based antidiscrimination principle employed by the U.S. Courts in interpreting the Equal Protection Clause of the Constitution as reflecting the idea that “similar things should be treated similarly”).

⁴⁵ Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 73, 81 (2003).

⁴⁶ Chandola, *supra* note 11, at 110.

⁴⁷ Sridharan, *supra* note 29, at 144.

⁴⁸ *Id.*, at 111-112.

⁴⁹ Morgan-Foster, *supra* note 45, at 87.

candidates.⁵⁰ This approach is complemented by various other affirmative action provisions implemented on a discretionary basis by the state and central governments.⁵¹ Compensatory discrimination is rooted in the belief that in the absence of strict quotas, minorities disadvantaged due to rigid societal hierarchies will be denied access to gainful employment.⁵² There is also the hope that the increased presence of members of disadvantaged groups in positions of power will translate into more opportunities for members of these groups across the board.

In addition to the constitutional protections against employment discrimination, the legislature has enacted a handful of statutes that address various aspects of discrimination in the workplace. For the purposes of this analysis, the most significant of these statutes is the Equal Remuneration Act of 1976, which guarantees women equal treatment relative to similarly situated men in the workplace.⁵³ The Equal Remuneration Act forbids discrimination in hiring, pay and conditions of employment between male and female workers engaged in the same or similar work, except where dissimilar treatment is mandated or permitted under the law.⁵⁴

4. THE LIMITATIONS OF THE CURRENT SYSTEM

Although India's primarily substantive approach to equality in employment rightly recognizes the potential for perpetuation of existing hierarchies in the absence of special solicitude for the interests of the disadvantaged,⁵⁵ the Indian approach has failed to generate the

⁵⁰ Raghavendra Chattopadhyay & Esther Duflo, *Women as Policy-Makers: Evidence From a Randomized Policy Experiment in India*, 72 *ECONOMETRICA* 1409, 14131 (2004).

⁵¹ MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA* 380 (1984).

⁵² *See* Prior, *supra* note 12, at 77-78 ("The [framers of India's Constitution] believed that compensatory discrimination in this field was both a method to strengthen India's underprivileged and a means of preventing upper classes from obstructing the admission of backward classes into government employment).

⁵³ Equal Remuneration Act (Act No. 25/1976, amended by Act No. 49/1987) (India).

⁵⁴ *Id.* *Cf.* Equal Pay Act, 29 U.S.C. § 206 (1963) (forbidding discrimination in wages between men and women engaged in similar work in regulated American workplaces).

⁵⁵ Sandra Fredman, *Facing the Future: Substantive Equality Under the Spotlight* (Univ. Oxford Legal Research Paper Series, Working Paper No. 57, 2010).

anticipated results. The shortcomings of the Indian approach lie in (1) its limited reach, (2) the near abdication of responsibility by the legislative branch of government, and (3) the judiciary's seemingly incoherent superimposition of formal equality principles on a vision of substantive equality colored by regressive cultural norms.

4.1. The Lack of a Comprehensive Framework

The lack of a comprehensive legal framework to address employment discrimination in its various forms imposes significant barriers to the realization of robust equality of employment opportunity in India. India has thus far relied almost exclusively on its system of compensatory discrimination to root out such inequality, and this approach has met with only moderate success.⁵⁶ A system grounded almost entirely on quotas is inherently limited because it disregards the manifold ways in which discrimination and structural inequality may operate in the workplace.⁵⁷ So, for example, a quota system does not address disparities in wages, promotion opportunities, and conditions of employment. The limitations of India's reservation-based approach are compounded by the fact that reservations are primarily concentrated in relatively undesirable areas of employment such as menial or janitorial work.⁵⁸ In this manner, members of disadvantaged groups remain segregated in areas of employment traditionally associated with their castes.⁵⁹ Instructive in this regard is the experience of nearly a hundred *Dalit* workers in the city of Ahmedabad, who, despite having advanced degrees in a range of subjects, could find only janitorial employment.⁶⁰

⁵⁶ Sridharan, *supra* note 29, at 111-12.

⁵⁷ See Ito, *supra* note 14, at 299 (underscoring the limitations of India's reservation-based approach to employment discrimination).

⁵⁸ See CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 28 (noting that *Dalits* occupy more than 65 percent of government sweeping positions and only 16.5 percent of non-sweeping positions).

⁵⁹ *Id.*

⁶⁰ Randeep Ramesh, *Untouchables in New Battle for Jobs*, THE GUARDIAN, Oct. 2, 2004, <http://www.guardian.co.uk/world/2004/oct/03/india.randeepramesh>.

In practice, reservations benefit less than one percent of the *Dalit* population.⁶¹ The private and agricultural sectors, which together account for a huge percentage of the total market, are outside the purview of reservations.⁶² The recent trend toward liberalization, with its concomitant privatization of industries, has further limited the compensatory discrimination system by taking these jobs out of the reach of reservations.⁶³ Due to a range of factors including resistance on the part of private employers and the informal working conditions prevalent in agricultural work, these sectors have been left almost wholly unregulated.⁶⁴ Although the Equal Remuneration Act and a smattering of other legislation provide women in private sector workplaces with some measure of protection from discrimination, members of the scheduled and backward classes are excluded from many of these protections under the existing statutory scheme.⁶⁵ Discrimination outside the public sector is both blatant and rampant. To take one example, Prakash Chauhan, who held a masters degree in Commerce, found his offer of employment at an accounting firm rescinded upon the firm's discovery that he was a *Dalit*. Chauhan was ultimately forced to take up sweeping when he could find no other employment.⁶⁶

Even for those nominally protected under the existing statutory scheme, effective recourse has proven difficult or impossible to obtain.⁶⁷ The Equal Remuneration Act is a

⁶¹ Narula, *supra* note 9, at 313.

⁶² *Id.*, at 319. See also Thorat & Attewell, *supra* note 14, at 4144 (“(I)t appears that caste favouritism and the social exclusion of dalits...have infused private enterprises even in the most dynamic modern sector of the Indian economy). For the employment figures, see *Employment in Public and Organised Private Sectors*, RESERVE BANK OF INDIA, available at <http://www.rbi.org.in/scripts/PublicationsView.aspx?id=13602> (last visited Jan. 12, 2012). See also India Labour Market Report 2008, ADECCO INSTITUTE, available at http://www.macrosan.org/anl/may09/anl110509Indian_Labour.htm (last visited Jan. 12, 2012).

⁶³ *Id.*, at 318.

⁶⁴ SMITHA RADHAKRISHNAN, APPROPRIATELY INDIAN: GENDER AND CULTURE IN A NEW TRANSNATIONAL CLASS 93 (2011).

⁶⁵ See CTR. FOR HUM. RTS. AND GLOBAL JUST. & HUM. RTS. WATCH, *supra* note 6, at 26 (noting that India has failed to provide *Dalits* with adequate protection against discrimination in employment).

⁶⁶ Ramesh, *supra* note 60.

⁶⁷ See Aditi Kavarana, *Equal Remuneration Act 11* (Ctr. For Civil Soc’y, Working Paper No. 15, 2000), available at <http://economics--www.ccsindia.org/ccsindia/policy/rule/studies/wp0015.pdf> (citing Assistant Labour

criminal statute, which requires victims of employment discrimination to register complaints with labor inspectors designated by the states.⁶⁸ The criminal system is limited in its ability to adequately address employment discrimination in its various forms.⁶⁹ The penalties for violations of employment statutes are relatively minimal, and suffer from chronic underenforcement.⁷⁰ The limited legal redress on offer disincentivizes complaints because victims have little to gain from expensive and drawn-out litigation that gives them little in the way of compensatory damages. Corruption is endemic, and labor inspectors tend to be overworked and underpaid.⁷¹ The interests of marginalized groups are thus often neglected.

4.2. The Legislature's Abdication of Responsibility

India's approach to employment discrimination has also fallen short of its egalitarian objectives because of the failure of the legislative branch of government to adequately fulfill its part in implementing substantive equality.⁷² Political expediency tends to drive all legislative decisions, and there is a perceived need on the part of legislators to appease vote banks.⁷³ This has produced hesitance on the part of legislative decision makers to champion controversial initiatives to mitigate discrimination against minorities when these initiatives do not align with the political interests of the decision makers.⁷⁴ Thus, influential members of nominally disadvantaged castes have been seen to benefit at the expense of the genuinely disadvantaged.⁷⁵

The highly politicized system of compensatory discrimination provides one example of this. It

Commissioner K.R. Sawhney as noting that enforcement of the Equal Remuneration Act is accorded minimal importance in Delhi).

⁶⁸ Indira Hirway & Neha Shah, *Labour and Employment Under Globalization: The Case of Gujarat*, ECONOMIC AND POLITICAL WEEKLY, May 28, 2011, at 62.

⁶⁹ Cf. Julie Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 Wash. U. L. Rev. 1315 (2008) (arguing that employment discrimination should be conceptualized as being neither civil nor criminal, in order to overcome the limitations of each of these procedural paths).

⁷⁰ Kavarana, *supra* note 67, at 10-11.

⁷¹ *Id.*, at 10.

⁷² Sood, *supra* note 18, at 847-48.

⁷³ Pager, *supra* note 10, at 338.

⁷⁴ Sarkin & Koenig, *supra* note 23, at 552.

⁷⁵ *Id.*, at 550.

has been observed that new castes are continually added to the affirmative action rosters at the behest of politicians eager to secure their interest with these groups, with little inquiry into their backwardness or lack thereof.⁷⁶ These castes, unlike the *Dalits*, vary widely in terms of their social and economic backwardness, and many are in fact economically and politically powerful.⁷⁷ Few are ever removed from the reservation lists.⁷⁸

The legislative branch has repeatedly reneged on its obligation to introduce legislation to remedy the effects of discrimination on disadvantaged minorities. Although the need for an umbrella employment statute has been increasingly stressed in recent years, no concrete action in this direction has yet been taken.⁷⁹ Nor has the legislature followed up on proposals to establish a centralized agency to address discrimination in employment.⁸⁰ Large gaps remain in the employment discrimination framework, and there is little action taken to fill this void.

The legislature's inadequate discharge of its responsibilities has forced the judiciary branch of government to assume an increasingly activist position.⁸¹ One example of this activism is the Court's creation of so-called public interest litigation, a framework by which public interest agencies and members of the public are empowered to litigate claims on behalf of

⁷⁶ The *Dalits*, in contrast, tend to be almost uniformly marginalized. Reservations tend to dominate any discussion on empowering *Dalits*, and other important considerations are inadequately explored. In this regard, commentator P. Sainath has observed, "In the media, any debate on Dalit rights is about reservation, and not about water, health, sanitation or land rights. In the minds of the media audience, we have created a stereotype that Dalit is equal to reservation, which is taken out of the context of all these other deprivations." *Trend of Repackaging Casteism Growing*, THE HINDU, Dec. 7, 2007, <http://www.hindu.com/2007/12/07/stories/2007120759081200.htm>.

⁷⁷ Narula, *supra* note 9, at 325.

⁷⁸ Pager, *supra* note 10, at 338.

⁷⁹ See *Anti-Discrimination/Sex Equality*, *supra* note 13 (noting that in 2006, the Sachar Committee had recommended adoption of a new framework for addressing discrimination against minorities in employment, and arguing that "India needs an equality legislation that protects multiple characteristics, extends beyond the private and public divide and addresses manifest discrimination in society").

⁸⁰ See *id.* (highlighting the 2008 Menon Committee's recommendation that an Equal Opportunity Commission be formed to address the grievances of minority workers).

⁸¹ Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L. & COMP. L. REV. 55, 56 (2009).

underprivileged victims of government discrimination and inaction.⁸² In *Vishaka v. State of Rajasthan*, the Supreme Court of India filled a conspicuous void in employment discrimination law by issuing a comprehensive set of sexual harassment guidelines binding on public as well as private employers.⁸³ The context in which these guidelines were issued was a case in which a government employee was raped in retaliation for her work against rural child marriage.⁸⁴ The activist posture of the Court is underscored by the point that the facts of the case did not implicate sexual harassment in private sector workplaces. In drafting these guidelines, the Supreme Court pointed to the complete absence of legislation addressing the pervasive problem of sexual harassment in the workplace.⁸⁵ The Court acknowledged the shortcomings of a judicially mandated sexual harassment framework, but maintained that the importance of the issue necessitated extraordinary action.⁸⁶ It stipulated that its guidelines would be binding only until appropriate legislation was enacted to cap the shortfall.⁸⁷ Legislative inaction has thus created a situation in which the Supreme Court has had to assume an increasingly prominent role in shaping employment discrimination policy.

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

The effective implementation of substantive equality in the realm of employment has also been hindered by the Supreme Court's seemingly random intermingling of formal equality principles with a substantive equality framework that has at times drawn upon regressive cultural

⁸² Sarkin & Koenig, *supra* note 23, at 560.

⁸³ *Vishaka v. Rajasthan*, (1997) 6 S.C.C. 241 (India).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* For a discussion of the drawbacks of judicial policymaking, see Sood, *supra* note 18, at 847-48 (noting that, as appointed officials, judges are not directly accountable to the people, that the judiciary is inherently limited in its ability to acquire the wide range of information and to devote the time usually necessary to creating effective policy, and that judicial overreaching carries the danger that the other branches of government may repudiate the judiciary's actions, ultimately leading to loss of credibility on the part of the judiciary).

⁸⁷ *Id.*

norms.⁸⁸ The Court's embrace of a primarily substantive approach to equality is reflected in its recognition of the differences between social groups.⁸⁹ Thus the Court has repeatedly upheld the validity of affirmative action schemes to benefit disadvantaged castes and women. The Court has noted that a strictly neutral application of laws and policies, as required by formal equality, will not meaningfully implement the guarantee of equality enshrined in the Constitution.⁹⁰ Although the Court has, on many occasions, appropriately recognized the disparities in social standing among different groups, it has not uniformly applied these substantive equality principles in cases involving extremely underprivileged parties.⁹¹ The Court has on occasion resorted to a shortsighted, selective application of formal equality principles, and the incoherence of the Court's doctrine in this regard has yielded unsatisfactory results.

In *Air India v. Nergesh Meerza*, the Court was confronted with a discriminatory policy that distinguished between the male and female members of the cabin crew of India's biggest airline. Air India established separate cadres, with separate terms of employment, for the male assistant flight pursers and the female airhostesses.⁹² The two classes performed substantially similar types of work.⁹³ The policy at issue required airhostesses, but not assistant pursers, to quit (1) upon marriage, if it occurred within four years of joining the airline, (2) upon conception of a child, and (3) upon reaching the age of thirty-five, unless granted a special extension up to the

⁸⁸ Kannabiran, *supra* note 25, at 90.

⁸⁹ *See, e.g.*, Kerala v. Thomas, (1976) 2 S.C.C. 310 (India) (permitting the government of the state of Kerala to make special exceptions, other than reservations, for members of the scheduled castes and tribes in government employment); *see also* Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (affirming the state's authority to make provision, in the form of reservations, concessions or exceptions, for the advancement of the backward classes, provided that backwardness was not determined solely on the basis of caste).

⁹⁰ *See Thomas, supra* note 89, at 513 ("The principle of proportionate equality is attained only when equals are treated equally and unequals are treated unequally.").

⁹¹ *See, eg.*, Municipal Corporation of Delhi v. Gurnam Kaur, 1989 AIR 38 (1988) (requiring no concrete action on the part of a state to provide for certain destitute pavement merchants evicted by the government from the public streets on which they plied their wares, despite the Court's recognition that the hawkers were forced by their circumstances to carry out business on public pavements).

⁹² *Air India v. Nergesh Meerza*, A.I.R. 1981 S.C. 1829 (India).

⁹³ *Id.*

age of forty-five.⁹⁴ In a convoluted opinion that mixed substantive and formal equality provisions, the Court upheld certain parts of the policy while striking others. In upholding the clause that required airhostesses to remain unmarried for four years after joining the airline, the Court reasoned that the provision was in the interests of the employees.⁹⁵ In the Court's view, the requirement would ensure that airhostesses would only enter into the institution of marriage physically prepared and with the necessary maturity.⁹⁶ The Court also upheld the differential retirement ages for airhostesses and pursers, observing in this regard that the two cadres were separate classes and therefore did not have to be governed by the same terms of employment.⁹⁷ It stipulated, however, that extensions of employment up to the age of forty-five were to be granted on a non-discretionary basis provided that the airhostess in question was in good health, in order to ensure non-discrimination *within* the airhostess cadre.⁹⁸ Finally, the Court struck down the prohibition on pregnancy, remarking that “divert[ing] the ordinary course of human nature” in this manner was “an open insult to Indian womanhood—the most sacrosanct and cherished institution.”⁹⁹ It wholeheartedly sanctioned, however, a proffered alternative version of the provision that mandated retirement upon an airhostess' third pregnancy.¹⁰⁰

Upon nearly identical facts, in July 2003, the Supreme Court in *Air India Cabin Crew Association v. Yeshawinee Merchant* reversed a Bombay High Court decision mandating non-discrimination between the male and female cadres, upholding in full its 1989 *Nergesh Meerza* decision.¹⁰¹ In delivering its opinion, the Court noted that some of the airhostesses were members

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Air India Cabin Crew Ass'n v. Yeshawinee Merchant*, A.I.R. 2004 S.C. 187 (India).

of the union that had negotiated these disparate terms.¹⁰² It reflected, with regard to the earlier retirement age mandated for airhostesses, that “[t]here is nothing objectionable for airhostesses to wish for a peaceful and tension-free life at home with their families in the middle age and avoid remaining away for long durations on international flights,” apparently overlooking the fact that the airhostesses challenging the policy were not so inclined.¹⁰³ Perhaps most surprisingly, the Court, viewing the union’s negotiation of the conditions of retirement as evidence that the airhostesses considered this a provision “favourable to them,” categorized this provision as the type of “special treatment” authorized by the Equal Remuneration Act to be performed in favor of women.¹⁰⁴ In other words, the Court interpreted the substantive equality exception to the Equal Remuneration Act, which permits the government to take special action for the benefit of women, to allow Air India to mandate that its female employees retire at an earlier age than similarly situated males.

Nergesh *Meerza* is widely cited by scholars as a thorn in the Supreme Court’s substantive equality jurisprudence.¹⁰⁵ In interpreting the equality provisions of the Constitution, the Court employed myopic and circular reasoning that essentially upheld continuing discriminatory treatment based on a superficial division of men and women into different classes which

¹⁰² *See id.* (“Where terms and conditions are fixed through collective bargaining as a comprehensive package deal in the course of industrial adjudication and terms of service and retirement age are fixed under agreements, settlements or awards, the same cannot be termed as unfavourable treatment meted out to the women workers only on basis of their sex and one or the other alone tinkered so as to retain the beneficial terms de hors other offered as part of a package deal.”). *Cf.* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (holding that provisions in a collective bargaining agreement compelling arbitration of statutory claims are enforceable).

¹⁰³ *Yeshawinee Merchant*, *supra* note 101.

¹⁰⁴ *See id.* (“The twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan.”). This finding is particularly startling in light of the fact that the lower court had found that one of Air India’s central reasons for establishing separate cadres for male and female staff was the universal opposition of male staff to the possibility of reporting to a female supervisor. The policy was drafted to ensure that only a male staff member could serve as a flight supervisor. *See Kannabiran*, *supra* note 25, at 95 (“The [Bombay High Court] rejected this argument asserting that “the hierarchy on board the aircraft will be based on seniority irrespective of sex,” a decision the Supreme Court set aside”).

¹⁰⁵ *See Sood*, *supra* note 18, at 112.

assigned men arguably preferable terms of employment.¹⁰⁶ The results fell far short of the egalitarian objectives expressed by the framers of the Constitution.

Consistent with a substantive approach to equality, the *Nergesh Meerza* and *Yeshawinee Merchant* Courts viewed themselves to be acting for the particular benefit of female workers, whom they perceived as being differently situated and having different priorities from their male coworkers. The Court believed that in permitting airhostesses to negotiate terms purportedly favorable to them, it was acting in their best interests.¹⁰⁷ This approach to substantive equality ultimately failed because it *assumed*, on the basis of regressive gendered norms, that male and female employees had different priorities.¹⁰⁸ It imposed what it believed to be substantive equality of opportunity to negotiate terms of employment without inquiring into the actual bargaining power of women within the union or the ways in which the gendered context in which they were operating limited their ability to negotiate better terms for themselves.¹⁰⁹

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

¹⁰⁶ See *Kannabiran*, *supra* note 25, at 95 (noting that the Court required no demonstration on the part of the employer that the tasks assigned to the male and female staff were sufficiently different to justify differential treatment of the two classes).

¹⁰⁷ See *Yeshawinee Merchant*, *supra* note 101 ("In employment requiring duties on Air craft, gender-neutral provisions of service may not be found necessarily to be beneficial for women. The nature of duties and functions on board of an Air craft do deserve some kind of a different and preferential treatment of women compared to men.").

¹⁰⁸ For an overview of the Supreme Court's application of similarly regressive reasoning in recent caselaw in this and other contexts, see *Kannabiran*, *supra* note 25.

¹⁰⁹ This is a particularly pressing concern in light of the fact that trade unions in India have failed to adequately prioritize the interests of women and other underprivileged groups. See Rohini Hensman, *Trade Unions and Women's Autonomy: Organisational Strategies of Women Workers in India*, in *GENDER, DIVERSITY AND TRADE UNIONS: INTERNATIONAL PERSPECTIVES* 95, 95 (Fiona Colgan & Sue Ledwith eds., 2002)("[W]hile some progress has certainly been made, women and disadvantaged sections of society remain marginalised in the labour force, and trade unions still fail to recognise the importance of tackling this issue.").

extensions beyond the default age of retirement, it refused to mandate that the airline offer the same terms of employment to male and female employees. This was so despite the Court's acknowledgment of a substantial similarity in the types of work performed by the airhostesses and the pursers.¹¹⁰ In accepting the airline's superficial distinction between the two classes based on discriminatory terms of employment and the purportedly different interests and priorities of the two groups, and in refusing to require equal conditions for similar work, as required by the terms of the Equal Remuneration Act, the Court intermingled substantive and formal equality in such a manner as to render both doctrines ineffective.

5. SOLUTIONS

5.1. Legislative Solutions

The deeply ingrained and multilayered structural inequalities that underlie Indian society necessitate the adoption of a substantive approach to equality that takes into account the fact that actors differently situated may not benefit in the same ways from a uniform application of equality principles.¹¹¹ However, India's existing approach to substantive equality has yielded unpredictable and unsatisfactory results in part because the existing framework is limited in its reach and flawed in its approach to employment discrimination.

The limitations of a primarily reservation-based system and the inadequacy of the current statutory scheme to account for various types of discrimination against a full range of disadvantaged groups significantly qualify the ability of the current framework to address the problem of employment discrimination.¹¹² One possible solution that has been increasingly

¹¹⁰ *Nergesh Meerza, supra* note 92.

¹¹¹ In this regard, Chief Justice Bhagwati of the Indian Supreme Court observed, "In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities... are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit..." *Jain v. Union of India*, A.I.R. 1984 S.C.1421 (India).

¹¹² *See supra* note 14.

proposed in recent years has been to extend reservations to the private sector.¹¹³ However, this step would have to be carefully considered in view of the significant opposition such proposals have met in the private sector.¹¹⁴ India is a developing country, with strong reasons to encourage a competitive business environment, and the possible detrimental effects of such legislation on industry would therefore need to be fully explored.

A less drastic solution might involve the legislation of a comprehensive umbrella employment statute,¹¹⁵ which would guarantee freedom from discrimination in the workplace to a full range of disadvantaged minorities. Such a statute would articulate the types of adverse actions that would qualify as illegal employment discrimination and the remedies to be made available to victims of such discrimination. It might impose a responsibility on private employers to take reasonable steps to ensure the full participation of minorities in the workplace. Given existing hierarchies, such a provision would necessarily require that employers make certain reasonable accommodations to create an environment in which disadvantaged workers would have the opportunity to function on par with their more privileged coworkers. An employment discrimination statute would provide guidelines for the Courts in interpreting state guarantees of equality, and would extend equality protections to the private and agricultural sectors. It might

¹¹³ Narula, *supra* note 9, at 319; *Anti-Discrimination/Sex Equality*, *supra* note 13. State governments have taken some steps in this direction. See, e.g., *Mayawati Announces Reservations in Private Sector*, EXPRESS INDIA, Jan. 18, 2008, available at <http://www.expressindia.com/latest-news/Mayawati-announces-reservations-in-private-sector/262923/> (highlighting an initiative by the government of Uttar Pradesh to introduce reservations in companies working on projects in conjunction with the state).

¹¹⁴ Narula, *supra* note 9, at 319. For a discussion of the arguments in favor of and against reservations in the private sector, see generally Jayati Ghosh, *On Reservations in the Private Sector*, FRONTLINE, Nov. 4, 2005, available at <http://www.flonnet.com/fl2222/stories/20051104004110800.htm>; see also G. Thimmaiah, *Implications of Reservations in Private Sector*, 40 ECONOMIC AND POLITICAL WEEKLY 745, 745-50 (2005).

¹¹⁵ *Cf.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (prohibiting discrimination in employment on the basis of sex, race, color, religion, or national origin).

incorporate a presumption in favor of disadvantaged employees in order to ease the extremely heavy burden of litigation.¹¹⁶

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

The limitations of the existing framework might be further addressed through the provision of civil remedies in addition to the existing criminal penalties for violations of employment law. The Equal Remuneration Act is a criminal statute, which prescribes fines and imprisonment for illegal discrimination.¹¹⁷ Although the criminal law places the responsibility of prosecuting offenses on the state, and thereby alleviates the burden of litigation on victims of employment discrimination who may have limited financial resources, the absence of damages may disincentivize the pursuit of judicial remedies. Concomitantly, the relatively minimal

¹¹⁶ Such presumptions are relatively common in the Indian legal system. See, e.g., Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 THE AMERICAN JOURNAL OF COMPARATIVE LAW 89, 101 (“[U]pon the establishment of certain facts in an abetment of suicide prosecution, a court *may presume* that the defendant abetted the victim’s suicide...[P]resumptions of this kind reflect ‘those natural inferences which the ‘common course of natural events,’ human conduct, and public and private business suggest to us.’”).

¹¹⁷ Equal Remuneration Act, *supra* note 53.

penalties associated with infractions fail to deter employers from engaging in discrimination.¹¹⁸ Widespread corruption among labor inspectors and the fact that the inspectors are overworked and underpaid result in failure to adequately prioritize women's interests.¹¹⁹ These obstacles deter prospective complainants from asserting their rights under the Act. The provision of a civil cause of action may bridge this gap by providing incentives for victims to seek judicial recourse and by ensuring that, at least in some cases, those pursuing judicial remedies will have a vested interest in the outcome. High-profile employment litigation, with significant damages at stake, may act as a general deterrent to employers who might otherwise discriminate with impunity.

To ensure adequate protection for complainants with limited means, the Indian government should explore possible incentives to encourage public interest organizations and other entities to help provide adequate legal representation.¹²⁰ Members of disadvantaged groups are often unaware of their rights, and thus cannot take advantage of the protections afforded them under the law.¹²¹ An agency that could work in tandem with the Courts and would have the power to oversee, investigate and litigate employment disputes would help fill this gap.¹²² Such an agency would presumably have the resources to effectively issue concrete guidelines that would help employers remain within the bounds of the law and would assist the Courts in reaching informed judgments.¹²³ It would also have the power to oversee the actions of labor inspectors and to address allegations of corruption and misconduct within their ranks.

¹¹⁸ Hirway & Shah, *supra* note 58.

¹¹⁹ Sood, *supra* note 18, at 837.

¹²⁰ Public interest litigation, discussed in section 4.2 *supra*, is one vehicle by which public service agencies are empowered to help provide legal representation.

¹²¹ Chandola, *supra* note 11, at 128.

¹²² India might be guided in this regard by the example of, for instance, the American Equal Employment Opportunity Commission.

¹²³ The Equal Employment Opportunity Commission in the United States, for instance, provides guidance as to the government's equal employment opportunity program and adjudicates disputes. *See About EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/> (last visited March 27, 2012).

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

5.2. *Judicial Solutions*

The fact that the legislature has been relatively reluctant to take bold steps, other than in the form of reservations, to protect disadvantaged minorities from discrimination in employment, has meant that the judiciary has taken a more active role in upholding the rights of the underprivileged.¹²⁴ Some of the judiciary's actions have been problematic, but in the overall analysis, it has stepped in to fill the vacuum created by the legislature's inaction.¹²⁵ Although structural solutions are more properly the province of the legislature, which has the resources and temporal bandwidth to enact effective policies, in the current circumstances, it may continue to fall to the judiciary to take the necessary steps to prod the legislature into fulfilling its part in upholding substantive equality.¹²⁶

Vishaka opens up a means by which the judiciary may be able to provide interim solutions to the deep-rooted structural inequalities in India.¹²⁷ In *Vishaka*, the Court issued sexual harassment guidelines that were to be binding upon employers until the legislature enacted a comprehensive sexual harassment law.¹²⁸ Following the decision in *Vishaka*, the Parliament introduced a sexual harassment bill that publicly acknowledged the Court's role in helping to

¹²⁴ Sood, *supra* note 18, at 845.

¹²⁵ Narula, *supra* note 9, at 322.

¹²⁶ For a discussion of the problems inherent in judicial policymaking, see text accompanying *supra* note 87.

¹²⁷ See Sood, *supra* note 18, at 843 (noting that Courts have extreme wide leeway in fashioning appropriate remedies in public interest litigation).

¹²⁸ *Vishaka*, *supra* note 83.

bring this matter to the notice of the legislature.¹²⁹ Although, as was observed by the Court itself, judicially imposed corrective measures may not be an ideal solution, they may in some measure alleviate the worst of the problems that exist in the employment sphere.¹³⁰ Such action on the part of the Court may also play a useful role in prodding the legislature into action.¹³¹ The legislature has often found it expedient to let the Courts take the first step in addressing divisive matters that have the power to backfire against legislators, who are directly accountable to the people.¹³² Whatever one may think of the legislature relinquishing its obligations in this manner, it might quite possibly be more willing to act when the Court has already confronted divisive issues in the first instance.

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

¹²⁹ Sood, *supra* note 18, at 872. The so-called Protection of Women Against Sexual Harassment at Workplace Bill remains pending in Parliament. Himanshi Dhawan, *Sexual Harassment Law May Soon Cover Domestic Workers*, THE TIMES OF INDIA, Jan. 12, 2012, <http://timesofindia.indiatimes.com/india/Sexual-harassment-law-may-soon-cover-domestic-workers/articleshow/11456584.cms>.

¹³⁰ See Sood, *supra* note 18, at 845-46 (noting that the public is strongly supportive of the judiciary's activism, particularly in light of the failure of the other branches of government to fulfill their obligations).

¹³¹ See *id.* at 844 (noting that the Court has on occasion directed the legislature to enact necessary laws through the vehicle of public interest litigation).

¹³² *Id.*, at 848.

classifications.¹³³ Judicial legitimization of regressive stereotypes has the effect of reinforcing social hierarchies that serve to devalue certain people at the expense of others.¹³⁴

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

To adequately account for the differences in social standing and access to opportunity between privileged and underprivileged groups, the judiciary should as a matter of general practice first look at cases through the lens of a substantive equality approach designed to dismantle those factors that operate to perpetuate the subordination of the disadvantaged. Formal equality should be applied only as a secondary approach, upon establishing that the relevant parties are in fact meaningfully similarly situated such that application of formal equality will not merely overlook existing structures of subordination.

A more effective approach to substantive equality in Nergesh *Meerza* and *Yeshawinee Merchant* would have examined more closely the ways in which the collective bargaining process operates to the disadvantage of the airhostesses. Such factors as the relative bargaining

¹³³ See Kannabiran, *supra* note 25, at 90 (“To the extent that they reflect and correspond with systems of social inequality, differentiation and classification may be the source of discrimination.”).

¹³⁴ Scholars have similarly lamented this judicial tendency to legitimize regressive stereotypes in legal contexts outside employment discrimination. See *id.* at 91 (observing, with regard to a case in which the Supreme Court upheld a statutory provision that empowered men, but not women, to prosecute those who committed adultery with their spouses, “[T]he court regret[ted] the fact that women are chattel within marriage and yet lock[ed] them firmly into the position of chattel by substituting constitutional morality with codes of public morality...”).

¹³⁵ See, e.g., *Javed*, *supra* note 24 (failing to consider the unequal burden on women imposed by a state ban on serving in public office after having more than two children).

power of the airhostesses within the union and the possibility that the same gendered expectations that originally led Air India to create separate male and female cadres might impose limitations on the airhostesses' ability to meaningfully negotiate would be relevant to this inquiry.¹³⁶

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

6. CONCLUSION

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

The legislature's failure to take decisive action to address discrimination in the workplace has exacerbated the problem. The employment discrimination framework remains extremely fractured, and the rights of the scheduled and backward castes and women are neglected. This inaction has forced the judiciary to take on an extremely activist posture to protect the rights of

¹³⁶ For an analysis of the inadequate consideration given by trade unions to the interests of women and other disadvantaged groups, see Hensman, *supra* note 109.

the disadvantaged, a circumstance which could prove problematic in certain situations.¹³⁷

However, in the absence of effective legislative policy, the judiciary should continue to further the cause of substantive equality in the manner employed in *Vishaka*.¹³⁸ This kind of activism on the part of the Court may provide interim relief and serve the purpose of prodding the legislature into fulfilling its part in upholding substantive quality.

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

¹³⁷ See Sood, *supra* note 18, at 847- 48 (highlighting the dangers of judicial overreaching, including lack of accountability on the part of judges and the potential loss of credibility that could result from the judiciary venturing into policy matters beyond its competence).

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