

Compensatory Discrimination: Is a Theory of Social Construction of Target Population in Public Policy Possible in India?

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Abstract

Schneider and Ingram (1997) have theorised that policy design in U.S. democracy is dependent on the social construction of the target population. The paper tries to analyse how the social construction of the target population happens in India, and how it is different from the Western context. The case study of compensatory discrimination policy in India has been used to demonstrate the factors affecting policy design in India. It demonstrates that as we go into the narrow details of any policy, in a democracy, the space for political entrepreneurship increases, despite all institutional constraints. One of the important factors highlighted is the politics of social construction of knowledge in India. A theorisation of the social construction of the target population might be helpful as an analytical concept in public policy, but it is incomplete without an understanding of the political economy of any given policy in India.

Keywords: Social Construction; Target Population; Knowledge, Compensatory Discrimination; Policy Design; Caste; Scheduled Castes; Other Backward Classes; Democracy

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1. Introduction

Some theories that have been prominent in the public policy area are pluralist democracy, policy sciences, public choice, and critical theories. In the '90s, Schneider and Ingram (1997: 10-11) were dissatisfied with the failure of these theories to establish a conceptual and causal link of where public policies go wrong in the United States (U.S.). Schneider and Ingram attributed this to treating all contexts alike, giving too much importance to one single value or single role of policy, and lack of focus on the substance of the design of the public policy.

In order to fill this conceptual gap in public policy design and provide a conceptual-analytical framework to study public policy, Schneider and Ingram (1997: 10) emphasised the importance of policy design. In particular, they identified the social construction of the target population as the guiding factor in understanding the flaws in policy design, and the relation between policy design and democracy.

It is the social construction of the target population that decides how benefits and burdens would be distributed in society. Schneider and Ingram divide the target population into 'advantaged', 'contenders', 'dependents', and 'deviants' depending on their political power and social construction. The theorisation is based on the context of U.S. democracy, and is largely able to answer how policies are designed in the U.S.

There have been questions raised on the theory, with Lieberman (1995) emphasising the need to take a historical-institutional view to understand policy design for a target group. There have also been studies conducted on the application of the theory of social construction and policy design (Pierce et al., 2014), and the theory is still being developed.

The purpose of the paper is to discuss whether the theory of social construction of the target population can be applied to the context of India. The entire purpose of Schneider and Ingram's work was to come up with a theory of policy design in a democracy; however, the theory still has to be tested in non-U.S. contexts, such as the Indian democratic process. Schneider and Ingram themselves emphasised that their theorisation is for a conceptual understanding of U.S. democracy. Hence, social construction and policy design work in Indian democracy cannot be assumed to be the same as in the U.S.

There are reasons to doubt how a conceptualisation for the U.S. would fit in the Indian setup. The Indian democratic setup is part of a wave of new constitutions in the Global South, that are transformative in character. They provide more space for policy-specific actions, compared to more liberal-based constitutions¹ of the global north (Mathew et al., 2019). But there are plenty of examples in the Global South, where democracy has not worked to the desired ends of socio-economic transformation as envisioned in their constitutions. The Indian constitution, despite its transformative character, has failed to deliver on many accounts.

First, the institutions have not worked the same way they work in the U.S. and other Western countries. These are imperfect institutions still looking to find their autonomy. Internally also, they

have not been able to leave the colonial legacy that they have borrowed and continue despite all attempts (Gooptu, 2012). For example, the institution of the Governor in the Indian democracy is much more political than it was originally conceived. This inability of institutions to perform at par with their Western counterpart despite of same procedures and constraints demonstrates that their role in social construction cannot be taken the same as the U.S.

Second, the social cleavages in Indian society have both similarities and dissimilarities with the Global North. The politics of class, caste, regionalism, nationalism, and majority-minority conflict in India is different – and arguably more significant – than in the West. Especially, since we are going to talk about the process of social construction in this discussion, understanding these cleavages, and how they intersect on various levels, becomes important to make sense of the policy design process in India.

Thirdly, the political process in India also works differently from how it does in the West. The political culture, the relation between the executive and the citizens, and the means of political mobilisation and leadership, all work differently in India. Often, the political process produces results that are highly unequal and tilted towards the powerful, but at the same time product of a robust democratic process (Mehta, 2001). At all critical moments in the Indian democracy, the strengths and the weaknesses of democracy both come up, making it difficult for an analyst to make sense of whether a given policy is reformatory or regressive.

Fourth, the ideological contestations that take place in Indian politics do not have a parallel in the West. Normative ideas shape social construction. It is thus the ideologies that decide the main framework of the policy action, with the evidence for policy action coming later in the debate. India has its own take on nationalism, representation, secularism, and social justice. These ideas have been contested, transformed, and evolved over the years (Chibber and Verma, 2008). It is these ideas that have shaped the core of social construction, that eventually leads to policy action.

Fifth, policy design and social construction are not always the product of a top-down process, they can also be a product of bottom-up mobilisation. Social movements and civil society play an important role in shaping policy architecture. It depends on the ability of the groups to mobilise, lobby, put pressure, and gain support from political quarters, which allow for a change of policy in their favour. It is very different from how lobbying takes place in the West; both, the groups agitating and their demands, are different. The way mobilisation and lobbying are done are also different, making policy designers act innovatively to assuage the demands of the mobilised group.

In order to study such a diversity of features of Indian politics and democracy, and fit it into the framework of social construction and policy design, we have to study a policy that is at the heart of many of these features. Obviously, not every aspect of Indian democracy can be analysed by selecting a single policy; a policy that can analyse the theory of social construction should be selected carefully, in order to go through all the features of this theory, and critically analyse it for the context of Indian democracy.

This article attempts to do so by looking at the policy for compensatory discrimination in India. The compensatory discrimination policy, also known as the reservation policy, is a strong form of affirmative action. It provides reservation in government services, educational institutes, and legislatures to groups that are socially and economically backward. There are multiple reasons for choosing the policy as a case study.

First, keeping in mind the transformative character of compensatory discrimination policy in India, which has found a place in the Fundamental Rights of the Constitution. While for Scheduled Castes (SCs) and Scheduled Tribes (STs), clear instructions were provided in the Constitution, the same was left to interpretation in when it came to any other 'backward classes'. Who were the backward classes? The answer was left open the interpretation (Kannabiran, 2012). The politics of social construction has been allowed immense opportunity to interpret who deserves the benefits of compensatory discrimination, and policy designs have been undertaken to fulfil these interpretations.

Second, caste is in itself of a unique character to India. In other countries, social cleavages are typically on the basis of class, ethnicity, or other easily distinguishable criteria. Caste in India, on the other hand, has both a secular and a religious character. The problem with caste is that its terminology (Beteille, 1996), its basic character (Berreman, 1971), its colonial legacy (Dirks, 2002), all are debated, and still there is no consensus in the disciplines of sociology and social anthropology over the exact character of caste. The lack of consensus provides ample space for the social construction in policy design to take place, with each designer choosing their own idea of caste.

Third, there is no doubt that caste despite, being an age-old custom, has adapted to the new-age custom of democratic politics. Rajni Kothari (1970) has emphasised the integrational, secular, and consciousness-generating aspects of caste. It is contested within the realm of political science whether the importance of caste in politics, and the politicisation of caste, is good or bad for Indian democracy. The state policy of compensatory discrimination, in the form of quotas, has led to further politicisation of caste (Sheth 2014). Caste-based reservation has become such an integral aspect of Indian politics, whose importance in social construction and policy design cannot be ignored.

Fourth, it is the Indian idea of social justice, that aims to tackle discrimination and historical injustice instead of deprivation- as in other affirmative action policies- is at the heart of the compensatory discrimination policy. The normative idea of social justice has dominated the policy of compensatory discrimination, which is eventually accompanied by ideas of merit and efficiency. Indian legislatures, judiciary, and commissions have debated these ideas at length (Bajpai, 2009), but to no definite conclusion. Since caste is more foundational in Indian society and is accepted as a socio-religious norm by even those it discriminates against, it makes conventional ideas of justice, equality of opportunity, and egalitarianism redundant. It allows new ideas of social construction and policy design to be demonstrated.

Fifth, India has witnessed mobilisations and counter-mobilisations with respect to the compensatory discrimination policy, at both the State and the Central level. The effect of these mobilisations on the working of the compensatory discrimination policy is often disputed. The ability

of these mobilisation to affect policy designs, change the perception about target populations, or start a counter-movement, all put the theory to test.

Sixth, no Indian citizen is untouched by the policy of compensatory discrimination. The basis of the policy is identifying those who are backward in India. There is no single criterion for identifying backwardness in India. With a plethora of criteria available, namely, educational, social, cumulative, under-representation, economic, geographical, etc. (Galanter, 1984: 222-279), there is a high chance that any Indian citizen can fall (or claim to fall) within these criteria. The anti-reservation protests and case laws at different points in Indian history demonstrate that those not included in the benefits of reservation have a problem with the policy itself (Balagopal, 1990).

As the paper goes through the important details of the theory in question, it would come out that most of the important propositions made by the theory can be examined through the compensatory discrimination policy in India. The purpose is not to neatly fit the case study in the theory; rather, this paper aims to raise critical points in the theory, thereby enabling further discussions on the theory.

2. Testing Theory Through the Case of Compensatory Discrimination Policy

The central proposition of the theory given by Schneider and Ingram (1993: 102) is that political power and social constructions combine to fit groups into ‘deserving’ and ‘undeserving’ target populations. The theory describes the process of policymaking as degenerative in character. A degenerative policy process increases inequalities, disregards democratic values, leads to citizenship getting distorted, and places little constraint on ethical, factual, empirical, or scientific evidence (Schneider and Ingram, 1997: 104-105).

The theory proposes that, rather than focusing on the issues that conventional policy theories emphasise, we as policy analysts should concentrate our attention on understanding the political opportunities and risks that a political leader faces while designing the policies. The underlying assumptions and social constructions in studying policy designs would be the best guide to understanding policies in a democracy (Schneider and Ingram, 1997: 104).

Many political scientists have already alluded to the political power of the target group (Stone, 1988). It is the focus on the social construction of such target groups that is the unique aspect of Schneider and Ingram’s theory. When it comes to the policy of compensatory discrimination, the question to be asked is: does the policy design divide the population into deserving and undeserving of such discrimination?

Key Questions Raised by the Compensatory Discrimination Policy

The compensatory discrimination policy presents multiple contradictions, the first of which shows up in the division of the target population into deserving and undeserving. On one level, it can be argued that all policies that are not universal in conceptualisation divide the target population into

deserving and undeserving groups. There is nothing inherently wrong with the conception, particularly when we are talking about a policy that is based on correcting historical injustices or bridging the gap between the privileged and the marginalised. It is inevitable that the policy would divide the target population in order to provide redistributive justice to those who have been deprived of equitable distribution of opportunities right from the beginning of their lives (Chandhoke, 2009).

The question that follows in such circumstances (and which supposedly Schneider and Ingram are also asking) is whether there has been manipulation in the social construction of who is deserving and who is undeserving. The deserving and underserving, for India's compensatory discrimination policy, have been divided on the basis of caste. Caste was considered the basic criterion on which backwardness had to be determined. Though this assumption can and has been questioned on multiple counts, it cannot be questioned that caste can be set up as at least the initial basis of finding who is deserving. Within the backward castes, who should be left out based on other kinds of non-inclusion criteria can be left for later questioning.

The debate in India has rarely revolved around the lines that caste is not an essential feature on which backwardness can be determined. The dissenting introduction by Kaka Kalekar in the First Backward Commission report in 1955 illustrates the point well. Kalekar was opposed to the idea of caste-based reservation because he was worried about the perpetuation of caste-based differences in India (First Backward Commission, 1955), which would keep India divided.

The basis for the rejection to the recognition of caste-based backwardness by the Central Government at that time was due to a lack of objective criteria adopted by the First Backward Commission, and the extension of benefits to too large a population (Yadav, 2002). While rejection of the very idea that backwardness should be determined with caste as its basic unit was put up by the judiciary in the 1960s, it soon came to be accepted as a determining criterion for backwardness in the 1970s (Jaffrelot, 2003:246).

There were reasons for not being able to deny the policy step of caste-based reservation. Caste is a social reality in India. It was so deeply seated, that there is hardly any way to deny it. Even common-sense understanding accepts the deprivations that accrue from the disability of the caste system. It does not require thorough research by experts to establish the point.

The transformative constitution recognised this social reality. Transformative judgments made use of the transformative features of the Constitution. *State Of Kerala vs N. M. Thomas* (1975) played an essential role in changing the idea of 'equality of opportunity' from a procedural notion to a substantive one (Bhatia, 2019). The social reality of caste had to have effects on the political reality of democracy as well (Kothari, 1970).

It is at this moment, that we need to go back to theory to re-engage with it. The theory of social construction of the target population through policy design will find it harder to explain the epochal changes in social construction of target population. Especially, in the case of the Global South, where historical injustices have a long history, it was the democratic change that brought about a reversal in ages-old historic injustice. It was not limited to individual rights as was the case in liberal constitutions,

but transformative constitutions recognised group inequality and strived for its remedy. It also needs to be taken into account that there are some social realities that cannot be manipulated. The theory would need to have space for positive changes in society, against the backdrop of undoubtable social realities.

The Space for Political Manipulation in Social Construction

The theory also needs to recognise that those constructed as deserving are actually deserving of the basic policy conception, and there is no way that the advantaged are benefiting from it. There are a few reasons for this claim.

1. The highest form of affirmative action was imagined for the SCs and STs. A weaker form of affirmative action could have also been provided, but the adoption of the radical quota system points to the willingness to take a step towards substantive equality and not dilute it by just procedural methods, which could eventually benefit the advantaged or contenders.
2. It is important to note that caste is considered an essential part of the Hindu social system. In Hindu society, the SCs and STs are not considered blameless for their plight. On the contrary, they are considered to be born in their caste because of their karma (Shah, 1991). There is a religious belief also in the mix, where a democratic republic is being imposed on a divided society with its own set of beliefs. Third, the power of the dependent advocacy group can be debated. Schneider and Ingram (1997: 109) have stated that the advocacy groups of dependent groups are not as strong, as compared to those constructed as advantaged or contenders. But Ambedkar won concessions for SCs through the Poona pact, was the main architect of the Constitution that had a transformative character, and that too without strong consistent pressure group tactics. Here we had the strong leader of a group that was neither politically empowered, considered politically deserving but religiously undeserving, who did not have many frontbenchers in Parliament, yet were able to gain strong policy concessions –more than what would be provided by a liberal constitutional order.

The discussion points out that the role of politicians to manipulate the policy design to suit political gains is also limited; they cannot discard social reality, and have to work within its constraints. How binding are these constraints for politicians? While some features of policy design can have large restrictions, in others there can be relatively a free hand to mould the policy according to political convenience.

This paper proposes that the space for political manipulation is not as simple a concept as theorised by Schneider and Ingram. In making these moves, the politicians have to work within the constraints discussed above, but also manoeuvre as much as possible in order to accrue political benefits out of the situation. Hence, this space left for political manipulation can help us understand how a policy devised for social justice can succumb to the charges of being a degenerative public policy.

Social Construction in the Case of OBCs

How might the original idea of the policy design be stretched to suit political comfort? The best way to understand would be to move beyond compensatory discrimination policies for SCs and STs and look toward the Other Backward Classes (OBCs).

Before focusing entirely on OBCs, the argument for the same kind of strong affirmative action policy for the OBCs as the SCs and STs is much more disputed, making the role of social construction in such cases subject to a higher degree of manipulation. The fact that in the present date, reservation is the only policy argued for any group that is marginalised, points to the larger political process where reservation has come to be seen as the panacea for the group that is categorised as marginalised. It is a depiction of how the process of reservation has been politicised, as anything below reservation is hardly part of the policy debate.

To start with, reservation for the OBCs was not as guaranteed as it was for the SCs and STs. One of the reasons for such an understanding was that OBCs as a section were not at the bottom of the Hindu social hierarchy. The SCs suffered from the social disability of untouchability, making the need for reservation for them undisputable. The case was not similar for OBCs, who suffered from slightly less-crippling social restrictions. The group fell above the SCs in the social hierarchy, and was more advantaged than them. It made their categorisation as dependents not as easy as it was for SC (Galanter, 1984: 154-158). The Constitutional moment also left the debate on OBCs open-ended and ambiguous, thus not granting them as much protection as the SCs.

At the national level, the consensus on OBC reservation did not come to fruition because of the fear of exacerbating caste base differences in a democratic country (First Backward Commission Report, 1955). Austin (cited in Jaffrelot, 2003) claimed that it was due to the absence of a political leader like Ambedkar that OBCs' demand for concessions was not able to be mobilised.

It was left up to the state governments to decide their criteria of backwardness, but with a guideline that they should not take caste as the basis for reservation (Yadav, 2002). While pragmatic, this judgment of the central government runs into difficulty with the Constitutional mandate that provisions can be made for socially and educationally backward sections of the society, per Articles 15(4) and 16(4) (Sitapati, 2016). It is this ambiguous constitutional mandate that came to the aid of state governments when they decided to provide reservations for OBCs in their respective states, in the period before the Mandal Commission report was submitted and then implemented.

In the period 1960-1980, the state governments and the courts played a determining role in guiding the social construction of the target population with regard to the compensatory discrimination policy. It was this exchange between state governments and the courts that would determine how the social construction would actually take shape. Going through this phase would help us understand how social construction comes about.

The phase can be called the battle of normative ideas over how backwardness should be conceptualised. The backward commissions appointed by the states stuck to the principle of caste in deciding backwardness. While the Supreme Court in 1963, in *M R Balaji vs State of Mysore*, refused

to recognise caste as the only criteria for reservation, it did state that caste was one of the relevant factors for determining the class of backward citizens.

This debate also put to rest the idea that special provisions were devised for a class of citizens rather than individuals. Since it was a provision that was also found in the Constitution, the levers to manipulate the interpretation were minimal. This shows how policy steps taken by politicians are somewhat restricted by the Constitutional provisions.

It is only the narrower question of how this backwardness of classes should be determined that had any scope left for interpretation. It is in this place that the scope of political entrepreneurs to make their moves for political gain increased. Would the politicians get a free hand in deciding what criteria to put in place to decide which communities are constructed as backward in the State? The politicians, despite knowing the electoral advantages that can accrue to them if they are seen as providing benefits to a section of marginalised who form a relatively large share or majority of the population, cannot arbitrarily select the communities to which preferences need to be given. This points to the need to turn the question of “how should backwardness be determined” and “who should be classified as backward” into a knowledge question.

‘Scientific Evidence’: The Social Construction of Knowledge in Determining Target Groups

Even in post-independence India, politicians needed to show themselves as neutral when trying to implement a social justice policy of reservation (Smith and Larimer, 2009). The Central government, and then a slew of state governments, appointed backward commissions with the mandate to come up with an objective, neutral, and scientific framework for determining backwardness, the backward communities, and the quantum of reservation for them. The use of such criteria would make it harder for questions to be raised on the decision of granting reservations to the communities selected by the backward commissions.

Table 1 (below) shows the chronological order in which the discourse on the need for evidence for bringing about a policy on compensatory discrimination for OBCs has evolved.

Table 1: Evolution of discourse on evidence requirement for compensatory discrimination

Reports	Why focus on objective and scientific criteria?
First Backward Commission Report (Kaka Kalekar) Report 1955	The central government did not accept the recommendations of the commission on the ground that it had not applied any <i>objective tests</i> for identifying backward classes (Yadav 2002). “... Kaka Kalekar report suffers from <i>great flaws of methodology and serious internal contradictions</i> .” (Second Backward Commission Report 1980)
Kumar Pillai Commission Kerala (Commission for Reservation of Seats in Educational Institutions) 1965 Terms of Reference (ToR)	The ToR clearly states that the Commission was set up in light of the Jacob Matthew vs State of Kerala judgment. R. Jacob Mathew vs The State of Kerala 1963: “nevertheless there is an obligation on the part of the State Government, to <i>make an elaborate investigation, collect the necessary data, and examine the said data in a rational and scientific way, and then make an objective approach</i> , before taking a final decision.” The need for <i>scientific evidence</i> to have the policy is repeatedly discussed in the judgment.
M R Balaji vs State of Mysore 1964	“The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an <i>elaborate investigation and collection of data and examining the said data in a rational and scientific way</i> .”
Lokur Committee (Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribe) Report ToR (1965)	“The Resolution observed that the present lists of Scheduled Castes and Scheduled Tribes did not show a uniform pattern and several anomalies had been brought to the notice of Government and that it was therefore very necessary that the lists of Scheduled Castes and Scheduled Tribes should be revised “ <i>in a rational and scientific manner</i> ” (emphasised by the report itself).
Nettur P Damodaran (The Backward Classes Reservation) Commission Report 1970	Set up on the order of judgment in V. Hariharan Pillai vs State Of Kerala, <i>cited the Balaji judgment on need of scientific evidence and directed the State to conduct a detailed survey</i> .

State Of Andhra Pradesh vs U.S.V. Balram 1972	<p>“If the Commission has only to go on doing the work of collecting particulars and materials, it will be a never-ending matter. In spite of best efforts that any commission may make in collecting materials and datas, its <i>conclusions cannot be always scientifically accurate</i> in such matters. Therefore, the proper approach, in our opinion, should be to <i>see whether the relevant data and materials referred to in the report of the Commission justify its conclusions.</i>”</p>
Havanur (Karnataka Backward Classes) Commission Karnataka 1972 ToR	<p>“In order to effectively implement the Constitutional intendment and make available the benefits of the special provisions that may be made to the really backward classes of citizens so that their social and economic interests are promoted, it is considered necessary that the determination of the backward classes should be done on a scientific basis, adopting relevant and appropriate criteria. This involves collection of statistical data and a detailed enquiry into the matter.” (Government of Mysore Order 1972)</p> <p>Somashekhar Veerappa B. Murgod vs The State Of Karnataka 1979: The Court was satisfied that multiple tests had been applied to identify the Backward Classes based on <i>data obtained on scientific basis by Havanur Commission.</i> (cited in the next backward commission report of Karnataka)</p>
Chhotey Lal Pandey And Ors. vs State Of Uttar Pradesh 1978	cited the same lines from Balaji in 1978
Akhil Bharatiya Soshit Karamchari Sangh vs Union of India 1980	<p>“But the judicial process while considering constitutional questions, must keep politics and administrative alternatives as out of bounds <i>except to the extent economics, sociology and other disciplines bear scientifically</i> upon the proposition demanding court pronouncement.”</p>
Mandal (Second Backward Classes) Commission 1980	<p>Mandal reports cite both the Government and the Supreme Court which have “emphasised <i>the need for evolving such criteria on the basis of field investigations and other independent evidence.</i>”</p> <p>Mandal report specifies that its report was designed with help of top scientists and specialists in their fields. Consulted with Research Planning Team of sociologists and Panel of Experts led by M N Srinivas.</p>
K.C. Vasanth Kumar vs State of Karnataka 1985	<p>“It is of paramount importance to say that this question of determining backwardness of classes requires <i>scientific investigation.</i>” “The state of backwardness of any class of citizens”, says Sen, J.’ in Vasantha Kumar’s case, “is a factual situation which needs investigation and determination by</p>

	<i>a fact-finding body which has the expertise and machinery for collection of relevant data</i> " (cited from second backward commission report of Karnataka)
Karnataka Second Backward Commission 1986	<p>"The Karnataka Second Backward Classes Commission takes this opportunity to express its grateful thanks to the Government of Karnataka for entrusting this onerous task of reviewing the existing list of Backward Classes in order to identify afresh the Backward Classes on the basis of a scientific survey and to recommend to the Government the list of Backward Classes under Art. 15(4) and 16(4) of the Constitution of India."</p> <p>ToR: "The Commission shall make a scientific and factual investigation of the conditions of the Backward Classes in the State and recommend specific measures for their advancement."</p> <p>The Third Karnataka Backward Commission also had the same condition of scientific and factual evidence.</p>
J A Ambashankar Commission (Second Backward Commission of Tamil Nadu) 1985 ToR	"The Commission shall make a <i>scientific and factual investigation</i> of the conditions of the BCs in the State and recommend specific measures for their advancement."
Indira Sawhney judgment 1992	<p>Contestation whether the Mandal report was scientific or not. Petitioner claimed that it was scientific, while respondents talked about its scientific validity.</p> <p>"It is crystal clear that the Commission only on the basis of the <i>galaxy of facts unearthed and massive statistics</i> collected [by] it, has made its recommendations on a very scientific basis of course taking 'caste' as the primary criterion in identifying the backward class in Hindu society and the occupation as the basis for identifying all those in whose societies, the caste system is not prevalent."</p>
T. Murlidhar Rao v. State of Andhra Pradesh 2004	"The report, in our considered opinion, is vitiated for the reason of not taking relevant factors into consideration. It is also vitiated for the reason of non-application of mind. We cannot help but observe that the Commissionerate acted in undue haste in submitting the report. The Commissionerate failed to realise the <i>complex nature of investigation and enquiry that was required to be made. No scientific or reasoned</i>

investigation or enquiry has been made. In the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The approach adopted by the authority is improper and invalid.”

“The Backward Classes can be identified on the basis of. a caste which is a social class in India provided it is identified to be socially and educationally backward for the purposes of Article 15(4) and backward for the purposes of Article 16(4). There are no legal or constitutional impediments for identification of the Backward Classes with reference to caste. However, the requirement is that a *rational and scientific* criteria must be evolved for determining backwardness and that criteria must be applied to find out whether any caste, occupational groups, classes or sections of people qualify for classifying them as Backward Classes. If the criteria evolved and applied for identification of the Backward Classes is found to be improper and invalid, then the classification of socially Backward Classes based on that criteria will have to be held to be inconsistent with the requirements of Articles 15(4) and 16(4)”

Major Sinho Commission (Commission for the Economically Backward Classes) Report 2010	The government had argued that EWS reservation had been granted on the basis of <i>scientific criteria</i>
K. Krishna Murthy & Ors vs Union of India 2010	“We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State Legislations since there is <i>no contemporaneous empirical data</i> . The onus is on the executive to conduct a <i>rigorous investigation</i> into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment.”
Jarnail Singh v Lacchmi Narain Gupta 2018	The Court also reiterated that the states must provide ‘quantifiable data’ in order to prove inadequate representation of SC/STs. However, the ambiguity in the meaning of ‘ <i>quantifiable data</i> ’ has caused difficulty for states to satisfy the conditions laid down in Jarnail Singh.

Jaishri Laxmanrao Patil v Chief Minister, Maharashtra 2021	<p>“The interpretive exercise carried out in Indra Sawhney saw this court enjoining the Central and State governments to set up some permanent mechanisms in the form of commissions, to identify SEBCs through a <i>systematic and scientific manner</i> and carry on regular periodic reviews.”</p> <p>“The existence of a permanent body, which would objectively, without being pressurised by the dust and din of electoral politics, consider the claims for inclusion, not based on ad-hoc criteria, but upon uniformly evolved criteria, with the aid of experts, in a scientific manner, be in consonance with the constitutional objectives...”</p>
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This brings us to the discussion of how the social construction of knowledge is done. The social construction of knowledge has also been a point that has been given attention by Schneider and Ingram (1997). According to them, the social construction of knowledge is heavily dependent on the social construction of the target population. If the decision-makers feel that the knowledge would not benefit them politically, they tend to ignore the evidence. But if they feel that the evidence is in favour of the already established social construction, the evidence is readily accepted (Schneider and Ingram, 1997: 12).

The problem with this theory is that it is too simplistic, and does not uncover how evidence is produced, how it turns into policy, and how natural science evidence is starkly different from evidence in social science. The example the paper uses here takes us into the world of social science, where evidence is not that readily accepted and value choices have to be much more than in natural sciences. Scholars, in order to show that natural science evidence can also be manipulated (Douglas, 2009), have often ignored the role of social scientific evidence in policy design.

As caste eventually came to be accepted as the principle on which reservation could be granted, the uncertainty over the tests to be done in order to find the backwardness of the community (in this case, caste) became the next narrower set of policy design principles that came to be debated.

The difficulty of determining backwardness can be ascertained from the fact that no standard tests for determining backward castes have evolved. It is usually up to the backward commissions to decide which parameters they want to consider relevant to decide the social, economic and educational backwardness of a caste, that separates it from the forward castes.

There has been relatively less interference by the Courts in these issues, like selecting the specific criteria for determining backwardness. On one level, it could be perceived as the Courts' reluctance to totally control how the process of determining backwardness would take place, thus intruding into the authority of the executive. On looking deeper, from the social constructivist lens, it must be known that the specific parameters of testing would only be limited to the academic circles, and would not become a point of debate among general public. Hence, the study which has adopted a few tests can be taken as an acceptable study and the challenge to it refuted by the Courts.

A more critical issue for the Courts is the presence (or lack thereof) of reliable data to accept the claim of backwardness as claimed by the backward commissions. Before the L.G. Havanur report of 1975 for the state of Karnataka, there was no socio-economic survey conducted in order to determine the backwardness (Hebsur, 1981). Even before the conduct of the socio-economic survey, the reports continued to be accepted by the State Governments, as they suited their political goals; for their part, the Courts which remained unsure of what 'objective and scientific data' actually meant. Despite the continued use of the term, the lack of data and an inconsistent attitude of the Courts continued.

Evidence and Interpretation: Backward Commissions and Courts as Sources of Legitimisation

It is important to note that scientific and objective data is subject to interpretation. On one end of the spectrum lies surveying the Government departments and educational institutes and showing that the seats have not been filled in proportion to the population of the community. The population of the community is determined from the 1931 census. In some cases, this much evidence is enough to convince the Courts of backwardness.

On the other end of the spectrum is the conduct of a socio-economic survey with varying sample sizes. The backwardness of the communities is claimed on the social, economic and educational backwardness of the whole population. The difference between the rigour of the two approaches is clear.

The stance adopted by the backward commissions can fall anywhere between the two positions. The Courts have been inconsistent in demanding rigour and that has opened the chances of manipulating the results more and more (Shourie, 2012). Rather than an effort to become an objective and scientific report on the backward classes in the State, the setting of backward commissions has become a means to legitimise the extension of reservation to a particular section, to which the political class wants to distribute the benefits. Disagreeing with Sunstein (1998), incomplete theorisation by the Courts can be termed as the reason for the policy process degenerating, but within the institutional limits.

Finally, the Courts also do not refrain from setting arbitrary red lines over how the backward commissions should proceed in process of knowledge production (Kumar 2008). The 50% weightage to be given to marks, ostensibly in order to maintain the efficiency and keep the fairness of competition, or the guideline that divergence between communities' backwardness and state average be 50%, given by Balaji have become touchstones on which each policy is tested (Second Backward Commission Report, 1980).

Preventing reservations to cross the 50% mark has come to be accepted as an important factor that could result in acceptance or rejection of the report. It is also important because it affects the people who are not included under the compensatory discrimination policy, as it increases or decreases opportunities for them. The internal discussion on the approach the backward commission should

take is a concern of a smaller section. All these judgments rest on personal judgments, rather than any objective or scientific criteria.

While the backward commissions were playing the role of determining how knowledge was socially constructed, under the watchful but inconsistent eyes of the Supreme Court, they were also making sure that the policy with the potential of degeneration, does not completely succumb to vote bank politics. The submission of the Mandal Report in 1980, and its acceptance ten years later, shows some truth in the theory that politicians would only accept knowledge generated when they feel it is advantageous for them.

The consequent Supreme Court judgment in the *Indira Sawhney vs Union of India* case on the Mandal report changed the ways in which compensatory discrimination was being socially constructed in India, becoming the touchstone of legitimacy. The study of the judgment and consequent politics allows us the chance to discuss more aspects of the theory of social construction of target populations, especially how the change in the social construction of the target population takes place.

First, the OBCs can be termed as a dependent population, but placed higher in the social hierarchy, with a higher social and political standing. In fact, many political scientists would hesitate in accepting that many OBC groups should be categorised as dependent (Hasan, 2011). According to them, due to land redistribution and the green revolution, it was the peasant castes (here the OBCs) who gained the most from the changes, and they no longer remain dependent (Frankel, 2005: 388-433). Also, seeing the political power they have gained in the second democratic upsurge (Yadav, 2000), their classification as dependent is further contested.

It can be concluded here that the extension of reservation to the OBCs is largely a political calculation, done in order to win over their votes, given that they comprise the majority in the country, and in most of the states as well.

Second, in order to divide the deserving from the undeserving, the Supreme Court came up with an ingenious solution. It accepted that the backward classes can be determined on the basis of caste. But it also added a means test only for those particular castes classified as OBCs. The process of dividing social construction is working in this case (Wagner and Morris, 2018).

While, the caste as a whole was categorised as deserving, because of their social, economic and educational backwardness, the rich individuals and families among them were excluded from the class, thus dividing deserving and undeserving sections within the same caste. This was done as a recognition that OBCs are not as dependent as the SCs and STs, and they need to be further divided based on class.

Third, the acceptance of the Mandal commission report with a few tweaks represents a tradition the social construction of knowledge had arrived at in India. The study done by the Mandal report came to be accepted without much questioning of its methods. The Supreme Court refused the requirement of a perfect report, despite the Mandal report itself accepting that their study did not have the rigour of proper research. It set the benchmark for what social construction of knowledge is

acceptable. Further liberty was taken in setting the criteria for the creamy layer, which if given close scrutiny did not have an objective basis behind it.

Fourth, after the Indira Sawhney judgment, a string of Constitutional amendments were made in order to override some of the orders of the Court (on the aspect of the backlog of vacancies that were not able to be filled, and the aspect of seniority of candidates appointed to reserved posts). The state was determined to be seen as being favourable to the most dependent of the society, and they felt that even a slight doubt in the minds of the target electorate (i.e., that these governments have not been favourable to them) might be electorally disadvantageous.

Finally, the inclusion and exclusion of communities in the OBC list are usually uncontroversial. It is done by the permanent Central and State Backward Commissions, which were formed on the order of the Supreme Court. Usually, these are small caste groups, where the process of social construction is neither as politically fraught nor as methodologically contentious, and their placement in the OBC list is not opposed. Instead of large-scale state-wise surveys, sample surveys of a particular community are typically used to justify the inclusion of the group by the backward commissions.

Though it must be noted that the permanent commissions have never looked into who should be excluded from the lists of OBCs, thus signifying the politicisation of the process. In 1965, the setting of Lokur Committee was a signal that the State had a political will to exclude the undeserving. Later, no legislature or executive took any step for exclusion, thus making the Supreme Court step in and dictate a criterion for excluding the undeserving, given the objectives of compensatory discrimination. It was a way for the Supreme Court to establish that it would only cater to the deserving, and to establish itself as more rational and objective than the politicians.

Reservations for Dominant Groups and ‘Economically Weaker Sections’

The inclusion of every community has not been as easy as that of smaller (politically irrelevant) groups. The reservation to politically dominant groups, such as Jats in Haryana, Patels in Gujarat, Marathas in Maharashtra, and Kapus in Andhra Pradesh, has led to the communities identified as contenders asking for the benefits associated with the dependent section (Deshpande and Palshikar, 2017).

Though the political mobilisation of the dominant communities has led to reservations being offered to them without disturbing the quota for OBC, it has failed to pass the test of the courts. This in turn is because the backward commissions, which are mandated to build the knowledge framework to justify reservations for the community in question, have not been able to provide such justification.

The extension of reservation based on caste beyond 50% was crossing the established institutional red line. The very idea of extending reservation to groups outside the OBC fold is a recognition that the middle castes are more well-off than those categorised as OBCs.

In order to escape the institutional red line, dominant castes have demanded reservation with the OBC quota. In turn, State governments have hesitated to provide the dominant castes quota within the OBC section, as it might alienate the castes already listed in the OBC list. Despite these

unfavourable constructions, governments continue to extend reservations within the OBC category also, only for it to be held unconstitutional by the courts, as in the case of Jat reservation. Jat inclusion in the Central list of OBCs in nine states was quashed by the Supreme Court in *Ram Singh vs Union of India* (2015). Jat inclusion in the State list of OBCs in Haryana was quashed in *Murari Lal Gupta vs State of Haryana* (2015). Jat of Dholpur and Bharatpur in State list of OBCs in Rajasthan was quashed in *Ratan Lal Bagri vs State of Rajasthan* (2017).

As the dependent categories of SC and OBC have now been firmly established, there remains little space for political manipulation. The process of subdivision of target populations has also started in many states in India. The demand for subdivision of SCs reservation between Malas and Madigas (Sambaiah, 2009), the demand of subdivision of OBCs reservation in Uttar Pradesh (Rashid, 2021), demand for quota specifically for Vanniyar caste within the Most Backward Classes in Tamil Nadu – these are all examples where subdivisions of the target population are attempted for electoral gains. When the ability to extract benefits out of the current arrangement is lost, political entrepreneurs and pressure groups find new ways (like subdivisions) in order to gain benefits from one or the other section of the population.

The coming of reservation for the Economic Weaker Sections has been often seen as an inflection point in the policy of compensatory discrimination. Deshpande and Ramchandran (2019) have argued that it completely overturns the original logic of reservation. The coming of the EWS reservation, providing quota to upper castes, is a form of social policy learning by the executive; despite a long-term demand from the upper caste, the goal of the policy would change only now (May, 1992).

Some scholars fear that this might change the social construction where economic basis might become the basis for reservation, in the process delegitimising caste-based backwardness (Kumar, 2019). In fact, the change would still be catering to the dependents, but in a different form and with a completely different normative basis.

The issue of reservation is not limited to public employment and education. While SCs and STs have always had political reservations, the same is not the case for OBCs. It shows that the same kind of construction is not necessary for all fields. States and Centre maintain a different list of OBCs, which means dependents are different for the States and the Centre.

Reservation for OBCs was first limited to public employment, then was extended to education, but has not been extended to political reservations. While some states have argued for political reservation at the local governance level, the same saga of reliable data has prevented the call for political reservation from crossing the judicial hurdle (Zagade, 2022). It is interesting to note that the issue of women's reservation in Parliament is stuck, because OBC parties and groups want the women's reservation to be subdivided, where reservation for OBCs is also there within the women's quota. It shows the varying ways in which social construction works.

3. Theoretical Restructuring in Order?

The exercise conducted in the paper through the case study can throw light on two features related to the social construction of the target population. First, the need for serious reconsideration of whether the theory of social construction of the target population can be as simplistic as devised by Schneider and Ingram. It is useful as an analytical concept, but the more we enter into the different layers of the policy, the more the social construction of the target population becomes questionable and contested.

Second, in the democratic setup of the U.S., social construction might be a helpful device to explain how policies degenerate in a democracy. Many similarities were found in the conception that would hold true for any democracy. The clear division between deserving and underserving, the role of institutions, and the entrepreneurial spirit of the politicians as observed in India are distinct from the patterns observed in the U.S. The historical, political, social, and economic system underlying how India works make it impossible to divide the target population into neat categories, as was conceptualised by Schneider and Ingram in the case of the U.S.

Third, caution should be practiced while establishing a direct correlation between how the social construction of knowledge impacts the social construction of the target population. In India, as depicted, the social construction of knowledge could be a state-sponsored project. These state-sponsored projects do not always work as desired, and might lead to some undesired consequences for the states. Similarly, any social construction of knowledge needs to be studied independently to understand if and how it has an impact on policy. Without understanding the process of the social construction of knowledge, predicting its impact on policy is not possible.

The paper was an attempt to bring out many features of how the social construction of the target population takes place, which tends to get hidden in broad conceptualisations. It is necessary to go into the depth of each and every narrow detail of a policy design in order to understand the complexities of social construction. It will not only help integrate other factors into the policy design, but also help policy theorists to come up with better policy theories.

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NOTES

¹ While liberal-based constitutions emphasised on negative rights, the new constitutions in the Global South gave space for positive action. The historical development and contextual considerations have also led to differences in the design of the Constitutions. The most important of them is that U.S. is a federation of existing units, and India is a union with federal characteristics.