Bolstering Female Labour Force Participation Rates in India: Lessons from The Canadian Employment Equity Model

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ABSTRACT

Poor female labour force participation (FLFP) and occupational ghettoization of women workers is a critical problem across the globe. The Indian FLFP rate has been steadily declining making the country one of the worst performers globally. In the stratified Indian society, the intersection of gender and caste makes FLFP a complex socio-legal issue that is yet to be confronted by the Indian Government in its entirety. In contrast, Canada has one of the highest FLFP rates worldwide with the Employment Equity Act as a 'proactive strategy' to target systemic discrimination against women and other minority workers. Therefore, the principal questions that the thesis addresses are how we can bring more women workers within the fold of decent work in India and how we dismantle occupational ghettos created along the lines of gender and caste in Indian society for more than a millennium. To address these two questions, the thesis scrutinises the discrimination confronting women workers with diverse identities in India and Canada. It then traces the history and development of the Canadian Employment Equity framework by engaging with primary materials such as the House of Commons debates and judicial precedents. Subsequently, the thesis examines the successes and failures of the employment equity framework through an intersectional lens and draws key lessons for a prospective Indian employment equity legislation. Significantly, the thesis proposes a legislative model for public and private organisations which retains the quota system but mandates other forms of special measures while requiring accountability to the National Commission for Women. The goal of the legislative model is to travel beyond improving the statistical representation of women to foster an accommodative work environment, bolster training and promotional prospects for women, dismantle occupational ghettos and transform organisational structures. The research methodology is doctrinal and comparative as the thesis studies two multicultural, constitutionally similar, and common law-based polities.

RÉSUMÉ

La faible participation des femmes au marché du travail et la ghettoïsation professionnelle des travailleuses constituent un problème majeur dans le monde entier. Le taux de participation des femmes au marché du travail en Inde n'a cessé de diminuer, faisant du pays l'un des plus mauvais élèves au niveau mondial. Dans la société indienne stratifiée, l'intersection du genre et de la caste fait de la PFLE une question socio-juridique complexe que le gouvernement indien n'a pas encore abordée dans sa globalité. En revanche, le Canada affiche l'un des taux de FLFP les plus élevés au monde et la loi sur l'équité en matière d'emploi constitue une « stratégie proactive » visant à lutter contre la discrimination systémique à l'encontre des femmes et d'autres travailleurs minoritaires. Par conséquent, les principales questions abordées dans la thèse sont les suivantes : comment faire en sorte qu'un plus grand nombre de travailleuses puissent bénéficier d'un travail décent en Inde et comment démanteler les ghettos professionnels créés en fonction du sexe et de la caste dans la société indienne depuis plus d'un millénaire ? Pour répondre à ces deux questions, la thèse examine la discrimination à laquelle sont confrontées les travailleuses aux identités diverses en Inde et au Canada. Elle retrace ensuite l'histoire et le développement du cadre canadien de l'équité en matière d'emploi en s'appuyant sur des documents primaires tels que les débats de la Chambre des communes et les précédents judiciaires. La thèse examine ensuite les succès et les échecs du cadre de l'équité en matière d'emploi dans une optique intersectionnelle et en tire des leçons essentielles pour une future législation indienne sur l'équité en matière d'emploi. De manière significative, la thèse propose un modèle législatif pour les entreprises publiques qui conserve le système des quotas mais impose d'autres formes de mesures spéciales tout en exigeant de rendre des comptes à la Commission nationale pour les femmes. L'objectif du modèle législatif est d'aller au-delà de l'amélioration de la représentation statistique des femmes pour favoriser un environnement de travail accommodant, renforcer les perspectives de formation et de promotion des femmes, démanteler les ghettos professionnels et transformer les structures organisationnelles. La méthodologie de recherche est doctrinale et comparative puisque la thèse étudie deux pays multiculturels, constitutionnellement similaires et basés sur la common law.

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My foremost thanks are owed to my parents and sister for believing in my abilities and giving wings to my dreams. Without their financial and emotional support, this degree and the thesis would not have been possible. This thesis is especially dedicated to my mother, Amrita Preet, a homemaker, whose Herculean labour day in and day out is undervalued and unpaid in the current economic structure. This thesis is aimed at remedying the historic injustices faced by my mother and millions of Indian women workers like her.

I am also indebted to my *guru* and supervisor, Professor Adelle Blackett at McGill for her invaluable academic and financial support, encouragement and inspiration while I was working in a foreign land with very few resources and copious challenges. Thank you for having faith in this thesis and its potential to usher in change.

Thanks also to my friends at McGill and NLU Lucknow who have witnessed my countless breakdowns and tirades during trying times. You give me hope and strength.

Lastly, I bow to Babasaheb Ambedkar – the foremost radical feminist and anti-caste revolutionary. I am because he was.

TABLE OF ABBREVIATIONS

Art.	Article
CRPD	Convention on the Rights of Persons with Disabilities
EEA	Employment Equity Act
EEP	Employment Equity Programme
EEART	Employment Equity Act Review Taskforce
FCP	Federal Contractors Programme
FLFP	Female Labour Force Participation
GoI	Government of India
ILO	International Labour Organization
OBC	Other Backward Classes
PLFS	Periodic Labour Force Survey
PwD	Persons with disabilities
SC	Scheduled Castes
SCC	Supreme Court of Canada
SCI	Supreme Court of India
ST	Scheduled Tribes

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CHAPTER 1: LAYING THE GROUNDWORK

I. Introduction

At first glance, the neatly trimmed hedges and the swanky cars lined up in the driveways of the Noida gated communities do not give away the segregation contained within them. As one begins to enter the "residential towers" in these communities which house the nouveau riche from the oppressor castes in Delhi-NCT (National Capital Territory), separate lifts greet the visitors. The lifts are marked with ominous signs such as, "residents only" and "no maids and workers allowed." Inside the "resident's lift", a sign warns, "Housemaids, delivery boys and workers should not use resident's lifts. In case, they are caught they will be fined INR 1,000/-"[1] The "workers' lift" is haphazardly constructed, dimly lit, larger in size (to allow space for delivery boxes, construction material and sometimes, dogs), slower and chock-a-block with "maidservants" from the marginalized castes in a rush to get to their employer's apartments in the morning. The "resident's lift", in keeping with its privileged caste user's sensibilities, plays gentle jazz music, smells of expensive perfumes and is generously lit. Caste and gender-based segregation of labour is alive and kicking in 21st-century India despite constitutional prohibitions in place.

The average Indian home tells a far more compelling story of the gender and caste-based segregation of labour than the ILOSTAT Modelled Estimates of Female Labour Force Participation (hereinafter, "FLFP") or the Indian Periodic Labour Force Survey data possibly could. Indian homes set aside separate utensils for the *Dalit* sweepers, debar menstruating women from the kitchen and the "temple room"[2] and forbid them from participating in paid employment to exact infinite hours of unpaid domestic labour. Gender and caste hierarchies intersect conveniently to ambush women from the oppressor castes into unpaid domestic labour while "terrorising"[3] women from the oppressed castes into precarious and dehumanizing occupations such as manual scavenging.

On the other side of the globe, Indigenous and racialized women in Canada experience alarming levels of sexual harassment, discrimination, isolation, underpayment and unsafe working

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[1] "Internet Debates As Housing Society Fines Maids, Delivery Persons For Using Main Lift", online: *NDTV.com* <https://www.ndtv.com/offbeat/internet-debates-as-housing-society-fines-maids-delivery-persons-for-using-main-lift-4611675>. This news piece is only one of the many examples of such segregation existing within gated communities across India.

[2] See generally, Deepthi Sukumar, "Personal Narrative: Caste Is My Period" in Chris Bobel et al, eds, *The Palgrave Handbook of Critical Menstruation Studies* (Singapore: Palgrave Macmillan, 2020).

[3] Isabel Wilkerson, *Caste: The Origins of Our Discontents* (New York: Random House, 2020) 151.

conditions, particularly, in "man camps"[4] such as the mining[5] and oil industries. Even as Indigenous and racialized women navigate the so-called free and fair labour market, they are bogged down along the way with unpaid care work, lack of access to childcare, limited opportunities on the First Nations and occupational stereotyping. The violence and occupational ghettoization that Indigenous and racialized women experience at the workplace is only one of the myriad manifestations of the legacies of settler-colonialism, racial segregation and erasure of civil, political, economic, social and cultural rights of the Indigenous and racialized peoples.

In the first instance, the shoddy FLFP rates in India or, the relegation of oppressed caste women to performing dehumanizing labour appear to be uniquely Indian problems that are a result of the millennia-old caste system. They do not seem to have much to do with Canada which has witnessed a swift surge in the number of women workers entering the upper echelons of workplaces and traditionally "masculine" positions since the 1990s.[6] However, upon closer examination, the assignment of women from oppressed castes or races to stigmatizing and dehumanizing occupations in both countries is a reflection of the common seemingly insurmountable structural barriers that confront them. The caste system in India and White supremacy in Canada are arbitrary structures that rely comfortably on the gratuitous, servile labour that women with so-called inferior ancestries are compelled to provide to earn a living in an unrelenting Neo-Liberal setup. Such is the sophisticated functioning of this "embedded hierarchy"[7] that a poor *Brahmin* domestic worker enjoys access to the inner sanctum of an oppressor caste household and finds employment as a "cook" in the "pure" realm of the kitchen.[8] In contrast, a *Dalit* woman worker is relegated to the precarious role of a garbage picker or a sweeper and

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[4] Kyle Edwards, "MMIWG's findings on 'man camps' are a good place for government to get started", (3 June 2019), online: *Macleans.ca* <https://macleans.ca/news/canada/mmiwgs-findings-on-man-camps-are-a-good-place-for-government-to-get-started/>.

[5] Dr Sue Moodie, et al, *Never Until Now: Indigenous and Racialized Women's Experiences Working in Yukon and Northern British Columbia Mine Camps* (Yukon: Liard Aboriginal Women's Society, 2021) ii.

[6] Joanne D Leck, "Making Employment Equity Programs Work for Women" (2002) 28 Canadian Public Policy / Analyse de Politiques S85–S100 at 88.

[7] Isabel Wilkerson, *Caste: The Origins of Our Discontents* (New York: Random House, 2020) 324.

[8] An overwhelming majority of domestic workers hail from the Scheduled Castes, the Other Backward Classes and the Scheduled Tribes. However, it must be noted that domestic work is also rooted in the concept of purity and pollution. Hence, cooking and other kitchen-related tasks often get allotted to oppressor caste women in the broader realm of domestic work. See generally, Neymat Chaddha, *Domestic Workers in India: An Invisible Workforce*, (Social and Political Research Foundation (3 July 2020), <https://sprf.in/domestic-workers-in-india-an-invisible-workforce/>. Also see, "Upper caste students boycott midday meal cooked by Dalit woman in Uttarakhand", (21 December 2021), online: *Hindustan Times* <https://www.hindustantimes.com/india-news/upper-caste-students-boycott-midday-meal-cooked-by-dalit-woman-in-uttarakhand-s-champawat-101640025089951.html>.

dismissed perfunctorily at the door. Similarly, Indigenous girls have historically been uprooted from their communities and forced to work as domestic workers in White households to assimilate them into White values and culture.[9] On the other hand, racialized immigrant women are overwhelmingly assigned poorly remunerated part-time work in the care sector despite being overqualified.[10] Meanwhile, women with disabilities face higher unemployment rates compared to non-disabled women and disabled men.[11]

These examples illustrate that both systems hinge upon the arbitrary but rigid ranking of human beings on varying levels of the "human pyramid." [12] Occupational segregation forms the strongest tool of both systems to coerce certain communities into performing the "lowliest, dirtiest jobs"[13] which invariably fall upon the shoulders of marginalized women. Therefore, the problem of diminishing FLFP rates in India cannot be addressed without taking stock of the caste-based framework within which women's sexual and labour rights, in particular, are controlled and restricted.[14] In essence, the problem confronting women's labour in India is two-fold – one, how do we bring more women into the national workforce and specifically, into decent employment? Second, how do we dismantle the occupational segregation of women workers based on historical patterns of caste and gender-based division of labour? These are the two problems that this essay will confront and address through a comparative study of the special measures in place in India, namely, the Indian Reservation System, through a discussion of Articles 14, 15 and 16 in the Indian Constitution and Canada, through the Employment Equity Act of 1986 (hereinafter, "EEA") and Section 15 of the Charter of Rights.

To undertake the tedious yet rewarding task of dismantling structural barriers, because that is what bringing more women workers into decent employment essentially is, it can be particularly

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[9] Lynne Fernandez & Jim Silver, *Indigenous People, Wage Labour and Trade Unions: The Historical Experience in Canada* (Winnipeg: Canadian Centre for Policy Alternatives, 2017) 5, 7.
[10] Bessma Momani et al, *Knowledge Synthesis Report on Canada's Racialized Immigrant Women and the Labour Market* (University of Waterloo, 2021) at 2.
[11] Statistics Canada Government of Canada, "The Daily — Labour market characteristics of persons with and without disabilities in 2022: Results from the Labour Force Survey", (30 August 2023), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/230830/dq230830a-eng.htm>.
[12] Isabel Wilkerson, *Caste: The Origins of Our Discontents* (New York: Random House, 2020) 24.
[13] *Ibid* at 129.
[14] In "Annihilation of Caste", Dr. Ambedkar surmises that though illogical, the caste system rests on "judicious mating." It prohibits persons belonging to different castes from inter-marrying in order to maintain "the purity of race." Further, he perceives the caste system as a vicious dependence on the labour of one caste by the other. Thus the moratorium on inter-marriage and the freedom to perform labour of one's choice buttresses the caste system. B R Ambedkar & Arundhati Roy, *Annihilation of Caste: The Annotated Critical Edition*, annotated edition ed, S. Anand, ed (London New York: Verso, 2016).

useful to look to the devices that other jurisdictions with a similar democratic framework have adopted. In this thesis, I demonstrate that comparative work is possible between two (arguably) vastly distinct countries across the Global North and South and also warranted primarily because the structural barriers in both countries have yielded similar socio-economic disparities for the marginalized. While the source of the tyranny against the marginalized varies, its manifestation remains similar as is seen through the lens of labour segregation and ghettoization.

To my mind, comparative work is integral when it comes to ushering transformative changes in the field of constitutional, labour and anti-discrimination laws because of their firm ties with the political and social landscape of a nation-state. The transfer of foreign rules and institutions acts as a "legal irritant" in that it stirs fresh discourse and reconstruction not only within the legal domain but also the social.[15] In the Indian context, a fresh (and transformative!) discourse is necessary for dismantling the gender and caste barriers that prevent women from reaping the benefits of their historically unpaid and undervalued labour. This entails having a relook at the special measures that the Indian Constitution has envisaged for those from historically marginalized communities who are continuing to bear the brunt of their identities in the current Neo-Liberal framework. Comparative work is also becoming increasingly critical in light of the *laissez-faire* economic system in India where the government has taken a lackadaisical approach towards reducing inequalities, particularly post-COVID which witnessed an overwhelming number of women leaving the workforce.[16] It thus becomes fruitful to re-forge the loosening bonds between the governing and its vulnerable citizens and to look to nation-states with similar constitutional principles and their relationship with the most marginalized citizens.

At present, the Indian Constitution, via Articles 14, 15 and 16 empower the Government of India (hereinafter, "GoI") to undertake measures for women, children, caste and religious minorities across the public sector. These provisions have not been applied to the private sector. The provisions are firmly entrenched in the principle of substantive equality and therefore, envisage quotas for the marginalized communities which have been consistently implemented for the Scheduled Castes and Tribes (hereinafter "SCs" and "STs") and Other Backward Classes

[15] Gunther Teubner, "Legal Irritants: How Unifying Law Ends up in New Divergences" in Peter A Hall & David Soskice, eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 417-441.

[16] "Hardly any women in India are in paid employment" *The Economist*, online: <https://www.economist.com/asia/2021/02/18/hardly-any-women-in-india-are-in-paid-employment>.

(albeit, not uniformly in the case of Other Backward Classes) across central and provincial universities, job appointments, political bodies and even, promotions.[17] However, with respect to employment in the public sector for women candidates, quotas are a fairly new phenomenon. Currently, they are being rolled out by various provincial governments at a slow yet steady pace by setting aside between 5-33% of seats for women. Since women's quota in public employment has not been implemented with as much rigour as it has for caste minorities, it has adversely affected the participation of Scheduled Castes and Tribes women in public employment who are trapped in the mesh of casteism and misogyny.[18] As can be expected, quotas have not resolved systemic issues of unfair wages and appraisals, occupational ghettoization of women workers at entry-level posts and traditionally masculine systems and structures which inhibit women's participation and leadership at their workplace.

In contrast, the Canadian Employment Equity Act of 1986[19], amended in 1995, is a much younger positive action mechanism compared to the Indian Reservation System which has been implemented in some form or the other since 1902. It contemplates a broad range of progressive measures to bolster the representation of women, Indigenous Peoples, visible minorities (racialized persons) and Persons with Disabilities (hereinafter, "PwDs"). Employment equity is a unique strategy that is broader, more holistic and proactive in targeting the statistical underrepresentation of women and other minorities while also taking down the institutional barriers confronting them brick-by-brick. Employment equity postulates that dismantling does not begin and end with quotas only, which I argue are critical but not sufficient for reasonably accommodating women in the Indian workforce. Instead, as contemporary developments and discussions demonstrate, it extends to smaller, more focused and powerful strategies on an everyday level, including doing away with arbitrary aptitude tests that prevent effective participation of women, developing stronger regulatory oversights over private and public organizations and committing to data justice and privacy while evaluating goals and achievements.[20] The underlying theme of this thesis is that people are not numbers. Women are not numbers. Such an understanding is missing in the

[17] *M Nagaraj & Others v Union Of India & Others*, 2006 (8) SCC 212.
[18] Sameena Dalwai & Aabhinav Tyagi, "Impact of Uttarakhand's Reservation Judgment on Women" (2020) 55:20, online: <https://www.epw.in/journal/2020/20/review-womens-studies/impact-uttarakhands-reservation-judgment-women.html>.
[19] *Employment Equity Act* (SC 1995, c 44).
[20] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 55.

prevailing quota-oriented Indian Reservation System and the oft-cited Affirmative Action model of the US.

This is also an interesting time to be referring to Canada in the realm of employment equity. The Employment Equity Act Review Taskforce (hereinafter, "EEART"), constituted in 2021 and chaired by Professor Adelle Blackett, recently released its final Report on the occasion of World Human Rights Day in December 2023. The Report, while retaining the core concerns of the 1986 Royal Commission on Equality in Employment penned by the sole commissioner, then Judge Rosalie Silberman Abella, has suggested far-reaching changes in the arguably otiose employment equity framework. Of significant note are the three pillars that the Report has identified as crucial for "stability" in the Employment Equity framework:

a. Identifying and eliminating workplace barriers;
b. Meaningfully consulting and engaging with the employers and workers regarding the goals of employment equity and,
c. Strengthening regulatory oversight or, in other words, increasing accountability of workplaces to governmental institutions.[21]

Succeeding discussion on India's Reservation System will demonstrate that these elements are sorely missing in the prevailing framework. Specifically, the lack of governmental intervention and oversight of the quota system has left private actors running amok with their discriminatory recruitment policies without due regard for the constitutional principles of equality. Simultaneously, public organizations which are subject to government-defined quotas have restricted themselves to recruiting a given number of women without truly doing away with everyday policies that make workplaces exclusionary for women, caste minorities and PwDs. The insights from the EEART Report will be instrumental in understanding the true meaning of substantive equality in the workplace while helping me reimagine and construct an effective employment equity model suited for Indian conditions.

To this end, this thesis will study the Canadian EEA 1995 and its role in strengthening the participation of women workers in the national workforce with an intersectional lens. This thesis posits that the congruity in the foundational constitutional principles of both India and Canada[22],

[21] *Ibid* at 21.
[22] Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 Yale J Int'l L 207 at 208.

the shared common law tradition and the resemblance in the structural barriers that confront *Dalit* and tribal women in India and Indigenous, Black and racialized women in Canada, warrant an inquiry into the legal and policy-based mechanisms that Canada has envisaged to dismantle such barriers.

Before I indulge in a full-fledged discussion on the Indian problem of diminishing FLFP rates in Chapter 2, I consider it essential to engage in a global discussion of women's work, its realities and the myths surrounding it.

II. Invisible labour by the "Invisible Heart"

Perhaps the most significant question one must consider before venturing into a full-fledged discussion about women's participation in the national workforce is, "What is work?" The International Labour Organization (hereinafter, "the ILO") postulates that "work" is "any activity performed by persons of any sex and age to produce goods or to provide services for use by others or for own use."[23] In that sense, all women work. A 2016 UN report titled "Women's Economic Empowerment in the Changing World of Work" estimates that unpaid care and domestic work done by women constitute 10% and 39% of the global Gross Development Product and can contribute more to the economy than the manufacturing, commerce or transportation sectors.[24] This "invisible labour"[25] consumes a total of 11 billion hours from women globally, every day, thereby decimating the myth that women do not work and are inherently underproductive and inefficient beings.[26] The ILOSTAT Modelled Estimates of Female Labour Force Participation and indeed, any other tool for measuring women's work, does not take into account a major chunk of women's labour, that is, domestic work for the reason that it does not yield "pay or profit" the way "employment" does.[27] Thus, all women work but not all women are employed.[28]

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[23] "Work and employment are not synonyms", (29 October 2019), online: *ILOSTAT* <https://ilostat.ilo.org/work-and-employment-are-not-synonyms/>.
[24] "Redistribute Unpaid Work", online: *UN Women – Headquarters* <https://www.unwomen.org/en/news/in-focus/csw61/redistribute-unpaid-work>.
[25] Adelle Blackett, "Domestic Workers and Informality: Challenging Invisibility, Regulating Inclusion" in Martha Chen & Françoise Carré, *The Informal Economy Revisited* (Routledge, 2020) at 110.
[26] Soraya Seedat & Marta Rondon, "Women's Wellbeing and the Burden of Unpaid Work" (2021) 374 BMJ n1972.
[27] "Work and employment are not synonyms", (29 October 2019), online: *ILOSTAT* <https://ilostat.ilo.org/work-and-employment-are-not-synonyms/>.
[28] This understanding is further complicated by alternative forms of employment, including informal employment, gig work, dependent contracts and so on. In many of these instances, women's work will yield "pay or profit" but such benefits may be infrequent and riddled with insecurity and instability.

Classical and Neo-Classical economists would concur with this distinction. They consider unpaid domestic labour performed by women to be outside the realm of the "mainstream economy" because it is "free", "unlimited" and a "housewives production."[29] This is further demonstrated in Adam Smith's notion of the "Economic Man," always driven by rational self-interest. The baker and the butcher do not provide a man dinner because they like him, Smith opines. They do so because their interests are "served through trade."[30] Katrine Marçal, in her provocatively titled book "Who Cooked Adam Smith's Dinner – A Story About Women and Economics", tersely points out a fallacy in Smith's work – "He didn't get his dinner only because the tradesmen served their self-interests through trade. Adam Smith got his dinner because his mother made sure it was on the table every evening."[31] In arguing so, she demonstrates how women's labour is "the other" in the free market that Smith fervently advocates. The ILOSTAT Modelled Estimates of FLFP make a similar fallacy. They take into consideration Smith's "invisible hand" but not the "invisible heart."[32] In other words, householding, farming, gathering water, and managing livestock done by women is work but not gainful employment and hence, not included in the labour force data. Even in the case of gainfully employed women, the metric does not take into consideration the quality of women's experiences, the wage gap, appraisal rates or alternative sources of income earned by them.[33] Another significant drawback of the estimate is its inability to include work performed by trans individuals who identify as women. The estimate relies on data collected from national labour surveys and is, therefore, dependent on a state's definition of "women" or "female." Consequently, labour patterns of trans women and their

[29] Indira Hirway, "Unpaid Work And The Economy: Linkages And Their Implications" (2015) 58:1 Ind J Labour Econ 1–21.
[30] Katrine Marcal, *Who Cooked Adam Smith's Dinner?: A Story of Women and Economics*, reprint edition ed, translated by Saskia Vogel (Pegasus Books, 2017) at 7.
[31] *Ibid*. Smith's father passed away when his mother was only 28. Thereafter, Smith inherited his father's estate and lived with his mother for most of his life. However, a further critique would be that men with his socio-economic status would not only be dependent on their mothers and wives for their sustenance but also domestic workers who were more likely to be racialized women.
[32] *Ibid*.; Nancy Folbre, *The Invisible Heart: Economics and Family Values* (New York, NY: New Press, 2002); Adelle Blackett, "Domestic Workers and Informality: Challenging Invisibility, Regulating Inclusion" in Martha Chen & Françoise Carré, *The Informal Economy Revisited* (Routledge, 2020)..
[33] Ginette Azcona, et al, "Spotlight on SDG8: The Impact of Marriage and Children on Labour Market Participation", (8 May 2020), online: *UN Women Data Hub* <https://data.unwomen.org/publications/spotlight-sdg8-impact-marriage-and-children-labour-market-participation>.

surrounding socio-economic realities fall through the folds of this metric even as ground-level trans rights organizations are beginning to collect data at a community level, at least in Canada.[34]

While acknowledging the pitfalls of the ILOSTAT Modelled Estimates, this thesis will assess the participation of women workers in the Indian workforce and draw comparisons with Canada by utilizing this metric. I find that the metric is incredibly detailed and helpful in making sense of the changing patterns of women's labour according to marital, income, geographical, institutional sector and migration status, even as I caution the readers that data can only capture a fraction of women's experiences at their workplace – at home or outside.

III. Methods, Approaches and Hypothesis

From succeeding discussions, it will emerge that poor FLFP rates and the precarious nature of employment confronting women workers from the marginalized castes pose an enormous challenge for the GoI. Hence, the principal argument of this thesis is that reimagining the Canadian model of employment in the Indian context will strengthen the representation of women workers in decent work, bolster their promotional prospects and dismantle occupational ghettos. My hypothesis is that a comprehensive framework of employment equity with stringent regulatory oversight which targets not only an increase in the statistical representation of women but also takes down systemic barriers will be instrumental in ushering women workers into "decent work." To "reimagine" the current quota system and transform it, I will first address the two questions I laid down in the introduction – one, how do we bring more women into the Indian workforce and second, how do we dismantle structural barriers of caste and gender to do away with occupational segregation of women?

To answer the first question, I will turn towards Canada which has one of the highest levels of FLFP rates in the world and a holistic employment equity programme rooted in principles of substantive equality that can provide some novel and pathbreaking insights for the Indian reservation framework. Thus, I undertake a comparative approach to the research work for the purposes of this essay. However, I am conscious that "reimagination" implies a "borrowing"[35] of laws from Canada which will potentially "irritate" or disrupt the existing special measures structure in India. In Chapter 3, I engage with theories surrounding the institutional transfer of

[34] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 149.
[35] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Georgia: University of Georgia Press, 1974).

laws and systems from abroad and how they are necessary to create a transformative[36] and robust framework of employment equity for India's marginalized women workers.

The comparative work I undertake rests on the argument that owing to similarities in the democratic and constitutional structure, a shared understanding of substantive equality, demographic diversity and similar challenges in bringing in women, particularly those from disadvantaged social backgrounds within the fold of "decent work", a comparative study of the Indian and Canadian special measures is necessary and that an institutional transfer is possible. The same has been explained through the theory of legal transplants and legal irritants in Chapter 3.

To address the second question concerning occupational ghettoization along the lines of caste and gender, this thesis will examine women's labour and special measures through an intersectional lens as theorized by Kimberle Crenshaw. In 1991, Crenshaw wrote:

> Contemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color. Focusing on two dimensions of male violence against women-battering and rape-I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the discourses of either feminism or antiracism. Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both.[37]

I employ the same framework of intersectionality and place the specific challenges of *Dalit* and tribal women in the labour market by juxtaposing their over-representation in the rural sector and informal organization as opposed to the under-representation in these sectors of women from the oppressor castes. I especially emphasize their qualitative experiences in precarious work, ranging from sexual abuse, exploitation at the hands of contractors in the informal sector and underpayment of wages despite equal work responsibilities. On the other hand, I acknowledge that *Brahmanical* notions surrounding purity and pollution of certain forms of labour, the taboos

[36] The term "transformative" is used deliberately from my reading of Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) I/212 New Left Rev 68–93.; Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023).

[37] Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford Law Review 1241–1299.

around the inter-mingling of castes and a gendered division of labour have also inhibited women from the oppressor castes from joining paid employment outside the realm of their homes.

Thus, the research methodology employed is doctrinal and comparative in nature. The Literature Review demonstrates that I deal with a variety of primary materials such as the Indian Constituent Assembly Debates and the House of Commons Debates, pieces of legislation and court precedents relevant to the area of employment equity across both jurisdictions. The debates from India are akin to the *travaux préparatoires* in International Law in that they clarify the text of the legislative provisions and provide insights into the rationale of the legislators. The House of Commons Debates from Canada, on the other hand, have provided crucial insights into the background, history and context of employment equity. The precedents and debates also inform me of the theoretical underpinnings of special measures and substantive equality in both jurisdictions. Aside from that, I rely on labour surveys and human rights reports from India, Canada and international bodies as these provide a background of the prevailing socio-economic conditions which inform me of the need for legislative changes. International conventions and materials also serve as important benchmarks for legislatures and judiciaries in both India and Canada and aid in legislation being interpreted in a manner that is consistent with these benchmarks. In Canada, for instance, the *Baker v Canada*[38] case international documents were recognized as important sources for informing the contextual approach to statutory interpretation and judicial review. Interestingly, the Canadian judgement of *Baker* noted that international human rights law principles have aided in interpreting domestic law akin to India's *Vishaka v Rajasthan* judgement which helped Indian lawmakers to frame the Prevention of Sexual Harassment at Workplaces Act.[39]

The reports from various domestic and international bodies will also be an authoritative source for statistics relating to various demographics which inform me of the disparities existing in the labour market in both jurisdictions. While legal documents form an important source for this comparative work, the literature review demonstrates that anti-caste and feminist sources constitute the theoretical underpinnings of this thesis work. As a result, I refer to Dr Ambedkar's speeches and writings to understand the intersection of caste and gender and thereby unravel the puzzle of occupational ghettoization and stereotyping in its entirety.

[38] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[39] *Ibid.*

IV. Literature Review

The first and perhaps, the most significant source of the theoretical framework underlying this thesis work is Dr BR Ambedkar's seminal work "Annihilation of Caste."[40] The document is an excellent treatise on the oppressive caste structures rampant in Indian society which are intertwined firmly with the caste-based division of labour and the lack of social mobility for those hailing from the bottom of the caste hierarchy. Ambedkar's writings and speeches inform the thesis about the prevailing division of labour along the lines of caste and gender. He has demonstrated that the "vicious"[41] *Chaturvarnya* system (the four-fold caste system) hinges on the exploitation of women's labour, insofar as it does not grant equality of opportunity to privileged caste women, while restricting them from "priesthood, soldiering, brewing and butchering."[42] The other volumes of his works document his support for the Maternity Benefit Bill and the Hindu Code Bill which were instrumental in challenging *Brahmanical* patriarchal norms by granting Hindu women the right to divorce and allocating a share to daughters and widows in inheritance. Ambedkar thus sought to decimate the caste system and "obliterate the caste precincts regarding marriage and adoption of a child."[43] The intersection of caste and gender-based discrimination that continues to restrict women's participation in decent work today has been made crystal clear in Ambedkar's works. For instance, Ambedkar is one of the foremost political leaders to recognise "women as gateways to caste"[44] due to their sexual liberties being repressed for the purpose of perpetuating "caste purity." Wandana Sonalkar[45] and Prachi Patil[46] have analysed Ambedkar's feminist leanings and his role in empowering women across castes in India in spheres of marriage, employment, divorce and inheritance to dismantle caste structures hinging on *Brahmanical* sensibilities. This insight is crucial in building an employment equity model suitable for India's social conditions.

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[40] Ambedkar & Roy, *supra* note 14.
[41] B R Ambedkar, *Dr. Babasaheb Ambedkar Writings And Speeches* (Ministry Of Social Justice & Empowerment), Vol 1 At 61.
[42] B R Ambedkar, *Dr. Babasaheb Ambedkar Writings And Speeches* (Ministry Of Social Justice & Empowerment), Vol 1 At 61.
[43] Dalit History Month, "The Hindu Code Bill — Babasaheb Ambedkar and his Contribution to Women's Rights in India", (17 April 2019), online: *Medium* <https://dalithistorymonth.medium.com/the-hindu-code-bill-babasaheb-ambedkar-and-his-contribution-to-womens-rights-in-india-872387c53758>.
[44] Karthick Ram Manoharan, "Radical freedom: Periyar and women" (2021) 1 Open Res Eur 6.
[45] Wandana Sonalkar, "An Agenda for Gender Politics" (1999) 34:1/2 Economic and Political Weekly 24–29.
[46] Prachi Patil, "Reclaiming Ambedkar Within the Feminist Legacy" (2022) Contemporary Voice of Dalit.

The thesis relies on Nivedita Menon and Shreya Atrey's works in the realm of the multilayered nature of discrimination that women from disadvantageous caste identities encounter. Menon, in "Marxism, Feminism and Caste in Contemporary India" implores readers to explore labour theory and women's participation in the national workforce through the "dimensions of caste and untouchability."[47] Meanwhile, Atrey in her monumental work, "Intersectional Discrimination"[48] draws a comparison between the compounded form of oppression experienced by Black women at the hands of White men, White women and Black men on one end and *Dalit* women at the hands of oppressor caste men and women and *Dalit* men on the other end. In terms of labour theory, Atrey finds that the feminist movement led by privileged caste women has historically battled issues of domestic violence, dowry, consent and widowhood whereas *Dalit* women are overworked, exploited as servants by privileged caste women, subjected to sexual violence by privileged caste men as maidservants, and experience a yawning wage gap in comparison to *Dalit* men even as they are engaged in dehumanizing labour involving corpses and faeces on a routine basis.[49] These starkly distinct realities confronting *Dalit* women workers must find resonance in a functional employment equity model for India.

There is an extensive amount of literature on the problem of women workers from *Dalit* and tribal backgrounds being overcrowded in the precarious informal sector. Renana Jhabvala has observed this to be a repercussion of globalization and liberalization that has compounded casualization and contractual labour.[50] She has emphasized the expansion of the social security net to the informal economy through "insurance, social security funds and state-supported childcare."[51] Albeit instrumental in supporting women workers in informality, these proposals do not target the paucity of female representation of women workers within the formal sector. Social security benefits merely remedy short-term problems within the same institutional framework

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[47] Nivedita Menon, "Marxism, Feminism and Caste in Contemporary India" in Vishwas Satgar, ed, *Racism After Apartheid* Challenges for Marxism and Anti-Racism (Wits University Press, 2019) 137.
[48] Shreya Atrey, *Intersectional Discrimination* (Oxford New York: Oxford University Press, 2019) at 67.
[49] Shubham Kumar & Priyanka Preet, "Manual Scavenging: Women Face Double Discrimination as Caste and Gender Inequalities Converge" (2020), online: <https://www.epw.in/engage/article/manual-scavenging-women-face-double-discrimination-caste-gender>.; "Attacks on Dalit Women: A Pattern of Impunity - Broken People: Caste Violence Against India's 'Untouchables' (Human Rights Watch Report, 1999)", online: <https://www.hrw.org/reports/1999/india/India994-11.htm#P1999_420561>.
[50] Renana Jhabvala, "Social Security for Unorganized Sector" (1998) 33:22 Economic and Political Weekly L7–L11.; Renana Jhabvala & Shalini Sinha, "Liberalization and the Woman Worker" (2002) 37:21 Economic and Political Weekly 2037–2044.
[51] *Ibid*.

where 41.9% of Scheduled Caste women across the rural and urban sectors are still engaged in "casual labour."[52] Whereas 13.4% of women from non-marginalised castes are engaged in "casual labour" as per the labour force survey reports from 2017-18.[53] In other words, they are not "transformative" enough to uplift vast segments of women workers and welcome them into decent employment.

Pushpendra Singh and Falguni Pathak have corroborated that caste is an integral determinant of a female worker's participation in the workforce and the nature of her working sector.[54] Those located lower in the caste hierarchy participate in the workforce at a disproportionately high rate while earning poor wages. The authors recommend affirmative action policy as a solution to the conundrum but do not envisage a detailed model of affirmative action.[55] Nidhi Sabharwal and Wandana Sonalkar have demonstrated that *Dalit* women are victims of "exclusion-based deprivation" and lag on several human development indices in comparison to privileged caste women which subsequently affects their recruitment in secure and fairly remunerated employment.[56] They note that unemployment rates are extremely high among well-educated *Dalit* women.[57] One of the solutions advocated by the authors to remedy this aberration is to institute special measures for *Dalit* women but the same has been dealt with cursorily. Meanwhile, Pankil Goswami, in his piece on the political economy of precarious work, has pointed to the development of this Neo-Liberal model of informal employment as a repercussion of the inefficiency and tardiness of legal institutions to provide a sturdy labour protection framework.[58] Chapter 2 of the thesis examines this hypothesis at length and demonstrates how women from marginalized communities have been left in the lurch without minimum social security benefits in the ever-expanding informal sector.

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[52] Ministry of Statistics and Programme Implementation, *Periodic Labour Force Survey: Annual Report 2017-18*, (New Delhi: Government of India, 2017)
[53] *Ibid*.
[54] Pushpendra Singh & Falguni Pattanaik, "Unequal Reward for Equal Work? Understanding Women's Work and Wage Discrimination in India Through the Meniscus of Social Hierarchy" (2020) 12:1 Contemporary Voice of Dalit 19–36.
[55] *Ibid.*
[56] Nidhi Sadana Sabharwal & Wandana Sonalkar, "Dalit Women in India: At the Crossroads of Gender, Class, and Caste" (2015) 8:1 Global Justice: Theory Practice Rhetoric, online: <https://www.theglobaljusticenetwork.org/index.php/gjn/article/view/54>.
[57] *Ibid*.
[58] Pankil Goswami, "The Political Economy of Precarious Work in India: A Case of Languishing Social Policy?" (2024) 50:1 Critical Sociology 125–140.

Considering that social scientists are largely in agreement that special measures are a potential solution for bettering FLFP rates, especially in the formal sector, it is integral to discuss whether the state can respond to the unequal treatment of women workers without stigmatizing them. Martha Minow identifies this as the "Dilemma of Difference"[59], whereas Nancy Fraser labels this as the "Redistribution-Recognition Dilemma."[60] Per Fraser, the current affirmative action framework to remedy multilayered forms of discrimination does not "transform" or "deconstruct" oppressive structures which are responsible for creating conditions of marginalization and exclusion in the first place. Consequently, communities that are designed to benefit from special measures, often end up being perceived as "weak", "less meritorious" and "requiring protection." Colleen Sheppard concurs that the essence of affirmative action is transforming institutional policies, practices, standards, and customs to welcome marginalized communities in.[61]

The "Research Project on Human Dignity", a report unveiled on the 60th anniversary of the Universal Declaration of Human Rights acknowledges that a radical interpretation of the concept of "decent work" would require reconceptualizing labour and its nexus with social identities. Decent and indecent work continue to be divided along the lines of gender, caste, race and class. Therefore, the report recommends that decent work must necessarily "centre worker agency" to enable those with disadvantageous identities to make active choices in work and employment.[62] This agency can only be developed once women workers are dignified participants in the formal sector. However, that is not to say that the formal sector is free from the pitfalls of the informal sector. It is still miles away from guaranteeing social security benefits, fair remuneration and overtime benefits to its workers and dismantling structural barriers for the various minorities in India. This is why the thesis advocates for sturdy employment equity legislation cutting across public and private organizations and the formal and informal economy.

Having established that instituting special measures is the way forward to remedy exclusionary workplace practices, it is valuable to examine the trends emerging in the Indian legislatures in this arena. Certain provinces in India are gradually providing "horizontal reservation" to women to

[59] Martha Minow, "Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) 48:2 Law and Contemporary Problems 157.
[60] Fraser, "From Redistribution to Recognition?", *supra* note 36.
[61] Colleen Sheppard and Ontario Law Reform Commission, *Study Paper on Litigating the Relationship Between Equity and Equality*, (1993) online: <https://digitalcommons.osgoode.yorku.ca/library_olrc/6/>.
[62] Frédéric Mégret et al, *Dignity: A Special Focus on Vulnerable Groups* (Panel on Human Dignity, 2009).

remedy the sore FLFP rate and the severe discrimination experienced by women workers.[63] This makes the thesis timely and essential in assessing the role of special measures for women in India. Further, there has been a consistent inquiry into reservations for the Scheduled Castes and Tribes, specifically in the public sector, and scholars such as Gail Omvedt[64], Pratap Bhanu Mehta[65] and Dipankar Gupta[66] insist that India should take cues from the American affirmative action experience. The conspicuous void in juxtaposing the Indian reservation system to other models from common law jurisdictions, particularly Canada which has maintained high FLFP rates and has commonalities with the democratic setup of India, is inexplicable.

Kamala Sankaran's edited book, "Affirmative Action:" A View from the Global South" provides important perspectives, particularly from Brazil, Mexico and Israel that have been largely ignored in previous (Global North-centred) studies on positive action.[67] While this book compares different systems of special measures in place, including India's, it does not study Canada and India specifically. This thesis intends to fill this gap in scholarship in this area while focusing distinctly on the challenges confronted by women workers, particularly those experiencing multilayered forms of discrimination.

I also find that studies and conversations surrounding reservations for women workers are often restricted to the precepts of economics and public policy.[68] There are copious studies that lay out detailed causes for the falling FLFP rates in India and consequent solutions through public policy measures. A 2020 World Bank Policy Research Paper[69] has also examined the benefits of political

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[63] Aditi Priya & Tejas Harad, "Providing horizontal quota: the Bihar way", *The Hindu* (3 August 2021), online: <https://www.thehindu.com/opinion/op-ed/providing-horizontal-quota-the-bihar-way/article35708537.ece>.

[64] Gail Omvedt, "Manufacturing Consent: The Propaganda Model for Social Media", (27 October 2023), online: *Round Table India* <https://www.roundtableindia.co.in/manufacturing-consent-the-propaganda-model-for-social-media/>.

[65] Pratap Bhanu Mehta, "Affirmation Without Reservation" in Sukhdeo Thorat et al, (eds), *Reservations and Private Sector: Quest for Equal Opportunity and Growth*, 1st ed (Rawat Publications, 2007).

[66] Dipankar Gupta, "Towards Affirmative Action" (2006) 33:3/4 India International Centre Quarterly 150–161.

[67] Ockert Dupper & Kamala Sankaran, *Affirmative Action: A view from the Global South* (Sun Press, 2014).

[68] Aditi Ratho, "Promoting Female Participation in Urban India's Labour Force" (March 25 2020), online (website): ORF <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro new_delhi/documents/genericdocument/wcms_342357.pdf>; Steven Kapsos Evangelia Bourmpoula & Andrea Silberman, "Why Is Female Labour Force Participation Declining So Sharply In India?" (2013) Institute for the Study of Labour, Discussion Paper No 7597; Sher Verick & Ruchika Chaudhary, "Women's Labour Force Participation in India: Why Is It So Low?" (2014) International Labour Organization, ILO Asia-Pacific Working Paper Series; Sonali Das et al, "Women Workers in India: Why So Few Among So Many?" (2015) International Monetary Fund, Working Paper; Erin Fletcher, Rohini Pande & Charity Troyer Moore, "Women and Work in India: Descriptive Evidence and a Review of Potential Policies" (2018) Harvard Kennedy School Working Paper RWP18-004.

[69] Klaus Deininger, et al "Political Reservation and Female Labor Force Participation in Rural India", Policy Research Working Paper (World Bank Group Development Economics) (August 2020), online: <

reservations for women in rural and urban areas. Yet, studies advocating sturdy positive action legislation are conspicuously missing. Additionally, there seems to be a lack of acknowledgement that law and legislation-making are powerful tools for effecting far-reaching changes in the labour market. This thesis fills this chasm by resolving the socio-economic problem of diminishing FLFP rates through legal reform and taking the conversation forward through the lens of substantive equality.

In the Canadian context, there has been substantial research on the history and development and comparison[70] of the Canadian employment equity model with the American model of affirmative action.[71] Harish Jain[72] has drawn an international comparison of the Canadian model with other models of affirmative action, including India's, yet the research lacks a feminist perspective and does not document the diverse forms of discrimination confronting women workers with marginalized social identities. Carol Lee Bacchi[73] has also compared several models of affirmative action in the United States, Sweden, Canada, Netherlands, and Australia from a feminist lens but the comparison does not include India.

As far as the marginalisation of Indigenous and racialized women workers is concerned, Joanne Leck and David Saunders acknowledge that little research has been conducted on the discrimination suffered by women with "dual status" in comparison to white women. [74] More specifically, Jerry White and Paul Maxim demonstrate several variations in the labour force activity of women even within the Indigenous communities. They find that women from the Registered Indian community were less likely to be employed compared to Other Indigenous communities and non-Indigenous persons. The research concludes that low human capital, discrimination, and high levels of fertility which led to higher costs of childcare were determining

https://openknowledge.worldbank.org/bitstream/handle/10986/34282/Political-Reservation-and-Female-Labor-Force-Participation-in-Rural-India.pdf?sequence=1&isAllowed=y>.

[70] Carol Agócs, "Affirmative Action, Canadian Style: A Reconnaissance" (1986) 12:1 Canadian Public Policy 148; Richard Block & Karen Roberts, "A Comparison of Labour Standards in the United States and Canada" (2000) 55:2 IRJ 273.

[71] Carol Agócs, "Affirmative Action, Canadian Style: A Reconnaissance" (1986) 12:1 Canadian Public Policy / Analyse de Politiques 148–162.

[72] Harish C Jain, Peter Sloane & Frank Horwitz, *Employment Equity and Affirmative Action: An International Comparison: An International Comparison*, 1st edition ed (Routledge, 2003).

[73] Carol Bacchi, *The Politics of Affirmative Action: "Women", Equality and Category Politics*, 1st edition ed (London; Thousand Oaks, Calif: Sage Publications, 1996).

[74] Joanne D Leck & David M Saunders, "Hiring Women: The Effects of Canada's Employment Equity Act" (1992) 18:2 Canadian Public Policy / Analyse de Politiques 203–220 at 204.

factors for Indigenous women's participation in the workforce.[75] The authors have proffered two-fold suggestions to address this disparity – improving the quality of education on Reserves and increasing access to the markets on the Reserves.[76] They also support the viewpoint that the composite nature of discrimination within marginalized communities in certain regions needs to be redressed by "special programmatic considerations aimed at these provinces" which implies that specialised provincial-level programmes need to be in place for remedying poor FLFP rates of certain Indigenous communities.

In the 2014 piece examining the status of the Indigenous workforce in Western Canada, Jacqueline Luffman and Deborah Sussman documented the ghettoization of Indigenous women in clerical, childcare and home support, educational, social service and secretarial jobs as opposed to non-Indigenous women as per the 2005 Canadian Labour Force Survey.[77] These studies help me establish that Canada's Employment Equity programme has yielded limited success insofar as it has not targeted multilayered forms of discrimination on First Nations territories. A prospective model drawing lessons from the Canadian model must keep these pitfalls in perspective.

Additionally, in the area of women with disabilities, Kim England has emphasized that the EEA has not been particularly efficacious in eliminating disparities between women and men with disabilities and Canadian workers without disabilities. The Act has fallen short of remedying the employer's "discriminatory and pejorative attitudes and practices."[78] I discuss this shortcoming in Chapter 4 of the thesis.

The EEART Report of 2023[79] has now become my foremost source since it has taken into consideration these previously unaddressed, unresolved and forgotten disparities that fell through the cracks in the Abella Commission's Report and the subsequent EEA framework.[80] I deal with the suggestions, recommendations and theoretical framework offered by the Report at length for

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[75] Jerry White, Paul Maxim & Stephen Obeng Gyimah, "Labour Force Activity of Women in Canada: A Comparative Analysis of Aboriginal and Non-Aboriginal Women*" (2003) 40:4 Canadian Review of Sociology/Revue canadienne de sociologie 391–415.
[76] *Ibid* at 412.
[77] "Perspectives on Labour and Income - The Aboriginal labour force in Western Canada", online: <https://www150.statcan.gc.ca/n1/pub/75-001-x/10107/9570-eng.htm>.
[78] Kim England, "Disabilities, gender and employment: social exclusion, employment equity and Canadian banking" (2003) 47:4 The Canadian Geographer 429.
[79] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023).
[80] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984).

culling out key lessons and takeaways for reimagining the Indian framework of employment equity. The Report has been particularly helpful in understanding the intersectional and aggravated forms of discrimination confronting women workers who are disabled, racialized and Indigenous and in re-thinking the language employed to refer to various marginalized communities in Canada. The next segment examines the issue of nomenclatures and terminologies before delving into the substance of the thesis work.

V. Speaking the Language of Justice

The 2023 EEART Report poignantly reminds us that employment equity is about identifying and removing barriers. Therefore, the language we choose to employ should convey this approach and goal. In keeping with this idea, this segment of the thesis delves into the rationale for doing away with some nomenclatures and adopting new ones. It is also intended to caution readers from expressing a "disconnected"[81] sense of pity and compassion towards historically marginalized communities. The goal is to raise questions of responsibility, reparations and justice. The following sub-section deals with the terminology of certain marginalized communities in India and Canada separately.

Referring to the marginalized castes: The Indian Constituent Assembly was indecisive about the appropriate term for the marginalized and ostracized castes and engaged with the issue in detail. Appellations such as "*Harijans*", "the Untouchables", and "the Depressed Classes" were all being used without uniformity. The term "Untouchable" is quite obviously pejorative since it conveys the idea that certain communities are "impure" or pollutive. Hence, I have not employed this nomenclature, which is now illegal, since Article 17 of the Constitution abolishes untouchability.

The term "*Dalit*" is now being used extensively by ethnicities and castes that consider themselves to be oppressed. The appellation originates from *Sanskrit* and literally means "broken or ground down"[82] referring to the deliberately "broken, suppressed and crushed identities" of the marginalized castes. Of late, the term has been witnessing variations. For example, Suraj Yengde's column in the Indian Express is titled "*Dalitality*" which is a Sanskrit and English portmanteau.[83] On the other hand, Dr Ambedkar used the term "*Dalithood*" to mean "life conditions which

[81] Mark Antaki, "Genre, Critique, and Human Rights" (2013) 82:4 University of Toronto Quarterly 974–996 at 984.
[82] Eleanor Zelliot, "Dalits" in *The Oxford Encyclopedia of the Modern World* (Oxford University Press, 2008).
[83] "Suraj Yengde | Read All The Stories Written by Suraj Yengde.", (20 October 2019), online: *The Indian Express* <https://indianexpress.com/profile/columnist/suraj-yengde/>.

characterise the exploitation, suppression and marginalization of *Dalits* by the social, economic, cultural and political domination of the upper castes' Brahmanical ideology."[84]

In my early research work, I was wary of using the term lest it reify the belief that the *Dalits* are a broken people. However, I now find that the *Dalit Panthers*, who were a community of revolutionaries hailing from the marginalized castes had re-appropriated the term as a matter of pride and had expanded its ambit to include "a worker, a landless labour, a proletarian."[85]

On one end, the terminology of the *Dalit Panthers* and Dr Ambedkar captures the everyday suppression and marginalization of the *Dalit* people, and on the other, Mahatma Gandhi's (a devout, caste-privileged Hindu) appellation *"Harijan*", that is, "children of God" apparently sought to restore the dignity of the community amongst the Hindu privileged castes. Gandhi's nomenclature was severely castigated by Dr. Ambedkar. He averred:

> …the Untouchables say that they preferred to be called Untouchables. They argue that it is better that the wrong should be called by its known name. It is better for the patient to know what he is suffering from. It is better for the wrongdoer that the wrong is there, still to be redressed. Any concealment will give a false sense of both as to existing facts. The new name in so far as it is a concealment is a fraud upon the untouchables and a false absolution to the Hindus.[86]

In a similar vein, political scientist Gopal Guru has reasoned that the term becomes a "useful device" for the caste-privileged Hindus to avoid the moral culpability of deliberately oppressing caste minorities for more than a millennium and satiating their guilty conscience without doing the real work of dismantling caste structures.[87] To my mind, such terminology is rooted in patronizing the marginalized castes while simultaneously disempowering them since the name has been "given" to them by the Mahatma as opposed to them choosing it. Hence, the thesis will employ the nomenclature "Dalit" to refer to the marginalized castes.

In constitutional parlance, the term "Scheduled Castes and Tribes" is used to refer to the caste minorities and the tribal or Indigenous peoples of India. Dr. Ambedkar had employed the

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[84] Adapa Satyanarayana, "Sectional President's Address: Nation, Caste, And The Past: Articulation Of Dalitbahujan Identity, Consciousness And Ideology" (2004) 65 Proceedings of the Indian History Congress 416–467 at 417.
[85] Kaustav Chakraborty, *The Politics of Belonging in Contemporary India: Anxiety and Intimacy* (Taylor & Francis, 2019).
[86] SPVA Sairam, "Dr. Ambedkar and the Question of Caste Identity", (11 September 2023), online: *Round Table India* <https://www.roundtableindia.co.in/dr-ambedkar-and-the-question-of-caste-identity/>.
[87] Gopal Guru, "The Language of Dalitbahujan Political Discourse" in Manoranjan Mohanty, *Class, Caste, Gender* (SAGE Publications India, 2004).

term "Depressed Classes" and admitted that there were a variety of nomenclatures in use at the time and no single, uniform appellation was in use.[88] For the tribal community, the term *Adivasi* has been prevalent in keeping with the understanding that they are the first residents of India. Hence, I employ the term *Dalit* and *Adivasi* women throughout this thesis. Simultaneously, I use Scheduled Castes and Tribes as per the language in the Constitution.

Readers will note that I have used the terms oppressed castes and underprivileged castes to refer generally to marginalized communities and oppressor and privileged castes for those who have benefitted from the caste system. This is a deliberate attempt to reject the binary of the "lower and upper castes" and "backward and forward castes." My goal is to place a focus on the deliberate oppression caused by the oppressor castes and draw attention to their social capital which is conveniently forgotten in any discourse on reservations and special measures. Of late, author and media person Dilip Mandal has also proffered the term "lowered caste" to imply that the caste minorities were not lower but deliberately lowered. It resembles the term "racialized" which the EEART report recognizes as an active language (discussed below).[89]

I also use the term Other Backward Classes, though the term "backward" invited a hint of shock from my interaction with Canadian academics who find the use of the word "backward" stigmatizing for the marginalized castes and classes. To apply Dr. Ambedkar's reasoning here – there should be no hesitation in calling out the wrong by its own name. Yet, it is also time to acknowledge that the term "backward" in the Indian Constitution needs to be done away with just as Canada has been recommended to do away with the term "Aboriginal" and adopt the phrase "First Nations, Métis and Inuit Peoples." Even though Chapter 2 of the thesis will explain the meaning of "backwardness" and determine whether women are a backward class of citizens, this thesis is opposed to this otiose and admittedly stigmatizing terminology.

Racialized Women Workers versus Visible Minority Women: The conundrum of using appropriate and sensitive terminology that helps achieve the goals of substantive equality is also seen in the Canadian EEA framework. The EEART Report, meaningfully observes that

[88] B R Ambedkar, *Dr Babasaheb Ambedkar Writings And Speeches* (Ministry of Social Justice & Empowerment), Vol 9 at xx.

[89] Dilip Mandal, "Lower, lowered, Shudra or OBC caste—What to call more than half of India's population?", (24 March 2023), online: *ThePrint* <https://theprint.in/opinion/lower-lowered-shudra-or-obc-caste-what-to-call-more-than-half-of-indias-population/1468742/>.

"language shapes our thoughts and is central to the way we experience the world"[90] in the context of the appropriate terminology for PwDs. In accordance with this understanding, the Report has made some important recommendations in the otiose language of the EEA. The Report has suggested the shift from the term "visible minority" to "racialized workers."[91] The terminology of "visible minority" has been problematic on multiple counts. For one, it imposes a requirement of "visibility" on a non-White populous, which seems to make "whiteness" the norm. This has led the UN Committee on Convention on the Elimination of Racial Discrimination to criticize the term since it invisibilizes the diverse and unique experiences of each of the communities. The Committee had asked Canada in 2007 "to reflect further."[92] This brings us to the second problem with the term – invisibilization. Due to the "clubbing together" of sub-groups, the term has invisibilized the distinct discrimination and marginalization of each sub-group through a broad brushstroke. As a result, several historically discriminated communities, in particular, the Black community have been left in the lurch by the EEA regime. Their progress at the workplace has been sluggish and the occupational segregation of Black women has continued in the realm of care work (Chapter 4 discusses this at length). Such focused examination of each sub-group has escaped the eyes of employers and institutions due to overbroad terminology. Consequently, the EEART Report has recommended the "disaggregation" of the data pertaining to the racialized groups to monitor the progress of each group separately.[93] As regards, the term "racialized", the Report recognises that the terminology is "active" and serves as a reminder that race is a social construct created through historical and ongoing practices of which occupational segregation is key.[94]

Accordingly, the thesis has used the term "racialized women workers" instead of "visible minority" women to include religious minorities, as well.

From Aboriginality to Indigeneity: The term "Aboriginal" is not only otiose but historically incorrect. It originates from Latin where the prefix "ab" implies "away from" or "not original" which is in complete contradiction to the fact that the Indigenous Peoples were the first

[90] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 120.
[91] *Ibid* at 387.
[92] CBC News, "Term 'visible minorities' may be discriminatory, UN body warns Canada | CBC News", (8 March 2007), online: *CBC* <https://www.cbc.ca/news/canada/term-visible-minorities-may-be-discriminatory-un-body-warns-canada-1.690247>.
[93] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 59.
[94] *Ibid* at 161.

settlers in Canada.[95] Further, the United Nations Declaration on the Rights of Indigenous People also employs the term "Indigenous" and not "Aboriginal" to refer to Indigenous communities. The EEART Report 2023 has taken this terminology seriously by recommending a "distinctions-based approach" for the First Nations, Métis and Inuit Peoples which is in opposition to the use of terms like "Indians" which is still present in Section 91(24) of the Constitution Act of 1867.[96] The term "Indians", the Report observes, is a derogatory term which was created by the European colonialists as a name for all Indigenous communities clubbed together.[97] Hence, an important part of the mandate of the Report and now this thesis is doing away with the colonizer's language which continues to perpetrate injustice and harm in the everyday life of Indigenous communities today.

While being sensitive to the meaning and impact of each of these nomenclatures and terminologies, I now lay down the skeletal structure of this essay in the form of key arguments that each chapter advances.

VI. Structure of Arguments

The principal argument of this essay is that the Canadian employment equity framework can support the reimagining of the Indian approach towards special measures to usher in more women workers into the workforce within decent work and dismantle occupational segregation along the lines of caste and gender. To that end, each of the following chapters has a core sub-argument which propels me towards the principal argument.

Chapter 2: This chapter demonstrates that women workers, in particular from the marginalized castes are trapped in precarious informal work. I argue that the prevailing horizontal quota system has been inadequate in bringing them into formal employment in the public and private sectors.

Chapter 3: The Canadian model of employment equity envisages a broad and proactive set of policies and practices applicable to the public and private sectors (to varying extents). This chapter argues that comparative work is not only possible but indeed warranted between the Indian and Canadian mechanisms of special measures.

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[95] "Why we say 'Indigenous' instead of 'Aboriginal' — Animikii", online: *Animikii Indigenous Technology* <https://animikii.com/insights/why-we-say-indigenous-instead-of-aboriginal>.
[96] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 98.
[97] *Ibid*.

Chapter 4: The EEA regime has yielded mixed results – while it has caused an overall increase in women workers in the national workforce but has lagged behind in benefitting Indigenous women, particularly those located on the Reserves, racialized women and women with disabilities.

Chapter 5: The final chapter derives lessons from the EEA regime in the form of five principles which I would like to be reflected in the reimagined employment equity framework. There is an appendix to this chapter at the end of the thesis which presents a potential employment equity legislation for India that incorporates the learnings from the Canadian framework.

This thesis now turns to the diminishing Indian FLFP problem in detail while also examining the socio-economic context which has led to the reduction of women in the workforce.

CHAPTER 2: UNDERSTANDING WOMEN'S LABOUR AND QUOTAS IN A NEO-LIBERAL INDIA

I. The Indian Conundrum at a Glance

India's growth story is incomplete. The country has been experiencing rapidly declining FLFP rates since 2005 from around 30.1% to 24% in 2022 which is lower than the South Asian average of 25.6%.[98] It is indeed a puzzling conundrum that this leading South Asian economy performs worse than some of its less well-off neighbours despite possessing more than seven decades of experience as a modern democracy. The country has managed to defy labour theories that posit a positive correlation between education levels and income. For example, the 2020-21 All India Survey on Higher Education demonstrated a 28% increase in female enrolment in higher education.[99] In fact, female enrolment is currently around 27% more than male enrolment.[100] Yet, there is nearly a fifty-point difference between the male and female labour force participation rates. Accordingly, the Indian FLFP rates exhibit a peculiar U-shaped relationship between education and participation levels where on one end women with low levels of education from financially poor backgrounds are compelled to join the workforce and on the other, women with high levels of education (and social capital) secure lucrative jobs that are too good to be dropped.[101]

The Deputy Director of the ILO Decent Work Team (South Asia), Sher Verick, has excavated four important causes behind this paradox –

a) There is increased enrolment in secondary schooling which has allowed more women and girls to stay in school longer.
b) An increase in household income which ends up making women's work in paid employment redundant in patriarchal households.
c) There is a mismeasurement of women's participation in the workforce

[98] "India", online: *World Bank Gender Data Portal* <https://genderdata.worldbank.org/countries/india/>.
[99] "Ministry of Education releases All India Survey on Higher Education (AISHE) 2020-2021", online: <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1894517>.
[100] Manash Pratim Gohain, "18% more women in higher education in 5 years", *The Times of India* (11 June 2021), online: <https://timesofindia.indiatimes.com/education/news/18-more-women-in-higher-education-in-5-years/articleshow/83415039.cms>.
[101] Ruchika Chaudhary, "Working or Not? What Determines Women's Labour Force Participation in India?" (April 2021), online (pdf): *IWWAGE Working Paper* <https://iwwage.org/wp-content/uploads/2021/05/IWWAGE-Working-Report-upd.pdf>.

d) There is a lack of employment opportunities for women in the non-farm sector which continues to be overwhelmingly dominated by women.[102]

However, in some way or another, many of these causes are intricately connected to the underlying decay in Indian society in the form of *Brahmanical* patriarchy which has been left unaddressed by successive governments in a bid to follow the footsteps of Western democracies. Succeeding discussions on the private sector and the ever-expanding informal sector show that the GoI has taken a *laissez-faire* approach when it comes to securing women workers decent employment. I lay special emphasis on the criterion of "decent employment" because even though women from the bottom of the caste hierarchy undertake paid unemployment, they are relegated to performing precarious work, which is unsafe, poorly remunerated, dehumanizing and exploitative. For the reader's convenience, I subscribe to the ILO's definition of "decent work" which is "productive work for women and men in conditions of freedom, equity, security and human dignity."[103]

Currently, only 5.3% of Indian women workers are "salaried employees" (that is, in formal employment) whereas around 20% are self-employed and 7% are in "casual labour." While it is true that merely joining formal employment does not ensure "decent work", it is also a fair assessment that formal employment offers at the minimum, a semblance of job security, regular remuneration and basic social security benefits. In contrast, women partaking in "casual" or "informal" labour are subject to extensive exploitation in the form of job insecurity, underpayment of wages, harassment and violence and extreme amounts of overwork in conditions of heat and stress. While there is a global shift towards "gig work" and "informalization" which impacts the rights and well-being of *all* workers, it is women workers who are adversely impacted by informalization disproportionately. After all, informalization has "increased insecure and low-paid employment" and it is women who are overrepresented in "stigmatised, hazardous and risky jobs such as health workers, waste pickers, domestic workers."[104]

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[102] Sher Verick, "The paradox of low female labour force participation" (2017), online: <http://www.ilo.org/newdelhi/info/public/fs/WCMS_546764/lang--en/index.htm>.
[103] "Employment and decent work", *European Commission,* online: <https://international-partnerships.ec.europa.eu/policies/sustainable-growth-and-jobs/employment-and-decent-work_en>.
[104] Shiney Chakraborty, "COVID-19 and Women Informal Sector Workers in India" (2020) 55:35, online: <https://www.epw.in/journal/2020/35/commentary/covid-19-and-women-informal-sector-workers-india.html>.

The subsequent section will capture and explain these disturbing trends. However, before venturing into this discussion, I find it imperative to explain the modalities of the Indian caste system since the intent of this thesis is to explore the dismantling of occupational ghettoization along the lines of caste and gender. Dr Ambedkar has drawn a crucial difference between caste and class. He states:

> …the Caste System is not merely a division of labour. **It is also a division of labourers**. Civilized society undoubtedly needs division of labour. But in no civilized society is division of labour accompanied by this unnatural division of labourers into watertight compartments. The Caste System is not merely a division of labourers which is quite different from division of labour—it is a hierarchy in which the divisions of labourers are graded one above the other. In no other country is the division of labour accompanied by this gradation of labourers.[98]

While Ambedkar's explanation is meaningful in clarifying the difference between caste and class, it still perpetrates harmful notions about racial capitalism which still results in the exploitation of labour of the socio-economically marginalised classes. Further, as is obvious today, the notion of "civilized society" is problematic and carries undertones of racism and colonialism.

To my mind, there is no other form of institutional discrimination which is as sophisticated, oppressive, relentless and refined as the millennia-old caste system. The system "efficiently" divides Hindus into four *Varnas* or sections – the *Brahmins* (the priestly caste), the *Kshatriyas* (the warrior caste), *Vaishyas* (the merchant caste) and the *Shudras* (the labour caste). The fifth section, the *Panchama* caste, falls outside the fold of the caste system and is relegated to the margins of society. This caste comprises communities that have borne (and continue to bear) the scourge of untouchability. Meanwhile, the *Adivasis* or the Indigenous Peoples or constitutionally, the Scheduled Tribes also fall outside the precincts of the caste system and are subjected to untouchability, extreme levels of poverty, exclusion and criminalisation.

Historically, the SCs and STs (constituting around 17% and 8.6%[106] of the Indian population, respectively) have been coerced into performing dehumanizing and "polluted" labour across occupations such as manual scavenging, sanitation work, dissection of corpses and other

[105] Dr BR Ambedkar, "Section 4 [Caste is not just a division of labour, it is a division of labourers]", online: <https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/section_4.html>.
[106] Kelsey Jo Starr and Neha Sahgal, "Measuring caste in India", (29 June 2021), online: *Decoded* <https://www.pewresearch.org/decoded/2021/06/29/measuring-caste-in-india/>.

forms of mortuary work and leather crafting (considered to be "pollutive" work by the oppressor castes because of its involvement with animal hide). The *Adivasis* also work as seasonal migrant unskilled labour in urban constructions and are relegated to performing the lowest-paid and precarious labour, particularly due to language barriers.[107]

Aside from the Scheduled Castes and Tribes, the Other Backward Classes (hereinafter, "the OBCs"), recognized under Article 340 of the Indian Constitution, are also victims of severe socio-economic marginalization. While they do not bear the scourge of untouchability and are the "last of the clean castes", the OBCs have historically been part of insecure and poorly remunerated occupations such as agriculture, smithery, herding and shepherding, art and craft work and so on. Hence, they have been denied equitable access to socio-economic opportunities. They constitute the largest proportion of the Indian population at around 35%.[108]

In the next sub-section, I illustrate through various national surveys that the caste and gender divide in the country manifests in the labour market through the overrepresentation of the Scheduled Castes and Tribes women in the rural sector as opposed to women from the oppressor castes. The emerging data corroborates the U-shaped relationship in that the women from the oppressor castes do not participate handsomely in the workforce in the urban sectors owing to a more secure financial background. This peculiarity is perhaps best explained by the patriarchal notion that women's interaction with men outside the home is "pollutive" and hence, best avoided.[109] However, women workers from the Scheduled Castes and Tribes being compelled to join the workforce is a "necessary evil" due to their fragile economic condition and low social status. Thus, to reiterate, our problématique is two-fold – one, Indian women work but their participation in paid employment has diminished and two, women's work has historically been segregated along the lines of the caste and patriarchal system. The following sections examine these problems at length.

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[107] David Mosse, Sanjeev Gupta & Vidya Shah, "On the Margins in the City: Adivasi Seasonal Labour Migration in Western India" (2005) 40:28 Economic and Political Weekly 3025–3038.
[108] Sahgal, *supra* note 106.
[109] Mukesh Eswaran, Bharat Ramaswami & Wilima Wadhwa, "Status, Caste, and the Time Allocation of Women in Rural India" (2013) 61:2 Economic Development and Cultural Change 311–333.

II. Caught in a Mesh of Caste and Gender: The Trials and Tribulations of the Indian Woman Worker in the Private Sector

While approaching the problem of poor FLFP rates in India, it must be recognized that the participation levels are not merely a result of a gendered division of labour but also a larger historically caste-based arrangement of society where the "low castes labour and reproduce labour, whereas the high castes do not labour and produce only specialists…"[110] Through a complicated labyrinth of exogamous endogamy, the Indian oppressor castes have successfully erased the existence and invisibilized the labour of the *Dalits* and *Adivasis* by their outright ostracization in marriage, dining and worship, thereby retaining and perpetuating "caste purity" and "caste supremacy" through generations. The *Brahmanical* obsession with caste purity has historically stigmatised women as "impure" due to their involvement with menstruation and childbirth.[111] Caste purity has culminated in the repression of privileged caste women's sexuality in the form of embargos on inter-caste marriages, widow remarriage and divorce. Thus, Atrey's observation that "women's identity in India has been the chief architectural motif in the construction of other identity categories like caste, nation, region, class, sexuality" is accurate.[112] To achieve the goal of caste purity, women from oppressor castes have been restricted to the realm of householding duties which is why participation in the national workforce remains low amongst privileged middle-class women.

Even as privileged caste women's bodies and labour are subjugated by *Brahmanical* notions of purity, *Dalit* and *Adivasi* women's bodies are perceived as expendable, "loose and promiscuous."[113] In such a debilitating and oppressive framework, more *Dalit* women with low levels of education are compelled to participate in sex work than women from the privileged castes.[114] There are even instances where the birth of women in de-notified tribal communities[115] is celebrated because women are expected to enter sex work, and thereby support the entire

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[110] Uma Chakravarti, "Gender, Caste and Labour: Ideological and Material Structure of Widowhood" (1995) 30:36 Economic and Political Weekly 2248–2256.
[111] Gail Omvedt, "Caste, class, and women's liberation in India" (1975) 7:1 Bulletin of Concerned Asian Scholars 43–48.
[112] Shreya Atrey, *Intersectional Discrimination* (Oxford New York: Oxford University Press, 2019) at 66.
[113] *Ibid*.
[114] S Nanda et al, *Caste, Gender, Labor and COVID-19 in the Urban Informal Economy: A Review of Experiences in three Selected Sectors,* (New Delhi: International Centre for Research on Women, 2022) at 13.
[115] Several communities constitute the De-Notified Tribes, including snake charmers, entertainers, blacksmiths and so on. These tribes were branded "born criminals" by the British Raj. Today, they are severely marginalized and incarcerated disproportionately.

household.[116] In contrast, in oppressor caste households the birth of a daughter is perceived as a tragedy.

These beliefs and attitudes towards labour performed by women from varying social strata demonstrate that the Indian labour market is deeply entrenched in the notions of caste supremacy and heteropatriarchy. It, therefore, becomes integral to examine the statistics through an intersectional lens, particularly in the prevailing political atmosphere with the Hindu supremacist *Bharatiya Janata Party* in power which envisions a Hindu *Raj* arranged on the lines of the *Varna* system.[117]

Recent data from the Annual Report of the Periodic Labour Force Survey (2022-23) (hereinafter, "PLFS") concerning women's labour is dismal. It is, however, an accurate depicter of the prevailing *Hindutva*[118] sensibilities that endorse an ethno-nationalist and caste-supremacist version of the Neo-Liberal capitalist economy – one that serves as the "richest fertilisation" of the cornering of wealth by a few and the dispossession of the masses.[119] Such a debilitating economic system hinges on the allocation of work based on gender and social identities as envisioned by the ancient Hindu caste system.[120] The framework also entails a concentration of trade, industry and wealth in urban centres and a widening of the existing urban-rural divide in India which successive governments have struggled or neglected to battle.

Worsening the situation is the additional challenge of informalization which deprives women workers of the bare minimum social security benefits and protection that the Indian labour codes guarantee since the codes are rarely implemented or applied by private actors. Since the

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[116] *Ibid*.

[117] Ambedkar was firmly opposed to the idea of a Hindu Raj. He stated, "If Hindu Raj does become a fact, it will no doubt, be the greatest calamity for this country. No matter what the Hindus say, Hinduism is a menace to liberty, equality and fraternity. On that account it is incompatible with democracy. Hindu Raj must be prevented at any cost" in B R Ambedkar, *Dr. Babasaheb Ambedkar Writings And Speeches* (Ministry of Social Justice & Empowerment), Vol 8 at 358.

[118] Hindutva, distinct from Hinduism, is a modern, virulent, ethnonationalist political philosophy advocating for a Hindu nationalist India structured along the lines of the Hindu *varna* system fulcrummed on the oppression of the *Dalits, Adivasis*, Muslims and Christians.

[119] Himani Bannerji, "Patriarchy in the Era of Neoliberalism: The Case of India" (2016) 44:3/4 Social Scientist 3–27 at 5.

[120] For instance, Manu, the writer of the ancient legal text *Manusmriti*, prohibited both women and "the low caste *Shudras*" from hearing the *Vedas*, the sacred Hindu texts. The *chandalas* or the "low-castes" were "dog-cookers" destined to perform demeaning tasks such as sweeping, clearing excrement and working with leather. Menstruation women were also pollutive. While "high-born" women were to remain under the protection of their fathers, sons and husbands and allotted domestic and maternal duties, particularly giving birth to a son. See generally, Kim Knott, "Challenges to Hinduism: Women and Dalits" in Kim Knott, ed, *Hinduism: A Very Short Introduction* (Oxford University Press, 2000) 80.

liberalization of the economy in 1991, India has witnessed aggravated levels of informalization of labour as a direct consequence which has continued unchecked by governments.[121] It is to no one's surprise that the Economic Survey of 2021-22 revealed that close to 90% of Indians were engaged in informal work and 98% were engaged in the unorganized sector.[122] The PLFS data from 2021-22 further noted that around 77.9% of male workers were engaged in informal employment versus 60.8% of female workers.[123] Readers must be cautioned that this data includes informal enterprises outside agricultural work. If agricultural work were to be considered, the proportion of women workers in the informal sector would be more in comparison to men. This is because around 62% of women workers are concentrated in agricultural work as opposed to only 38% of men.[124] While the problem of informalization deprives all workers of social security benefits, fair remuneration and job security, the succeeding paragraphs will establish that the problem affects women workers distinctly in a compounded fashion compared to men.

Since urban areas have become powerhouses of wealth and progress even as rural infrastructure has crumbled in a Neo-Liberal setup, women's income has become indispensable in the rural household income as is demonstrated by the U-shaped relationship between wealth and labour. For instance, rural General category women have a 28.6% share in the workforce in contrast with the urban General Category women (non- SC, ST, OBC women) who have a share of 23.3%.[125] Specifically, rural ST women's participation is at 62.9% (close to Canada's overall FLFP) whereas urban ST women have a 37.5% share in the national workforce.[126] Similarly, rural SC women's participation is pegged at 42.7% versus urban SC women's participation at 29.3%.[127] The data from industry-wide participation is even more striking. Around 76% of rural women workers are concentrated in agricultural work in stark contrast to only 11.7% of urban female workers who are predominantly working in manufacturing, trade, hotel and restaurant.[128] Women from urban areas, which tend to be financially secure, thus partake in the workforce at a significantly lower level than rural women.

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[121] Ramaa Sambamurty, "Review of Trade Liberalization and India's Informal Economy" (2009) 44:1 Indian Economic Review 147–149 at 147.
[122] Ministry of Finance, *Economic Survey 2021-22*, (New Delhi: Government of India, 2022) at 398.
[123] Ministry of Statistics and Programme Implementation, *Periodic Labour Force Survey: Annual Report 2022-23*, (New Delhi: Government of India, 2022) at 15.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid* at 14.

The PLFS Report also neatly captures the trend of "casualization of women's labour." Over the years, the share of women in the informal sector has increased from 58.5% in 2020-21 to 65.2% in 2022-23 in rural areas and 54.7% to 55.5% in urban areas.[129] The Report, unfortunately, does not record the caste-wise distribution of women workers in the informal sector. Yet there is no dearth of research documenting the overwhelming presence of *Dalit* and *Adivasi* women in precarious work.[130] For instance, almost all sanitation workers (40-60%)[131] in India belong to the lowest of *Dalit* sub-castes which is perceived as the most impure and pollutive occupation by the privileged castes. Contrary to public perception, such is overwhelmingly performed by women from the *Dalit* and *Maha Dalit*[132] communities in the face of severe health-related challenges, unfair wages, unsafe environment, and sexual abuse.[133]

A 2016 study conducted by a grassroots organization corroborates that the informal or the unorganized sector[134] is populated with women from the Other Backward Classes (around 38.8%), followed by the General Category and then women from the SC and ST communities.[135] Most female workers in the informal sector were working at least 14-16 hours a day if they were migrants as opposed to local women workers who were working 8-10 hours a day. Such women workers were largely unlettered, particularly if they were from the oppressed castes and were under immense financial duress due to indebtedness.[136]

The expansion of technology in manufacturing and construction activities has worsened the conditions for women workers. It has caused an expansion in the number of women workers in casual employment, a phenomenon which has been termed as "feminisation of labour"[137] owing to the notion that women workers are docile, largely unskilled and willing to work at low wages

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[129] *Ibid* at 15.
[130] Authors Vivek Soundararajan and others define "precarity" as "employment situations that are insecure, flexible, unpredictable and often exploitative" in Vivek Soundararajan, Garima Sharma & Hari Bapuji, "Caste, Social Capital and Precarity of Labour Market Intermediaries: The Case of Dalit Labour Contractors in India" (2023) Organization Studies, online: <http://www.scopus.com/inward/record.url?scp=85162650404&partnerID=8YFLogxK>.
[131] Sagar Kumbhare,"Sanitation Workers: At the Bottom of the Frontline Against COVID-19?", online: <https://thewire.in/urban/sanitation-workers-covid-19>.
[132] *Maha Dalits* are the most impoverished sub-castes within the *Dalit* community.
[133] Shubham Kumar & Priyanka Preet, "Manual Scavenging", *supra* note 45.
[134] In the Indian context, the terms "unorganized sector" and "informal sector" are often used interchangeably.
[135] RG Foundation, *Study on Working Conditions & Privileges of Women in the Unorganized Sector in India*, (New Delhi: Ministry of Women and Child Development, 2016) at 10.
[136] *Ibid* at 21.
[137] See generally, Nandita Shah et al, "Structural Adjustment, Feminisation of Labour Force and Organizational Strategies" (1994) 29:18 Economic and Political Weekly WS39–WS48.

for long hours.[138] The construction sector, as an example, abounds in exploitative contractors who function outside the fold of the regulated labour market and employ a large number of casual workers. These contractors subject women workers to physical and sexual abuse, wage theft[139] and underpayment of wages in deplorable working conditions under heat and stress. Since informal jobs fall through the fold of the labour law framework, women workers are disentitled from social security and welfare schemes designed by the GoI.

The abysmal experiences of informal women workers in the construction sectors reverberate across other industries, as well. A 2023 study examining the impact of caste on the precarity of Labour Market Intermediaries in a garment exporting cluster in Southern India culled out the following observations which are all too familiar for caste minorities:

1. The oppressed caste contractors generated limited revenue, lacked the social capital to build support networks unlike the privileged caste contractors and functioned with severe restrictions in their hiring and recruitment practices.
2. The oppressed caste contractors also lacked control over their workers, suffered from stigmatization and invigilation of spaces occupied by them and even experienced segregation in their production facility.
3. Even as they reeled from impoverishment, they received no financial support from the privileged castes in terms of access to resources and opportunities which thwarted their mobility in the industry.[140]

The study is instrumental in exposing the omnipresence of caste discrimination across industries but visible most conspicuously in the informal economy which has escaped the strong arms of the law. The copious data and research work documenting the debilitating lives of women workers in the informal sector regulated by the private forces (although, sub-head II of this chapter demonstrates that the public sector is exclusionary in its own way), are sufficient to make the case for positive action for women workers to bring them within the fold of the formal section.

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[138] Jayanta Parida, "Globalization and Its Impact on Women - an Assessment" (2011) 72:2 The Indian Journal of Political Science 429–435.

[139] The term "stealing of wages" refers to dishonestly and deliberately withholding wages for a period of time. Whereas underpayment would be the affixing of wages at a lower rate than prevailing in the market. Hence, I distinguish and emphasize both these phenomena in the Indian labour market.

[140] Soundararajan, Sharma & Bapuji, "Caste, Social Capital and Precarity of Labour Market Intermediaries", *supra* note 130.

The following section lays out the contours of the unique Indian Reservation System which has recently exhibited vigour in instituting quotas for women workers in governmental positions. However, readers must note that the reservation mechanism applies only to the public sector and leaves private employers outside its realm. Thus, private employers providing formal work opportunities are not mandated to execute any special measures to augment the representation of women workers.

III. The Idiosyncrasies of the Indian Reservation System

i. Early attitudes towards women's quotas

The beginnings of the Indian Reservation System belie the "trending" belief in Neo-Conservative circles of the West that positive action is a recent, "woke DEI program"[141] unleashed by the far-Left. India has known some form of reservation or the other since the last few years of the 19th century. Most notably, Shahu Maharaj of the princely state of Kolhapur had first introduced 50% reservations for the *Shudras* and *Ati Shudras* (currently, the SCs and STs) in state employment.[142] Thereafter, in the sphere of political reservations, seats were to be reserved for the Marathas, Sikhs, Europeans, Parsis and other communities in the legislature in the Communal Award of 1935. With regard to the "Depressed Classes", that is the SCs and STs, special constituencies were to be set aside where their population was numerically high.[143] Thus, this setting aside of "seats" in line with numerical goals has consistently been the Indian idea of positive action. With this understanding, the Draft Constitution of 1948, via Article 37 obligated the State to promote with "special care the educational and economic interests of the weaker sections of the people" and protect them from "social injustice and all forms of exploitation" which in reference to the conditions of the Scheduled Castes and Tribes.[144] For the specific purpose of fair representation in public employment, Article 10 of the Draft guaranteed that the State was at liberty

[141] "Affirmative action wars hit the workplace: Conservatives target 'woke' DEI programs", online: *USA TODAY* <https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007/>.
[142] Bhagwan Das, "Moments in a History of Reservations" (2000) 35:43/44 Economic and Political Weekly 3831–3834 at 3832.
[143] *Ibid*.
[144] "Article 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections", online: *Constitution of India* <https://www.constitutionofindia.net/articles/article-46-promotion-of-educational-and-economic-interests-of-scheduled-castes-scheduled-tribes-and-other-weaker-sections/> at 46.

to make provisions for the reservation of appointments for any "backward class of citizens" who were underrepresented in the eyes of the State.[145]

The chief motivation for the Indian Constituent Assembly to ensconce the Indian Reservation System, popularly known as the "Quota System" in the structure of the Indian Constitution was the overarching principle that every section of the population must have "proper representation and a proper voice in the administration of the country."[146] This principle was agreed upon even though there were differences amongst the assembly members as to whether social status or economic backwardness should be the determinant of the eligibility of an individual in securing the benefits of reservation. The discussion around reservations travelled beyond making right historical wrongs. Instead, the narrative was centred around the "prevailing social customs" and the "upliftment" of the marginalized castes.[147] This rationale is in keeping with Senior Advocate Rajiv Dhawan's (a scholar in the field of affirmative action and constitutional laws) understanding that the case for reservation for women or for that matter any marginalized community is not made because there is an "inter-generational duty to right historical wrongs." If that were the case, there would be no shortage of historical injustices requiring compensation. However, when the "endemic continuance of past injustice" prevails in the present, positive action becomes a potent tool to remedy the skewed power dynamic, be it in the realm of employment, education or housing.[148] This is why in the foregoing sections of the thesis, I have made the case for positive action for women workers by illustrating the ancient caste and gender-based demarcation of labour in Indian society *and* the influence of these notions on the contemporary labour market that continues to dispossess women of their right to work – and to work dignifiedly at that.

However, the idea of proffering reservations to women who had quite obviously suffered from the caste-based arrangement of Indian society was not palatable to the women members (largely hailing from the privileged castes) in the 389-member strong Constituent Assembly. One of the strongest indictments came from Renuka Ray who perceived reservations as "an impediment

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[145] "Article 16: Equality of opportunity in matters of public employment", online: *Constitution of India* <https://www.constitutionofindia.net/articles/article-16-equality-of-opportunity-in-matters-of-public-employment/> at 16.
[146] "26 May 1949 Archives", online: *Constitution of India* <https://www.constitutionofindia.net/debates/26-may-1949/>.
[147] *Ibid*.
[148] Rajeev Dhavan, "Reservations for Women: The Way Forward" (2008) 20:1 National Law School of India Review, online: <https://repository.nls.ac.in/nlsir/vol20/iss1/1>.

to our growth and an insult to our very intelligence and capacity."[149] Her rationale stemmed from an ill-defined "psychological factor" that comes into play whenever the reservation of seats is involved. However, it is unclear through her speech whether this "psychological factor" is the fear of being perceived as "weak" or "less meritorious" or a general disgust towards positive action which is often a sentiment amongst the privileged castes.[150] She doubled down on her stance during the July 1947 session by stating that women from the so-called "enlightened nations"[151], as opposed to Indian women, have had a "narrow suffragist movement". However, Indian women, in contrast, have striven for their rights, in particular the right to partake in work and serve India. She even ventured a step forward and opined that the "social backwardness" of women would be exploited akin to the backwardness of other sections of India if reservations were to be granted[152]. She was also confident that women of "exceptional ability" would invariably occupy positions of responsibility at par with men.[153] Needless to say, her speech was insensitive to the plight of millions of women who had been leading a life of indignity under the helm of the *Brahmanical* patriarchal structures.

Ray and other women members ultimately dismissed the idea of securing reservations for women in the political or employment sphere. They were then congratulated by Former Deputy Prime Minister Sardar Vallabhbhai Patel for "coming forward to say that they do not want any special treatment."[154] Unfortunately, while engaging with Ray's tirade against special measures for women, I find that her understanding was a culmination of otiose myths about reservations and positive action, namely, that they compromise merit or "worth", cause "strife" amongst communities and reinforce stereotypes about the "weaker sex." To her credit, Ray's opposition to reservations also originated from her aspirations for and faith in a newly independent India where women "would come forward and work in free India, if the consideration is of ability alone."[155] I wonder if the dismal statistics seven decades after independence would change her mind.

In marginal contrast to Ray's speech, member Hansa Mehta admitted, "One swallow does not make a summer" in reference to the infrequent achievements of a few privileged women in

[149] "18 Jul 1947 Archives", online: *Constitution of India* <https://www.constitutionofindia.net/debates/18-jul-1947/>.
[150] *Ibid*.
[151] She is referring to the coterie of Western nations, here.
[152] *Ibid.*
[153] *Ibid*.
[154] *Ibid*.
[155] *Ibid.*

Indian politics.[156] She was acutely conscious that the women of India had suffered for centuries from inequalities and had been denied "ordinary human rights" through restrictions on their right to free movement. Despite this consciousness, Mehta went on to pat herself on the back for never asking for "privileges", quotas, separate electorates or reserved seats.[157] Her demand, on the other hand, was social, economic and political justice for women. It is ironic that it did not dawn upon the "founding mothers" that perhaps positive action was the indispensable tool that they were looking for to achieve the social, economic and political justice that they had longed for. They found it sufficient that sex was removed as a ground for discrimination in education, employment and other opportunities, constitutionally.

Albeit in the sphere of political reservations for the Scheduled Castes and Tribes, the only *Dalit* woman member in the Assembly, Dakshayani Velayudhan made her stance clear in no simpler terms, "Personally speaking, I am not in favour of any kind of reservation in any place whatsoever."[158] However, her rationale and apprehensions about separate electorates were legitimate considering her own experiences of abuse and discrimination as a *Dalit* woman. She was of the view that as long as the "*Harijans*" were the "economic slaves of other people"[159], no number of separate electorates could ameliorate their position. She posited that the "*Harijans*" would "do better by joining with the majority community" instead of "standing apart from other communities."[160] Now, her views on the issue of women's reservation in the legislature or public employment are not known. However, the tenor of her criticism of separate electorates, which is a form of reservation, conveys her legitimate concerns surrounding the further isolation of the beneficiaries of quotas and divisiveness amongst communities. My thesis concurs with her rationale that eliminating the "economic slavery" of the SCs and STs, particularly SC and ST women is crucial to truly break the chains which have long tied them to a life of domesticity and dehumanization. Perhaps, as a staunch socialist Veladhuyan would have become a fierce advocate

[156] "19 Dec 1946 Archives", online: *Constitution of India* <https://www.constitutionofindia.net/debates/19-dec-1946/>.
[157] *Ibid*.
[158] "28 Aug 1947 Archives", online: *Constitution of India* <https://www.constitutionofindia.net/debates/28-aug-1947/>.
[159] *Ibid*.
[160] *Ibid.*

of reservations seeing the spurned Indian woman worker in a free market, liberal Indian economy seventy-seven years down the line.

ii. Are Indian women workers a "backward class of citizens"?

As demonstrated at the start of the chapter, the prevailing environment of Neo-Liberalism is entrenched in the millennia-old patriarchal and caste-based kinships that employers (comprising, generally of the privileged castes) have forged.[161] This implies that the cheerleading of the "Dalit Capitalist project", as Suraj Yengde labels it, will not result in more *Dalits* (or, women for that matter) becoming industry leaders but will only fortify caste and gender-based division of labour in the Neo-Liberal economy.[162] Thus, recommendations by public policy experts to improve access to education for women, implement parental leaves at workplaces and nationalize childcare to support women workers within the same Neo-Liberal economic framework are not "transformative" [163] enough measures that will lead to meaningful change in the quality of women's work.[164] Additionally, these measures alone cannot protect *Dalit* and *Adivasi* women trapped in precarious and underpaid employment and bring them within the fold of decent work which is still the stronghold of the privileged castes.

In recognition of the failings of the public and private job sectors to grant adequate representation to women across castes in formal employment for the past seventy-seven years, we must trace our steps back to the provisions of the Indian Constitution which allow reservations, and indeed, any special measure for discriminated communities. Article 15 of the Indian Constitution provides:[165]

> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

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[161] "(On the) Make in India: Family business in the neoliberal era", online: <https://www.eth.mpg.de/4199198/blog_2016_08_15_01>.
[162] Suraj Yengde, *Caste Matters* (Gurgaon: India Viking, 2019) at 196.
[163] Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) I/212 New Left Rev 68–93.
[164] Valeria Esquivel & Marzia Fontana, "Tackling gender segregation: How a new policy tool can finally help bring about change", International Labour Organization, (6 March 2024), online: <http://www.ilo.org/employment/Informationresources/covid-19/other/WCMS_913375/lang--en/index.htm>.
[165] *The Constitution of India*, 1950, art 15.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Aside from enumerating the grounds for discrimination, these clauses grant a window into the nature of discrimination historically prevalent in Indian society in the form of deprivation of access to a wide range of public spaces and services. Accordingly, courts have interpreted the term "shops" widely to even include universities and colleges since they provide educational services.[166]

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

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

This segment of the provision is key – it empowers the State to make special provisions for the advancement of women, children, Scheduled Castes and Tribes and socially and educationally backward classes of citizens. In other words, women, children, Scheduled Castes and Tribes and socially and educationally marginalized classes are protected categories under Article 15. The terminology of "socially and educationally backward classes of citizens" has deliberately been created as broad so as to permit the State to uplift various categories of citizens including PwDs[167] and trans individuals.[168]

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement

[166] Thulasi K Raj, "Private discrimination, public service and the constitution" (2022) 6:1 Indian Law Review 17–36.
[167] "India", online: *Disability:IN* <https://disabilityin.org/country/india/>.
[168] Utkarsh Anand, "Quota benefits only for marginalised transgender persons, Centre tells SC", (26 July 2023), online: Hindustan Times <https://www.hindustantimes.com/india-news/transgender-persons-can-avail-quota-benefits-under-existing-reservation-categories-centre-tells-supreme-court-101690313482421.html>.

of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

As is apparent, the State can undertake special measures for the aforesaid categories of citizens at both public and private educational institutions barring minority educational institutions such as those funded and operated by religious minorities.

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.— For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

Clause 6 is a recent addition to Article 15 since it has now introduced a new protected category of economically weaker individuals who will now be granted reservation to remedy economic backwardness.

Even as Article 15 allows special measures more generally, Article 16 goes a step ahead and envisages positive action specifically in public employment for those facing socio-economic backwardness[169]: The relevant clauses are:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

[169] *The Constitution of India,* 1950, art 16.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(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.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

Now, it will be an obvious urge of the readers to interpret Article 16(4) which sanctions reservations for the "backward classes" as a contradiction to the promise of equality in 16(1). Anurag Bhaskar points out that over a period of time, there has been a "constitutional shift" in the stance that Article 16(4) is merely "an exception clause and is not an independent provision" which has to be construed strictly.[170] Bhaskar notes that in the *State of Kerala v NM Thomas* judgement, Justice Fazal Ali noted that Article 16(4) is a "part and parcel of Article 16(1) and (2)" and cannot be read in isolation.[171] In the same case, Chief Justice Ray made a significant observation that the phrase "equality of opportunity" is to be construed as "effective material equality" which entails providing special measures for the members of "backward classes."[172] Such an understanding

[170] Anurag Bhaskar, "Reservations, Efficiency, and the Making of Indian Constitution | Economic and Political Weekly", (8 May 2021), online: <https://www.epw.in/journal/2021/19/special-articles/reservations-efficiency-and-making-indian.html>.
[171] *Ibid*.
[172] *Ibid*.

based on the principles of substantive equality is crucial while dealing with the question of whether women workers can be classified as a "backward class."

The Constitution drafters had agreed in numerous sessions that the criterion of "backwardness" is mired in politics and inexactitude.[173] Dr Ambedkar, on the other hand, had opined that a backward community is a community which is backward "in the eyes of the local government"[174] thereby, indicating that backwardness is determined by one's socio-economic position in a certain geography. The question then arises whether women workers can be constitutionally classified as "backward." The answer lies in the four-fold benchmark laid down by the 1979 Mandal Commission which was constituted to identify the "Other Backward Classes" and as a consequence, secure affirmative action for the community:

i. Low social position in the traditional caste hierarchy of Hindu society
ii. Lack of generational advancement among the major sections of a caste of community
iii. Inadequate or no representation in Government service
iv. Inadequate representation in the fields of trade, commerce and industry[175]

If these parameters were to be applied, women across all castes and classes would be identified as a "Backward Class" within the meaning of Articles 15 and 16 due to the general socio-economic backwardness and lack of access to opportunities they have experienced throughout Indian history.

The first segment of the chapter has established that women's participation in "trade, commerce, industry", which is largely the forte of the private sector, is increasingly becoming casual and ultimately, precarious. A general discussion on the caste system also shows that women have been relegated to the bottom of the caste hierarchy and accorded either domestic chores or precarious work. This has largely prevented their overall advancement in socio-economic terms in Indian society. Thus, the first three criteria spelt out by the Mandal Commission are satisfied. In terms of their participation in governmental services, the share of women employees in Central Public Sector Enterprises had fallen between Financial Years 2020-21 and 2021-22 and now stands

[173] The Constituent Assembly Debates, Volume X, Oct 14, 1949 <https://indiankanoon.org/doc/54336/>.
[174] Nirupama Pillai, "Who are the Other Backward Classes?" (2007) 19:1 Student Bar Review 31–49 at 35.
[175] BP Mandal, *Report of the Backward Classes Commission*, (New Delhi: The Government of India, 1980) at1.

at only 9.12% of total employees.[176] Worse yet, the phenomenon of occupational ghettoization is glaring – around 57% of women employees are concentrated in the "worker" category whereas only 33.70% are represented in the "managerial/executive" positions.[177]

Interestingly, the Public Enterprises Survey noted that maternity leave benefits and the Internal Committee for preventing sexual harassment of women were implemented in consonance with the pertinent legislative mandates.[178] Yet, these measures, of their own accord, have been incapable of improving women's representation and tackling occupational ghettoization in the absence of quotas. In contrast, the posts for the SC, ST and OBC are reserved, and their representation was roughly in accordance with their share of India's population. If the demographics in the central public offices were examined more intimately, the absence of *Dalit*, *Adivasi* and OBC women would become starkly visible. The first Backward Classes Commission Report published in 1955, which laid down the groundwork for the Mandal Commission Report, had accurately predicted such a scenario and recommended the inclusion of women within the sphere of "Other Backward Classes" and accord them the benefits of affirmative action. This proposal fell on deaf ears.[179]

In 2022, the Madras High Court was confronted with a similar question as this thesis – can women be classified as a "Backward Class" such that they can be granted reservation as a separate category?[180] The High Court answered this question in the affirmative while pointing to Article 15(3) of the Constitution which envisages special provisions for women, generally. Additionally, Article 16(4) empowers the State to provide to Backward Classes in the field of public employment while leaving the definition of "Backward Class" open to interpretation. The High Court further observed that Article 16(2) enumerates "sex" as a prohibited ground of discrimination. Reading all these provisions in the equality codes harmoniously, the High Court concluded that women are indeed a "vulnerable section" of society no matter the strata to which they belong.

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[176] Ministry of Finance, *Public Enterprises Survey 2021-22: Annual Report on the Performance of Central Public Sector Enterprises,* (New Delhi: Government of India, 2022) at 96.
[177] *Ibid* at 97.
[178] *Ibid* at 98.
[179] Nomita Yadav, "Other Backward Classes: Then and Now" (2002) 37:44/45 Economic and Political Weekly 4495–4500 at 4495.
[180] *M Sathish Kumar v The Tamil Nadu Uniformed Services*, WP (C) NO 237 OF 2020.

iii. The Modalities of Horizontal Quotas

Before undertaking a discussion on the trends in instituting horizontal quotas, I find it imperative to explain the modalities of vertical and horizontal quotas to readers who are unversed in the intricacies of the quota system. The following chart from the *Saurav Yadav v The State of Uttar Pradesh*[181] judgement has been provided that demonstrates reservations in the provincial police cadre:

Post	**Open Competition/ Unreserved (in %)**	**Scheduled Caste (in %)**	**Scheduled Tribe (in %)**	**Socially and Educationally Backward Classes (in %)**	**Total posts available for recruitment**
Police Inspector	51	12	17	20	100
Women's seats reserved at 33%	17	4	6	7	33

Table 1: The "Proper and Correct Method of Implementing Horizontal Reservation for Women" as per the Supreme Court of India in *Saurav Yadav v The State of Uttar Pradesh*, (2021) 4 SCC 542.

This chart shows that the vertical quota categories are based along the lines of caste while the horizontal quotas for women cut through the vertical categories. These "interlocking reservations" grant women across the vertical categories a 33% share in the seats which effectively ensures that *Dalit* and *Adivasi*, women who have not enjoyed access to public employment, are guaranteed a 33% share in the seats at the very least. Meanwhile, the Open or General Category seats remain available for all categories to compete. Although, a 33% share out of the Open Category remains reserved for women.

A common inquiry that arises in the context of these categories is why Indian women have not been designated a distinct category akin to the SCs, STs and OBCs despite experiencing

[181] *Saurav Yadav & Others v State of Uttar Pradesh & Others*, (2021) 4 SCC 542.

historical and contemporary socio-economic backwardness. The first explanation is that Indian society, despite being heteropatriarchal, has historically been arranged along the lines of the caste system. Thus, decimating and dismantling the caste system through the upliftment of the marginalized castes remains the primary focus of special measures in India.

The second explanation for envisaging horizontal quotas is provided in the *Indra Sawhney v Union of India*[182] judgement, which has been reiterated in the *Saurav Yadav* judgement. These judgements rely on Articles 15(4) and 16(4) to explain that providing reservations to women as an exclusive vertical category would be "tantamount to reservation in favour of upper caste" which is contrary to the goals and objectives of the special measures envisaged in the Indian Constitution.[183] This explanation rests on the intersectional understanding of the aggravated and compounded form of discrimination confronting SC, ST and OBC women. Clubbing all women together in a vertical category would replicate the "iniquitous phenomenon"[184] that the Constitution set out to remedy. Vertical reservations for women would result in oppressor caste women securing a majority of seats in public employment, owing to their social capital, while leaving behind *Dalit* and *Adivasi* women. This understanding is anchored in the principles of substantive equality and intersectionality and has been reiterated and reaffirmed by several judgements and is now settled law in Indian jurisprudence.

iv. The Tryst with Horizontal Quotas in Indian Politics

Although the Union Government ("Federal Government" for a Canadian audience) has not instituted any quotas for women in central employment, it has undertaken several measures including maternity leave for 180 days, childcare leave, child adoption leave, special allowance for women with disabilities and exemption from payment of fees for a few examinations for Central Government positions.[185] Yet, as demonstrated above, the representation of women has diminished in the public sector. This is understandable as some of these measures, in particular the lack of paternity leave in synchrony with maternity leave can make women appear as

[182] *Indra Sawhney v Union of India*, 1992 supp (3) SCC 217.
[183] *Ashish Kumar Pandey And 24 Others v State Of UP*, 2016 SCC OnLine ALL 187.
[184] *Indra Sawhney v Union of India*, 1992 supp (3) SCC 217; *M Sathish Kumar v The Tamil Nadu Uniformed Services*, WP (C) NO 237 OF 2020. The "iniquitous phenomenon" implies the unfair competition which *Dalit* and tribal women will be subjected to if *all* women were to be treated as a homogenous vertical category in the recruitment process of public employment. It would effectively seize the equality of opportunity from marginalized women which the Constitution set out to guarantee.
[185] "Less than 11% women figure in Central Govt jobs", (12 March 2020), online: *The Indian Express* <https://indianexpress.com/article/jobs/only-10-93-women-figures-in-central-govt-jobs-jitendra-singh-6311121/>.

"unproductive" workers to recruiters and thereby jeopardize their employment prospects. Hence, not all of these measures are meaningful in increasing women's participation levels. In contrast, several provincial governments in India are making rapid strides in guaranteeing "horizontal quotas" for women and other marginalized communities such as trans persons, in municipalities and urban local bodies and public employment. As demonstrated above, the court jurisprudence has played an integral role in propelling horizontal quotas forward.

. Most recently in January 2023, the small province of Uttarakhand instituted a 30% horizontal reservation in public services and posts for women in the face of backlash and legal challenges.[186] Meanwhile, in 2021, the province of Bihar implemented 33% reservation for women in the state's engineering and medical colleges even as it has continued to set aside 50% seats for women in *Panchayati Raj* institutions, 50% seats in cooperative societies, 35% in police recruitment and 50% posts in all government jobs. These policies were instituted as a direct response to the poor FLFP rates in the province (6.1% in urban areas and 6.4% in rural areas between 2019-20).[187] The reservation policy in the police force has resulted in more female police officers being recruited across the province.[188] Further, since 2020, the province of Punjab has envisaged 33% horizontal reservation for women in Punjab Civil Services "under all the establishments at the stage of direct recruitment"[189] even as the province has executed 50% horizontal reservation for women in *Panchayati Raj* Institutions since 2017. A few provinces such as Tamil Nadu headed by a Left-leaning provincial government have even expanded quotas for women in government jobs from 30% to 40% while giving preference to orphans who have lost their parents in the COVID-19 pandemic, first-generation graduates and Tamil medium students in government schools.[190] A spate of reservation policies for women in the provinces has pressured

[186] *The Uttarakhand Public Services (Horizontal Reservation for Women) Act*, 2022, Act No: 01 of 2023.
[187] Aviral Pandey, "Explaining the U-curve Trend of Female Labour Force Participation in Bihar" (2023) 58:30, online: <https://www.epw.in/journal/2023/30/special-articles/explaining-u-curve-trend-female-labour-force.html>.
[188] PTI, "Women's Reservation Bill inspired by Nitish Kumar, claims JD(U)", online: *Deccan Herald* <https://www.deccanherald.com/india/womens-reservation-bill-inspired-by-nitish-kumar-claims-jdu-2692403>.; Santosh Kumar & Nishith Prakash, "Effect of political decentralization and female leadership on institutional births and child mortality in rural Bihar, India" (2017) 185 Social Science & Medicine 171–178.
[189] *Punjab Civil Services (Reservation of Posts for Women) Rules, 2020*, Notification No GSR 87/Const/Arts309 and 15/2020.
[190] "Tamil Nadu raises quota for women in govt jobs from 30% to 40%", *The Times of India* (13 September 2021), online: <https://timesofindia.indiatimes.com/city/chennai/tamil-nadu-raises-quota-for-women-in-govt-jobs-from-30-to-40/articleshow/86170164.cms>.

the ethnonationalist BJP government heading the GoI to list women's reservations as an agenda in its election manifesto for the forthcoming provincial and national elections, as well.[191]

By now, the readers will have understood that horizontal quotas suffer from severe pitfalls. For one, they are inapplicable to the private sector. This is a critical drawback considering that the public sector is shrinking and being privatized. This implies that the labour law protections or constitutional quotas will not be available to the protected categories in the private sector."[192] The Minister of State for Finance from the ruling government has also admitted that a loss in quota jobs will follow the disinvestment policies.[193] Thus, pushing for the implementation of horizontal quotas in the face of surging privatization makes little sense unless a prospective employment equity legislation includes the organized private sector, as well.

Now even if the private sector was subject to Article 16 and mandated to provide horizontal quotas to women, it would still not resolve issues of occupational ghettoization, stigma and discrimination, stereotyping, resentment and an inhospitable work environment for women. The shortcomings of the system can be explained through Sandra Fredman's multi-dimensional framework of substantive equality. These involve redressing disadvantage, addressing stigma, discrimination, violence or prejudice, enhancing voice and participation and, accommodating difference and achieving structural change.[194] While horizontal quotas help achieve numerical goals of inducting more women into the national workforce in the formal sector, they do not remedy the concentration of women in certain "women-centric" jobs that are typically underpaid, unstable and do not provide them meaningful say at the workplace even within the formal sector organization. In the EEART Report of 2023, one of the foremost recommendations is the expansion of the meaning of "employment equity" to include not only achieving but also "sustaining substantive equality" through "effective employer implementation, meaningful consultations and regulatory oversight" over the special measure programme. These include

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[191] Sumir Karmakar, "BJP promises 33% reservation for women in govt jobs in Mizoram, probe against MNF regime", online: *Deccan Herald* <https://www.deccanherald.com/elections/mizoram/bjp-promises-33-reservation-for-women-in-government-jobs-in-mizoram-probe-against-mnf-government-2745177>.

[192] TCA Sharad Raghavan, "Govt not in business: Modi govt accounts for 72% of all disinvestment since 1991, data shows", (31 October 2022), online: *ThePrint* <https://theprint.in/economy/govt-not-in-business-modi-govt-accounts-for-72-of-all-disinvestment-since-1991-data-shows/1185450/>.

[193] "Disinvestment of PSUs will lead to loss of quota jobs: Govt in Lok Sabha", (9 August 2021), online: *Hindustan Times* <https://www.hindustantimes.com/india-news/disinvestment-of-psus-will-lead-to-loss-of-quota-jobs-govt-in-lok-sabha-101628513295760.html>.

[194] Sandra Fredman, "Substantive equality revisited" (2016) 14:3 IJCLAW 712–738.

"correcting disadvantages" and undertaking the task of 'barrier removal" which will ultimately lead to institutional change.

Then there is the logistical aspect of extending horizontal quotas to private organizations. Without devising a stringent oversight mechanism, there will likely be excessive non-compliance with the quota programme and perhaps, even a flawed data collection system for identifying the beneficiaries.[195] In the prevailing system, no one national or provincial commission or institution is in charge of enforcing quotas, monitoring compliance and tracking results.

In Chapter 5, I explore these inadequacies at length through the lens of five principles that I will derive from the examination of the EEA framework and the EEART Report of 2023. These principles are – barrier removal, meaningful consultation, stringent regulatory oversight, extending applicability and coverage and data justice. I highlight how the horizontal quota falls short on all these five counts and offer insights into remedying these drawbacks through a detailed employment equity legislation.

The next chapters are dedicated to examining and studying the Canadian framework at length along the principles of substantive equality and culling out key learnings for India.

[195] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 84.

CHAPTER 3: THE CANADIAN EMPLOYMENT EQUITY MODEL AT CLOSE QUARTERS

I. Looking to the Colonial Cousin Canada

Commenting on the final draft of the Constitution presented by Dr. Ambedkar in November 1949, Constituent Assembly member K. Hanumanthaiah wryly remarked – "we wanted the music of *Veena* or *Sitar*, but here we have the music of an English band."[196] Speaking to the unitary nature of the Constitution, its use of English, "a foreign language" and the straying of the Constitution drafters from Gandhian principles, Hanumanthaiah pointed to the Western education of the Constitution drafters for coming up with a document that did not truly reflect the "principles and ideologies" of a "great country like India."[197] Hanumanthaiah's quote serves as an important caution for this thesis work. It institutes an immense onus on me to justify why looking westwards to Canada (when academia is increasingly looking to the South through TWAIL) makes sense. To address this potential critique, I turned to studying the goals of TWAIL which Professor Makau Mutua describes eloquently – to understand, deconstruct and unpack the purpose of international law as a tool for perpetuating racial hierarchies, to provide an alternative legal edifice for international governance and to eradicate the conditions of underdevelopment in the Third World through the re-shaping of scholarship, policy and politics.[198] I find that the employment equity framework in Canada is itself a powerful product of TWAIL and concerted action by marginalized communities, including racialized minorities, Indigenous Peoples and women to overhaul the existing understanding of equality in employment and workplace structures. It is aimed at transforming structures which have historically oppressed the working class, who more often than not, are formerly colonized citizens. It, therefore, makes sense for me to look to Canada's marginalized for the purpose of eradicating oppressive working conditions for India's marginalized. In that sense, this thesis is a dialogue between the marginalized communities of both jurisdictions instead of a legal transfer of white structures into the prevailing *Brahmanical* setup.

To make this comparative work and dialogue meaningful, I find it useful to refer to the theory of "legal transplants" and "legal irritants."

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[196] "17 Nov 1949 Archives", online: *Constitution of India* <https://www.constitutionofindia.net/debates/17-nov-1949/>.
[197] *Ibid*.
[198] Makau Mutua & Antony Anghie, "What Is TWAIL?" (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31–40 at 1.

The term was first coined by legal historian Alan Watson in the 70s. In his book "Legal Transplants: A Comparative Approach to the Law", Watson teases out the following reflections:

I. The transplanting of individual rules or legal systems is a common phenomenon.

II. Transplanting is the most "fertile source" of development as can be seen through the development of Roman Civil law and English Common law.

III. Transplanting of legal rules is "socially easy" even when they come from different kinds of systems.

IV. Voluntary reception or transplant almost always involves a change in the law which could be due to factors such as climate, economic conditions, et al.

V. Reception of the transplant is easier if the receptor is less advanced materially and culturally.

VI. The importance of authority for transplants and for law in general is crucial – lawyers are always looking for precedents to bolster their opinions.

VII. Laws are the fruit of human experience and once and rules can be adopted for the needs of many nations once their value is appreciated.[199]

VIII. In the "Afterword", Watson adds a further reflection that is crucial for building my case. He wonders whether the selection of a system to borrow depends on the shared, social, political and economic values and conditions. However, he concludes that the key criterion is "accessibility." Accessibility, according to him, can be determined through a) the written word, b) the ease of understanding the rule(s), including understanding the language and c) the ready availability of the rule.[200]

These principles of "legal borrowing" make it amply clear that the institutional transfer of rules and systems is not only common but also a "fertile source" for the development and evolution of the law. Even though colonialism has produced vastly distinct socio-economic realities for India and Canada, the experiences of the marginalized and disenfranchised communities in both jurisdictions manifest in similar ways, particularly in the labour problem that I have sought to address. As stated above, this thesis is not a stereotypical comparative law project that often possesses an underlying theme of the "Imperialist matrix" which serves to "legitimize and cloak

[199] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Georgia: University of Georgia Press, 1974) 96.
[200] *Ibid* at 113.

the bloodiest acts of piracy in a mantel of progressive nationhood and beneficent whiteness."[201] Instead, it takes stock of the historical context of imperialism and colonialism which have given birth to, sustained and prodded on Comparative Law studies until now, as Professor Helge Dedek observes. He urges that there must be a reframing of conversations such that we take into account the "historical dynamics of comparison" instead of undertaking studies situated in an "ahistorical vacuum in which Western universalism is blameless and benign."[202] Therefore, Watson's notion that legal transplantation is easier if the receiver is "less advanced" is harmful in that it intends to establish a racial hierarchy between the transferor and transferee. In contrast, this thesis demonstrates that there is a re-forging of connections between the marginalized across jurisdictions as we study special measures in a "context-sensitive"[203] manner.

Both India and Canada have inherited the Parliamentary style of democracy along with the common law tradition reflected most conspicuously in tort, contract, property and wills and trusts law.[204] Aside from sharing this inheritance, both jurisdictions organically developed certain unwritten principles in their constitutional jurisprudence which possess an uncanny similarity. The 1998 *Reference re Secession of Quebec*[205] matter identified federalism, democracy, constitutionalism, rule of law and protection of minorities as underpinnings of the Canadian Constitution.

On the other side of the hemisphere, India developed the "Basic Structure Doctrine" in the 1960s and 70s which was solidified in the *Keshavananda Bharati* judgement.[206] The Doctrine lists twenty-one principles, including the supremacy of the Constitution, federalism, rule of law, secularism, parliamentary system of government and so forth, as basic features of the Indian Constitution which cannot be amended. These unmistakable similarities in the democratic structure of both polities, developed independently, have led legal academics to confer the title of "colonial cousins" on India and Canada.[207] These developments demonstrate that both countries share similar political and legal values in a related democratic setup. Additionally, both states

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[201] Helge Dedek, "The Tradition of Comparative Law: Comparison and its Colonial Legacies" in Mathias Siems & Po Jen Yap eds, *The Cambridge Handbook of Comparative Law* (Rochester, NY, 2022).
[202] *Ibid*.
[203] *Ibid*.
[204] Using the word "impose" instead of "inherit" is historically accurate considering that the legal tradition system was imposed upon colonised populations without due democratic processes.
[205] *Reference re Secession of Quebec*, [1998] 2 SCR 217.
[206] *Kesavananda Bharati v State of Kerela*, (1973) 4 SCC 225.
[207] Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 Yale J Int'l L 207 at 208.

have historically served as hubs for a confluence of cultures, ethnicities, races, and religions. Yet, post-pandemic, it seems that both jurisdictions are grappling with similar challenges of socio-economic disparities affecting their most marginalized communities.[208] The prevailing socio-economic conditions in India that I have discussed in the foregoing chapters demonstrate that the time is ripe for legal and institutional change.

As regards the accessibility of the EEA, the legislation itself and its underlying principles are not foreign to India. Readers will appreciate the congruence in the tenor of Articles 15 and Section 15(2) of the Indian and Canadian Constitutions which empower the governments of both states to undertake positive action (which manifests in distinct ways) for marginalized communities. The same has been acknowledged by the Bombay High Court in *Yash Pramesh Rana v State of Maharashtra*[209] to determine the contours of the reservation programme in India. There is a shared understanding of other Fundamental Rights and Charter Rights, as well, including free speech, freedom from unreasonable search, balancing of protected rights under a conflict and so on.[210] Thus, the EEA and the Charter Rights are not in any way inaccessible or hard to grasp for the Indian lawmakers and the citizenry. One can argue that the Indian Constitution in itself is a result of vast legal transplantation and institutional transfers from the UK, US, France, Australia, Germany, the USSR, Japan and so on. The employment equity reform that I examine in this essay serves as a strong precedent from Canada which has been engaged with and respected in Indian jurisprudence. In Watson's terminology, the change is "socially easy."

There is one other consideration while arguing for legal borrowing. Gunther Teubner observes that transplants do not necessarily imply that the transferred material will remain identical in the "new organism." Rather, a foreign rule will cause "fundamental irritation" which can lead the organism into unchartered territories previously unaccounted for.[211] Thus, legal irritants can cause

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[208] John Shields & Zainab Abu Alrob, "The Political Economy of a Modern Pandemic: Assessing Impacts of COVID-19 on Migrants and Immigrants in Canada" (2021) 32:1 Alternate Routes: A Journal of Critical Social Research, online: <https://alternateroutes.ca/index.php/ar/article/view/22532>.; Elif C Arbatli Saxegaard et al, "Inequality and Poverty in India: Impact of COVID-19 Pandemic and Policy Response" (2023) 2023:147 IMF Working Papers, online: <https://www.elibrary.imf.org/view/journals/001/2023/147/article-A001-en.xml>.

[209] *Mr Yash Pramesh Rana And 25 Ors v State Of Maharashtra And Ors*, 2020 SCC OnLine Bom 678.

[210] The Supreme Court of India referred to *Dagenais v Canadian Broadcasting Corp* in *Sahara India Real Estate Corporation Limited and Others v Securities and Exchange Board of India and Another*, (2012) 10 SCC 603 while explaining these principles.

[211] Gunther Teubner, "Legal Irritants: How Unifying Law Ends up in New Divergences" in Peter A Hall & David Soskice, eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 417-441.

disruption and turbulence in the receiving country. I find that such a disruption is a *sine qua non* in ushering in a new era of transformative change in how India perceives, interprets and implements positive action. As the foregoing chapters have argued, there is a sore need for shifting from a single-dimensional perspective towards substantive equality to a more holistic interpretation – one that truly grants dignity, voice and liberty to the millions of women workers. The change in discourse and narratives surrounding special measures, perhaps can only be triggered once we look beyond the current framework which we are familiar with. Additionally, such disruption would not be new for Indians. The Parliamentary form of democracy and the Indian Constitution were all results of foreign institutional transfer and yet Indians found a way to make this so-called "elite" document written in a foreign language their own. Rohit De in the book "People's Constitution" highlights how one of the first cases regarding the fundamental right to trade and occupation was brought to the Supreme Court by a vegetable vendor from a small town in India in 1950 – barely a month after the Constitution was adopted.[212] Who would have thought that this document would be engaged with so critically and meaningfully by Indian minorities and subaltern groups in the aristocratic chambers of the Supreme Court over these seven decades? I am confident that the Canadian EEA framework will similarly be reconstructed, "Indianised" and engaged with thoroughly by the Indian citizenry, in particular by the marginalized. Such disruption is welcome.

II. The Beginnings of Employment Equity in Canada

Section 15 of the Canadian Constitution is rooted in the principles of substantive equality. Clause 2 of the provision akin to Articles 15 and 16 of the Indian Constitution empowers the State to make laws, programmes or carry out activities for the "amelioration of conditions" of individuals or groups who are disadvantaged owing to the grounds listed in Section 15(1), namely, race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

With this understanding of substantive equality, the Royal Commission on Equality in Employment was established in 1983 and that culminated in what is popularly called the Abella Report, 1984. The Report was conceived and drafted by Justice Rosalie Silberman Abella, the first Jewish woman to be appointed as a Judge in the Supreme Court of Canada. The Report was a

[212] Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic*, illustrated edition ed (Princeton: Princeton University Press, 2018) at 1.

direct repercussion of concerted labour movements in the 1970s and 80s in the face of surging inflation, wage inequality and deplorable working conditions. These movements had pressured the then Progressive Conservative Government headed by Prime Minister Brian Mulroney to assign Justice Abella with the mandate "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting all individuals to compete for employment opportunities on an equal basis…"[213] on a "shoestring budget" of CAD 1 million "in a tight time frame" as Justice Abella later recalled.[214]

At the heart of the labour struggles emerging in Canada were issues of social justice and inequality brought to the fore by women, racialized peoples, the Indigenous Peoples and persons with disabilities who now constitute the four designated groups that are granted protection in the EEA.[215] Significantly, the Black railway porters who had fought the racially segregated labourers employed in Canadian railways against gruelling working hours, below-par living wages and segregation had propelled the movement forward. Historian Cecil Foster observes that Canada became "multicultural" because of the work put in by the porters at the railways and domestic workers at home.[216]

Of significance was also the inclusion of feminist issues in the agenda of largely male-dominated trade unions, including issues of childcare, pay equity, maternity leave and sexual harassment at workplaces, particularly because of the increase in women entering the workforce and full-time employment and eventually becoming union members.[217] Kim England calls this period of the 70s and the 80s "watershed decades" due to the increased feminization of paid employment, the onset of the second wave of feminism and the growth in human rights legislation in Canada and across the world.[218] Carol Agócs and Harish Jain note that this was also a period where human rights tribunals were being inundated by individual cases alleging discrimination

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[213] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 3.
[214] Carol Agócs, "The Making of the Abella Report: Reflections on the Thirtieth Anniversary of the Report of the Royal Commission on Equality in Employment" in *Employment Equity In Canada: The Legacy of the Abella Report* (Toronto: University of Toronto Press, 2014) at 16.
[215] Carol Agócs, "Perspectives on Employment Equity in Canada" in *Employment Equity In Canada: The Legacy of the Abella Report* (Toronto: University of Toronto Press, 2014) at 3.
[216] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 140.
[217] "Labour Movement and Women's Equality – Rise Up! Feminist Digital Archive", online: <https://riseupfeministarchive.ca/activism/issues-actions/labour-movement-and-womens-equality/>.
[218] Kim England, "Women, Intersectionality and Employment Equity" in *Employment Equity In Canada: The Legacy of the Abella Report* (Toronto: University of Toronto Press, 2014) at 72.

and harassment by employers[219] and the idea of "systemic discrimination", that is, "patterns and culture of the workplace that create or perpetuate a position of relative disadvantage for some groups (and advantage for others), or individuals, on the basis of their group identity[220] was gaining ground.

Even though the US affirmative action policy framework influenced Canada to address systemic discrimination[221], Justice Abella was opposed to the terminology of "affirmative action" lest it invite negative sentiments and confusion from Canadians. In keeping with the original spirit of the Abella Report and respecting the independent nature of Canada's employment equity developments, the 2023 EEART Report reiterates firmly:

> We repeat: United States law is not Canadian law. The Supreme Court of Canada has been extremely clear since the Canadian Charter of Rights and Freedoms came into being. Canadian equality law generally, and employment equity measures specifically, have developed quite differently from the U.S. and deliberately so… The U.S. idea of "reverse discrimination" has in particular gained a lot of attention. It is used so often in common parlance that many people do not recognize that it is not a part of Canadian substantive equality law.[222]

An additional concern espoused by Abella was going beyond "numerical representation" something that affirmative action and indeed, Indian reservations have focussed on achieving. She instead, wanted to design an "organizational change strategy"[223] focussed on reforming organizational policies and ensuring that minorities become full and equal participants at the workplace and enjoy the career opportunities available to them – something that the American affirmative action policies failed to envision. The same criticism applies to the Indian Reservation System, as well, which is entirely focused on increasing the number of SCs, STs and OBCs and of

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[219] *Systemic Racism In Employment In Canada: Diagnosing Systemic Racism In Organizational Culture*, By Carol Agócs & Harish C Jain (The Canadian Race Relations Foundation, 2001) at 1.

[220] Carol Agócs & Catherine Burr, "Employment equity, affirmative action and managing diversity: assessing the differences" (1996) 17:4/5 International Journal of Manpower 30–45 at 31.; John Grundy & Miriam Smith, "Evidence and equity: Struggles over federal employment equity policy in Canada, 1984–95" (2011) 54 Canadian Public Administration 335–357.

[221] "Introduction", (11 December 2023), online: <https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports/act-review-task-force/introduction.html> Last Modified: 2024-02-21.

[222] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 7.

[223] Carol Agocs & Catherine Burr, "Employment equity, affirmative action and managing diversity: assessing the differences", (1996) 17: 4/5 It'l J Manpower 30.

late, women in public employment and education without addressing attitudes, policies, and systems that have enabled the oppression of these communities for no less than a millennium.

The Abella Commission Report's metamorphosis from just another study on workplace discrimination to a piece of legislation has an interesting journey in the Canadian Parliament. The Report was first tabled in the 33rd session of the House of Commons in November. But the announcement of measures that the Progressive Conservatives were undertaking in response to the Report was done only on March 8, 1985, by then Minister of Employment and Immigration, Flora Macdonald. The measures were introduced with the lofty ambition of touching the lives of over one million Canadians and guaranteeing, "…fair access and equal opportunities for advancement – is a reality from coast to coast, from the shipyard to the assembly line, to the corporate bedroom."[224] Despite this glorious inauguration, the Act covered only 11 Federal Corporations and around 800 companies out of 4,500 as pointed out by Liberal MP Warren Allmand.[225] The announcement also came under severe criticism by the Liberals on the grounds that Justice Abella had recommended that employment equity be implemented via legislation and yet the Minister declined the necessity of legislating upon it.[226] However, later during the session, Minister MacDonald assured that legislation would be imminent when issues regarding "compulsory action on the part of the Government" were raised by the Opposition.[227] Eventually, Bill C-62, the Employment Equity Bill was introduced in the House of Commons on June 27, 1985, and passed exactly three years after the Abella Commission was constituted, bearing testament to the sheer significance of concerted labour struggles and political will.

III. The Intricacies of the Employment Equity Act

This segment delves into the EEA model in detail and engages with the Abella Report closely to discern the functioning and scope of the EEA and in doing so, distinguish the oft-neglected Canadian model from other special measure systems across the world. Each of the following sub-heads deals with a defining element of the EEA model and intends to simplify the model for a non-Canadian audience. The following chapter will deal with the impact of the model on different demographics of women separately.

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[224] *House of Commons Debates*, 33-1 (8 March 1985) at 2821 (Hon Flora MacDonald).
[225] *House of Commons Debates*, 33-1 (8 March 1985) at 2822 (Hon Warren Allmand).
[226] *Ibid*.
[227] *House of Commons Debates*, 33-1 (8 March 1985) at 2822 (Hon Roland de Corneille).

i. What is Employment Equity?

Justice Abella provided two definitions while coining the term "employment equity" in her Report – one borrowed from the Affirmative Action Technical Training Manual and the other reflected her own understanding of the term. She states, "Affirmative action" or "employment equity" programs are comprehensive planning processes "for eliminating systemically induced inequities and redressing the historic patterns of employment disadvantage suffered by members of target groups."[228]

> Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.[229]

The underpinnings of the Report lay in the doctrine of "substantive equality", as opposed to "formal equality" even though the term "substantive equality" did not appear in the Report or the Canadian courts' vocabulary until 1986.[230] Perhaps, the best interpretation of the doctrine of substantive equality provided by a Canadian court is by the SCC in *Eldridge v British Columbia (Attorney General)* where it propounded that the purpose of equality rights is not merely to prevent discrimination but rather to "ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society ...."[231] On the other hand, the Report defined the goal of equality "as more than an evolutionary intolerance to adverse discrimination."[232] Whereas, the EEA signifies the purpose of employment equity to include "special measures and the accommodation of differences" and "to correct the disadvantage" in employment, or otherwise. The pivotal *Action Travail* case[233] judgement which was the first matter at a Canadian court to refer to the Abella Report defines employment equity thus:

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[228] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 193.
[229] *Ibid* at 2.
[230] *Syndicat canadien de la fonction publique c Québec (Procureur général)*, [1986] JQ no 2643.
[231] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.
[232] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 1.
[233] *CNR v Canada (Human Rights Commission)*, [1987] SCJ No 42.

> An **employment equity** program, such as the one in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotions in the past. Rather, an **employment equity** program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

This understanding stems from a progressive interpretation of Section 15 of the Charter of Rights and Freedoms which states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[234]

The language employed by Section 15 and Articles 14[235] and 15 (1) of the Indian Constitution is similar. The first clause, an affirmative statement, imposes a positive obligation on the Canadian State to treat all individuals equally before and under the law. Whereas Clause 2 begins with a negative tenor and precludes claims of "reverse discrimination" by privileged communities if the Canadian State undertakes special programs for the benefit of disadvantaged communities. The same has been upheld in the milestone judgements of *R v Andrew*[236] *and R v Kapp*[237] which explain that "every difference in treatment between individuals under the law will not necessarily result in equality" and in fact, "identical treatment" is not a Charter objective.[238] Consequently, steps undertaken by the Government to identify and remedy systemic

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[234] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[235] Article14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
[236] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
[237] *R v Kapp*, [2008] 2 SCR 483.
[238] *Ibid*.

discrimination will "inevitably exclude individuals from other groups" but they will not be unconstitutional or "reverse discrimination."[239] The EEART Report, 2023 re-affirms this understanding developed over a period of time in Canadian jurisprudence. It sets out powerfully in simple terms, "Equity means substantive equality." The Report also intends to shift the narrative around substantive equality from individual accommodation to overall equitable inclusion. This involves strategies such as those propounded in the *Meiorin* case.[240] Instead of introducing different criteria for women firefighters in the fitness tests, the Supreme Court decided to strike down the tests in entirety on the grounds that they were *prima facie* discrimination (owing to adverse impact discrimination) and were not necessary for achieving the "legitimate work-related objectives."[241] This shift from individual accommodation to dismantling policies and practices that lead to systemic discrimination is what is meant by employment equity.

In a step forward, Kerri Froc brings "substantive equality" within the fold of "fundamental justice" which is sacrosanct in the Canadian Constitution with the reasoning that justice is not fathomable without substantive equality.[242] This jurisprudence surrounding substantive equality and reverse discrimination is integral in the framing and implementation of the EEA. However, this thesis would argue that the framework of the EEA goes beyond the traditional understanding of the "single principle"[243] of substantive equality and correlates to the four-dimensional principle that Sandra Fredman proffers (discussed in Chapter 2).[244] Readers will note the remarkable similarity between the Abella strategy and Fredman's four-dimensional principle though both Fredman and Justice Abella interpreted substantive equality independently. The Abella Report delineated the following strategy which explained the steps constituting employment equity:

a. A clear statement of executive support, including holding the senior management accountable for implementing the EEPs and dedicating appropriate resources, establishing an implementation structure for a suitable labour-management consultative process.
b. The organizational plan should include:

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[239] *Ibid*.
[240] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3.
[241] *Ibid*.
[242] Kerry A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42:3 Ottawa Law Review 411.
[243] Fredman, *supra* note 194.
[244] *Ibid*.

i. Identification and removal of discriminatory barriers in hiring, training, promotion and remuneration policies,
ii. Alternative, corrective steps,
iii. Special remedial measures to remove the effects of previous discrimination and,
iv. Quantifiable goals with an appropriate monitoring and assessment system to ensure that women and minorities are represented and remunerated equitably at all levels of the organization.[245]

The layout of the employment equity strategy conveys that it intends to achieve organizational and transformational reform as opposed to inundating the lower levels of corporate entities with women and other minorities. The EEA also offers ways of resistance and reformation to bring about institutional change as advocated by Carol Agócs. In similarity with the layout of the employment equity strategy, Agócs surmises that a failure to implement reform may occur in the following manner:

a. Failure to allocate resources for implementation – staff time, budget, technical support,
b. Lack of enforcement of the new policy and failure to determine accountability,
c. Failure to set standards, objectives or timelines against which progress can be assessed,
d. Co-optation, that is, failure to empower the decision-maker to fulfil responsibility or contrastingly, overloading the staff appointee with numerous duties.[246]

Arguably, the EEA suffers from weaknesses in all or some of these parameters and yet, a cursory reading of the legislation would reveal that it requires employers to dedicate time, effort and resources to develop EEPs (Part I) and designate employers, the Canadian Human Rights Commission and the Employment Equity Review Tribunal as bodies responsible for the auditing and enforcement of the EEPs (Sections 12, 28 and 32). It also requires employers to institute such standards and practices that ensure the representation of the designated groups in the organization in accordance with their presence in the Canadian workforce (Section 5). Thus, the mandate of employment equity, in comparison to the Indian Reservation System, is an expansive set of "positive action"[247] policies that broadly include elements of institutional reform, elimination of

[245] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 194.
[246] Carol Agócs, "Institutionalized Resistance to Organizational Change: Denial, Inaction and Repression" (1997) 16:9 Journal of Business Ethics 917–931 at 928.
[247] Nicole Busby, "Affirmative Action in Women's Employment: Lessons from Canada" (2006) 33:1 Journal of Law and Society 42–58 at 44.

discriminatory barriers, challenging negative attitudes and ensuring accountability. Past discussions on the quota system have demonstrated that all these elements are lacking in the prevailing framework.

ii. *Rejecting Quotas*

As pointed out in previous discussions, Justice Abella was firmly opposed to the implementation of quotas. The Summary of Recommendations in the Report makes this amply clear with the prohibitory statement – "No quotas should be imposed."[248] The Report lists four key rationales for not adopting quotas, namely:

a. They tend to be set low on the understanding that they are a minimum objective and yet they end up being the maximum beyond which organization believe the need not strive."
b. They may overlook regional considerations and the different demand and supply issues faced by different industries and groups.
c. They may foster resistance, condescension and resentment in the workplace and can be gratuitously insulting to, and undermining of the individuals so hired or promoted.
d. They are inflexible and arbitrary.[249]

The Indian quota system is symptomatic of all these inadequacies. *First*, generally, quotas are being affixed somewhere between 5-33%, which is arbitrary and treated as the ultimate objective by employers and governments. The arbitrary affixing of quota seats leads to the conundrum – what is the "sufficient" number of women or minorities that an organization should hire? Justice Ruth Badger Ginsburg answers this question rather optimistically, "And when I'm sometimes asked when will there be enough [women on the Supreme Court]? And I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that. So that's the dissenter's hope."[250]

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[248] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 255.
[249] *Ibid* at 212.
[250] Jill Filipovic, "Justice Ginsburg's distant dream of an all-female supreme court", *The Guardian* (30 November 2012), online: <https://www.theguardian.com/commentisfree/2012/nov/30/justice-ginsburg-all-female-supreme-court>.

The *NCAAR v Professional Institute of the Public Service of Canada* enunciates this conundrum succinctly by stating that EEPs help to create a "critical mass of the previously excluded group in the workplace. This critical mass has important effects." It helps prevent problems of "tokenism."[251] The answer to the question as to what constitutes a "critical mass" continues to evade everyone. In the Indian context, the jury is out on the question of whether 33% women workers of the total employees in public employment is a "sufficient" number of women workers to constitute a "critical mass." *Second*, unless quotas span across categories of caste, race and indigeneity, they might simply end up benefitting privileged caste or White women as the foregoing discussions have demonstrated.[252] *Third*, the Indian experience with quotas bears testament to the hypertoxic levels of resentment that quota beneficiaries can draw – often compelling them to commit suicide.

In Canada, Elisabeth Gigengil points out that explicit mention of quotas "acted as a brake on support for affirmative action to improve the representation of racial minorities" for both men and women.[253] However, the word "quotas" had no impact on women's support for affirmative action.[254] The sentiment espoused by Justice Abella and perhaps, the general public towards quotas, was reflected in the House of Commons when Bill C-62, that is the Employment Equity Bill, was tabled. MP Mary Collins discussed the issue of quotas and enforceability and opined that the goals and objectives have to be designed by the employers themselves and not forced by "a bunch of paperwork propounded by bureaucrats."[255] She went on to explain that employers must "know what the database is" in terms of racial minorities, women and so on instead of saying that "there should be 30 per cent women…that is totally unrealistic."[256] As regards enforceability in the absence of governmental "policing" of quotas, she placed confidence in the Canadian Human Rights Commission to initiate complaints and urge employers to comply.

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[251] *National Capital Alliance On Race Relations (NCARR) v Professional Institute Of The Public Service Of Canada*, 1997 CanLii 1433 (CHRT).
[252] "Affirmative Action Has Helped White Women More Than Anyone", (17 June 2013), online: *Time* <https://time.com/4884132/affirmative-action-civil-rights-white-women/>.; Louis Menand, "The Changing Meaning of Affirmative Action" *The New Yorker* (13 January 2020), online: <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action>.
[253] Elisabeth Gidengil, "Gender and Attitudes Toward Quotas for Women Candidates in Canada" (1996) 16:4 Women & Politics 21–44.
[254] *Ibid*.
[255] *House of Commons Debates*, 33-5 (3 October 1985) at 7285 (Hon Mary Collins).
[256] *Ibid* at 7286.

The antagonism towards quotas and employment equity, in general, became most conspicuous in Ontario with the passage of the Job Quotas Repeal Act, 1995 by the Conservative Government. The Act repealed the Employment Equity Act, 1993 enacted in the province by the previous government. The Repeal Act was challenged in *Ferrel v AG (Ontario)* where the Applicants alleged that the Conservative Government had improperly believed that the repealed EEA of 1993 was "never quota oriented but rather was goals oriented" and owing to this and several other grounds, the repealing of EEA was unconstitutional and in breach of the equality rights of the Applicants under Section 15.[257] The Ontario Court of Appeal had affirmed per contemporary jurisprudence that there was no constitutional duty to enact positive legislation to protect legislation rights under Section 15. As regards, the improper understanding of the EEA being quota-driven, it was irrelevant since the move was a political decision that the Government was entitled to take.[258]

Considering that quotas have been couched in controversy and sentiments of negativity across Canadian institutions and the general public, they have historically been disfavoured as one of the potential special measures. As a result, the lack of quotas, which seem to be a go-to for most affirmative action legislation/policies across the world[259], is one of the defining features of the Canadian model of Employment Equity and implores academics and lawmakers to examine whether special measures can succeed without such "hard measures" in place.

iii. Including Part-time Workers

Recognizing that part-time workers bear the most severe form of gendered segregation of labour, the Abella Report delved into the condition of part-time workers, particularly women, in great detail. It was recognized that many women were engaged in part-time work due to household responsibilities, they would transition to full-time employment as was seen in the years subsequent to the Report.[260] For instance, in 1975, the Report notes that 72% of part-time workers were women whereas in 2022, the statistics have reversed and 75.4% of women are now employed full-time.[261]

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[257] *Ferrell et al v Ontario (Attorney General)*, 116 OAC 176 (CA).
[258] *Ibid*.
[259] *Promoting Employment Opportunities for People with Disabilities -Quota Schemes*, by ILOAIDS (Geneva: Gender, Equality and Diversity & ILOAIDS Branch, 2019).
[260] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 28.
[261] Statistics Canada Government of Canada, "Proportion of workers in full-time and part-time jobs by sex, annual", (17 April 2019), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410032703>.

Owing to such a vast number of women partaking in part-time work at the time of the Report, it became a part of the larger "women's issues" to be taken up by the Parliament. Both the Abella Commission and Parliamentarians recognized that the root cause for women being relegated to "underpaid job ghettos"[262], that is, part-time work in this case, was not an unwillingness to work full-time but rather extensive household and childcare duties holding women back. Therefore, the Abella Report dedicated a significant chunk of its research to recommending the nationalisation of childcare on the grounds that a) children should receive basic standards of care; b) parents engaged in full-time care may not be able to give this care and c) therefore, society must provide childcare if parents are unable to provide it.[263] Notably, Justice Abella used the term "parents" instead of "mothers" or "women" to emphasize the gender-neutral duty of taking care of one's child. Currently, the EEA does not impose an obligation on employers or any institution to provide childcare facilities but considering that the contours of the term "positive policies" are undefined, it is expected that employers consider child-rearing duties when recruiting women workers who are disproportionately affected by domestic work. This could entail providing flexible working hours to parents to support their responsibilities at home.

On the other hand, the Abella Report also endorsed the findings of the Commission of Inquiry into Part-time Work in Canada and recommended that organizations should collect data on the representation of women and minorities in hiring, promotions and terminations in part-time and contractual work. Not only was the data to be collected but also part-time workers were to be considered for training and re-training programmes to enable them to transition to full-time work. Most significantly, the Report recommended that part-time workers receive on a "pro-rated basis" the same protection, rights and benefits as were available to full-time workers. This was considered a "woman-centric" move considering that women part-time workers were victims of unequal wages compared to men and did not benefit from pensions and promotions or educational leave.[264]

Keeping in view the prevailing situation of part-time workers and the vulnerability of women at the time, the Employment Equity Regulations include "permanent full-time employees" and "permanent part-time employees" within the definition of the term "employees" which states:

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[262] *House of Commons Debates*, 33-5 (3 October 1985) at 7772 (Hon Margaret Mitchell).
[263] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 182.
[264] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 175.

employee, in respect of

- **(a)** a private sector employer, means a person who is employed by the employer, but does not include a person employed on a temporary or casual basis for fewer than 12 weeks in a calendar year;
- **(b)** a portion of the federal public administration referred to in paragraph 4(1)(b) or (c) of the Act to which the Public Service Employment Act applies, means a person who has been appointed or deployed to that portion pursuant to that Act but does not include
    - **(i)** a person appointed as a casual worker under subsection 50(1) of that Act, or
    - **(ii)** a person appointed for a period of less than three months; and
- **(c)** a portion of the federal public administration referred to in paragraph 4(1)(b) or (c) of the Act to which the Public Service Employment Act does not apply, means a person appointed to that portion in accordance with the enactment establishing that portion, but does not include a person employed on a temporary or casual basis for a period of less than three months. (salarié).[265]

Section 6(1) of the Regulations mandates employers to collect information on and maintain records of all employees, including permanent part-time workers for each designated group.[266] This implies that the EEA has a wide-spanning application on both full-time and part-time employees which is typically unheard of in most affirmative action policies, including India's. The Indian Labour and Employment Statistics Report has noted that more women are involved in part-time work than men.[267] Yet no governmental report delves into a full-fledged analysis of the reasons for women employees foregoing full-time employment. Consequently, the Indian labour law or the reservation framework does not envisage supportive measures of nationalising childcare or bringing permanent part-time workers within the fold of special measures.

v. *Applying EEA to Public and Private Organizations*

One of the most admirable features of the EEA is the application of the EEA across public and private organizations. Typically, the GoI has been reticent in mandating private organizations to carry out "positive duties" under the constitution which is largely the State's forte. However,

[265] Employment Equity Regulations, SOR/96-470, s 1(1).
[266] *Ibid* s 6(1).
[267] Directorate General of Employment, *Labour and Employment Statistics 2022* (New Delhi: Government of India, 2022) at 46.

there is emerging jurisprudence in the field of *prima facie* discriminatory actions of a private individual or entity which causes societal harm.[268] Canadian courts, as opposed to Indian courts, have been proactive in nipping private discrimination in the bud through a variety of progressive judgements. In *Re Drummond Wren*, Justice Mackay held that a racially restrictive covenant prohibiting the sale of land to Jewish persons or persons with "objectionable nationality" was invalid by propounding, "…. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity..."[269]

Even though the Charter does not apply to private entities since they have not been bestowed with the duty to implement any governmental policies, it is also well-acknowledged that private entities often end up carrying out a "public function" while implementing a specific governmental policy or programme. In the *Eldridge* case, the SCC cautioned that the State can give authority to carry out public functions to a body that is not subject to the Charter but they cannot be allowed to "evade their constitutional responsibilities" by delegating the implementation of their policies and programmes to private entities.[270] This implies that bodies carrying out state-like functions with "ultimate or extraordinary control"[271] by the government, particularly via public funding, can be subjected to the Charter. This understanding is consistent with increasing inquiries into how much of the private sector is really "private" considering that corporates increasingly enjoy economic support through subsidies and bailouts which are ultimately funded by the taxpayers. It only makes sense that at the very least private entities subscribe to and abide by constitutional and Charter values in their day-to-day functioning and strengthen the protection of minorities which is part of the basic structure of the Canadian Constitution.[272] Hence, it makes sense that the EEA regime also involves private players in combatting systemic discrimination and creating inclusive workplaces. I discuss below the Federal Contractor's Programme and the Legislated Employment Equity Programme that reflect the understanding that certain constitutional principles such as substantive equality cannot be divorced from the free market economy.

[268] Thulasi K Raj, "Private discrimination, public service and the constitution" (2022) 6:1 Indian Law Review 17–36.
[269] *Noble et al v Alley*, 1950 CanLII 13 (SCC).
[270] *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624.
[271] *Stoffman v Vancouver General Hospital,* [1990] 3 SCR 483.
[272] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

a. The Federal Contractor's Programme

Justice Abella was conscious of the "pervasiveness of systemic discrimination" and the belief that "fairness demands a general application of the law", especially in the face of the rapid growth of the private sector.[273] On the other end, Justice Abella also acknowledged the dangers and inadequacies of "overregulation" of the private sector through mandatory programmes and quotas.[274] As a middle ground, contract compliance (now termed the Federal Contractor's Programme (hereinafter, "the FCP") was devised. The Report defines contract compliance as:

"*Contract compliance is a method of encouraging employment equity in the private sector by using government purchasing power as leverage*."[275]

Contract compliance was an effective tool of "voluntary compliance" that became immensely popular under President John F Kennedy in the United States and its successful expansion to different parts of the United States influenced Justice Abella's disposition towards the programme.[276] Contrary to popular understanding, the FCP is distinct from but runs parallel to the EEA. Since the EEA only applies to federal Crown Corporations such as Air Canada and the Bank of Canada, the FCP was devised to include private employers who do not fall under federal jurisdiction. The FCP came into being through a directive of the Federal Treasury Board in September 1986 and applies to all Canadian organizations which are not federally regulated with 100 or more employees who bid on federal contracts worth CAD 200,000 or more. Initially, the FCP was to apply to only provincially regulated employers so as to ensure that they do not fall outside the fold of employment equity measures but after the 1995 amendment in the EEA, there were significant changes in the programme, including its extension to federal public services. The way that the FCP functions is that private sector organizations which bid on an eligible contract, must enter into an Agreement to Implement Employment Equity which then becomes an "ongoing obligation" for the organization – even beyond the termination of the contract. The organization that receives an eligible contract must:

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[273] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 223.
[274] *Ibid*.
[275] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 226.
[276] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007) at 159.

1. Collect and maintain workforce information, including representation of the four designated groups,
2. Conduct a workforce analysis and complete an "achievement report",
3. Establish short-term and long-term numerical goals and begin actions that remove employment barriers,
4. Make "reasonable efforts" towards having a workforce that is representative of the designated groups.[277]

Since the FCP is not a legislated programme, it grants significant leeway to private organizations to fashion an EEP best suited to their organization's functioning as opposed to the Legislated Employment Equity Programme (hereinafter, "LEEP"). Simultaneously, the organizations are subjected to compliance audits and the relevant reports are at the disposal of the general public and the Canadian Human Rights Commission.[278] In the event that contractors do not honour their commitment to employment equity with the aforesaid requirements lose the right to bid on future federal government contractors or standing offers over CAD 25,000, including all applicable taxes.[279] Due to its voluntary nature, it has faced severe criticism for its shoddy implementation and compliance mechanism. For instance, the 2002 Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities on Promoting Equality in the Federal Jurisdiction concluded that the FCP was in a "state of disarray" in the absence of a requirement to report annually and having inadequate programme support and guidance.[280] Consequently, the Minister of Labour who is in charge of administering the FCP was recommended by the Committee to re-structure the programme and ensure that the employment equity requirements were identical to those of the "employer" as under the EEA.[281] These changes are yet to see the light of day in the FCP framework.

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[277] Employment and Social Development Canada, "Federal Contractors Program", (4 November 2020), online: <https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors.html>.
[278] Enakshi Dua & Nael Bhanji, "Exploring the Potential of Data Collected Under the Federal Contractors Programme to Construct a National Picture of Visible Minority and Aboriginal Faculty in Canadian Universities" (2012) 44:1 Canadian Ethnic Studies 49–74.
[279] *Supra* note 277.
[280] Judi Longfield, *Promoting Equality In The Federal Jurisdiction: Review Of The Employment Equity Act*, (House of Commons, June 2002) at 28.
[281] *Ibid*.

b. Legislated Employment Equity Programme

The LEEP is the legally enforced programme under the EEA that is applicable to all federally regulated industries and Crown Corporations with 100 or more employees, including the Canadian Forces and the Royal Canadian Mounted Police. The programme requires federal organizations to develop an EEP under Section 10 of the EEA to delineate positive policies and practices for the hiring, training, promotion and retention of the members of the designated groups and provide them with reasonable accommodation. *Prima facie*, the calculation behind hiring a representative workforce may seem complex but it is best explained through the factual matrix of the *Action Travail* case. The Applicants, *Action Travail Des Femmes*, a public interest organization had made allegations of "systemic discrimination" in the hiring and promotion of women in the blue-collar jobs at CN Railways. *Inter alia*, the group alleged that women workers constituted one-third of the total labour force in Canada while holding around 41% of professional and technical positions and 72% of clerical jobs nationwide. In contrast, they constituted only 4% of the total CN Railways workforce and held less than 0.5% of the senior management jobs. A report studying the employment trends at CN also noted that by 1981, women occupying unskilled jobs in the geography where CN was operating constituted only 0.7% of the total unskilled workforce available to the organization. Nationally, it was reported that 13% of blue-collar workers were women but they constituted only 5% of the total applicant pool at CN. The discrepancy in the recruitment trends of women workers in the national workforce and CN made it obvious to the tribunal and courts that CN was guilty of discriminatory recruitment practices. Consequently, the Human Rights Tribunal, *inter alia,* had imposed a "special employment programme" on CN which required the proportion of women workers to be commensurate with 13%, that is, the national average of women workers in "non-traditional occupations" and until this was achieved, the organization was required to hire one woman for every four non-traditional jobs. The SCC held these imposed goals as reasonable and reiterated the significance of inducting a "critical mass" of discriminated communities within organization which are guilty of discriminatory practices.

Even though this 1998 case does not deal with the provisions of the EEA *per se*, it illuminates the various duties of the employers under the EEA at great length. For instance, one of the issues under consideration in the case was the lack of "reasonable progress" in recruiting and retaining women workers at CN. Section 11 of the EEA specifically requires employers to make "reasonable progress" towards the development of the EEP. Further, the plan must be periodically

reviewed and revised and the numerical goals must be updated as was required by the SCC in the *Action Travail* case and such a process must be undertaken in consultation with the employees and their representatives. After undertaking such measures as necessary to fulfil the mandate of the EEA, a private sector employer, in particular, must furnish the Minister of Labour a report of the previous calendar year specifying the occupational groups in which its employees are employed and the degree of representation of members from the designated groups aside from the relevant salaries and the promotions and terminations made throughout the year. The 1986 version of the EEA was perceived as "lacking teeth" since it lacked monetary penalties and sanctions.[282] However, due to the 1995 amendment, a private sector employer violating the EEA is subject to a CAD 10,000 monetary penalty for a single violation and a CAD 50,000 penalty for repeated or continuous violations. Currently, the LEEP extends to about 500 private sector employers, 30 Crown Corporations and 5 other federal organizations and the total workforce of these organizations is pegged at around 760,000 employees and around 5% of the total Canadian workforce.[283] The EEART notes some dismal statistics with regard to the penal provisions under the EEA regime. Only 4 employers to date have ever received a notice of assessment with the largest penalty received being CAD 3,000.[284] The last penalty issued was in 1991. Under the FCP, no contractor has been found in violation of the EEA since 2013.[285]

vi. *Designating Responsibility*

Despite being opposed to a mandatory quota system, Justice Abella was alive to the significance of enforcement bodies and oversight mechanisms to make EEA an effective legislation. The 1986 version of the EEA did not envisage any penalties and was reliant on the *bona fides* of the employers. It also enabled legislative action against erring employers and also envisaged enforcement mechanisms lest it should "lack credibility."[286] Further, the traditional

[282] Eddy SW Ng & Ronald J Burke, "A comparison of the legislated employment equity program, federal contractors program, and financial post 500 firms" (2010) 27:3 Canadian Journal of Administrative Sciences / Revue Canadienne des Sciences de l'Administration 224–235.
[283] Employment and Social Development Canada, "Legislated Employment Equity Program", (4 November 2020), online:<https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/legislated.html>.
[284] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 305.
[285] *Ibid*.
[286] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 214.

human rights framework prevailing at the time had proven to be incapable of addressing the surge in workplace discrimination cases. The Canadian Human Rights Commission could only go so far in addressing individual complaints when, as established through the foregoing discussions, the problem was more systemic and infrastructural in nature.[287] Consequently, the Abella Report conceived four models involving an amalgam of pre-existing and new independent bodies which could monitor, consult and hold employers liable for shirking duties under the EEA. "Model 1", for instance, proposed that the Canadian Human Rights Commission co-exist with a new, independent agency with the former adjudicating disputes, monitoring contract compliance and collecting and reviewing data from employers. The latter body would have no enforcement powers and would act as a "consultant on a confidential basis" to employers to best fulfil the mandate of employment equity. The body would support the Commission and help with the negotiation and conciliation process, as well.

The current framework of the EEA has collated the suggestions proffered by Justice Abella through the models and has accorded various responsibilities to the Canadian Human Rights Commission and the Employment Equity Review Tribunal. Section 22(1) of the EEA clearly holds the Commission responsible for the enforcement of the obligations which are imposed on the employers under sections 5,9,15 and 17 which have been discussed in the previous sections. Further, in keeping with the Abella Report, the Commission is tasked with negotiating with errant employers while appointing "Compliance Officers" when necessary for the audits of the employers. The Commission can rely on the opinion of the Compliance Officer in the event that the employer has failed to assist the Officer and issue such orders to the employer as necessary. This process also complies with the principles of natural justice in that it allows employers to seek a review of the directions of the Commission Thereafter, the Canadian Human Rights Commission can also apply to the Chairperson of the Canadian Human Rights Tribunal to request for the Employment Equity Review Tribunal to be constituted to issue decisions as court orders.[288] The Tribunal, under Section 29(1), has the power to summon witnesses and examine evidence as any superior court of record would. Accordingly, it must furnish a reasoned order either, confirming, rescinding or modifying the Commission's order. The reason that the Commission remains the

[287] Lubomyr Chabursky, "The Employment Equity Act: An Examination of Its Development and Direction" (1992) 24:2 Ottawa Law Review 305 at 320.
[288] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 308.

primary enforcement body under the EEA is that the Canadian Human Rights Act deals with discriminatory practices or policies at workplaces under Sections 10-14, including unequal wages, sexual harassment and retaliation and brings these issues within the Commission's jurisdiction. The EEA, therefore, has not tampered with the existing powers of the Commission and prevented an overlap in the exercise of these powers.

Prima facie, it seems the enforcement mechanism is well-oiled and responsive to the needs of the discriminated communities. However, the mechanism has come under severe criticism for failing to be effective. In particular, the EEA imposes a few limitations on the powers of the Commission such as the Commission cannot impose "undue hardship" on the organization to accommodate the designated communities. This provision continues to be used by employers to avoid policies and actions which they might perceive as a "hassle." Further, the Commission cannot impose quotas in any event even if the organization is found to be severely errant. The over-reliance on the *bona fides* of the employers has weakened the enforcement mechanism. Busby also notes that there seems to be too much focus on the record-keeping obligations of the Commission rather than making actual use of the data which is only possible through increased investment in the auditing process.[289] She also observes the lack of a clear mandate in the Commission's role in enforcing employment equity.

The objective of highlighting the enforcement mechanism despite its obvious pitfalls is the serious lack of supervisory bodies in India which can monitor the implementation of the quota system. It is ironic that institutions such as the National Commission for Women[290], the National Commission for the Scheduled Castes and the National Commission for Scheduled Tribes[291] have been accused of institutional bias and successive failures in safeguarding the rights of women and caste minorities against state overreach in a nation that sorely requires proactive quasi-judicial institutions in the face of tremendous backlog at the courts. Contrary to strengthening these

[289] Nicole Busby, "Affirmative Action in Women's Employment: Lessons from Canada" (2006) 33:1 Journal of Law and Society 42–58.
[290] Sadhna Arya, "National Commission for Women: An Overview of Its Performance" (2013) 48:18 Economic and Political Weekly 112–119.; "Why The National Commission For Women Is Anti-Indian Women", online: <https://www.article-14.com/post/why-the-national-commission-for-women-is-anti-indian-women>; Tribune News Service, "NCW has failed our women", online: *Tribune India News Service* <https://www.tribuneindia.com/news/archive/comment/ncw-has-failed-our-women-772667>.
[291] "Failure to Meet Domestic and International: Legal Obligations to Protect Dalits - Broken People: Caste Violence Against India's 'Untouchables' (Human Rights Watch Report, 1999)", online: <https://www.hrw.org/reports/1999/india/India994-13.htm>.

institutions, marginalized citizens are required to undertake the long, tenuous journey to the SCI or the High Courts in the event that special measures are denied to them.

Having examined and emphasized the distinct features in this chapter, the succeeding chapter will delve specifically into the condition of Canadian women workers and determine whether the prevailing EEA model has been successful in ameliorating their condition in the labour market.

CHAPTER 4: MAPPING THE SUCCESS OF EMPLOYMENT EQUITY FOR CANADIAN WOMEN WORKERS

The story of the EEA model is one of mixed successes. While Canadian women's participation in the workforce and full-time employment has increased steadily since the 1990s (around 58%), it has stabilized at around 61% in the last decade which is amongst the highest in the world. Joanne D Leck notes that with the introduction of EEPs, there have been three key positive developments in the sphere of women's labour, namely:

i. *Improved HR practices* have resulted in better hiring and appraisal decisions and an increased willingness to recruit traditionally disadvantaged candidates.

ii. The period between 1987 and 1996 witnessed an overall *increase in women workers* entering non-traditional jobs such as upper management and manual work.

iii. EEPs have resulted in the *narrowing of wage gaps*, in particular for White women even as the wage gap for Indigenous and immigrant women has reduced, albeit at a slower pace compared to White women.[292]

On the other hand, the gender wage gap has not been eliminated in its entirety. The gender wage gap in 2022 with individuals with a Bachelor's degree or higher was 12% for Canadian-born women when compared to 30% for immigrant women who landed as adults, 17% for Indigenous women and 15% for immigrant women who landed as children.[293] Further, immigrant women who obtained their credentials outside of Canada faced the largest wage gap at 33%. Worse yet, these wage gaps were compounded for women in full-time employment as opposed to part-time work.[294]

Aside from wage gaps, "pink ghettos" have not yet been dismantled by the EEA model due to archaic notions of what constitutes "women's work." The prevailing gender-based segregation of work has only commodified work that was previously performed at home by women.[295] For instance, the "care economy" in Canada is represented by a three-fourth majority of women and within this economy, women workers have dominated occupations such as nurses, elementary

[292] Joanne D Leck, "Making Employment Equity Programs Work for Women" (2002) 28 Canadian Public Policy / Analyse de Politiques S85–S100 at 88.
[293] Statistics Canada Government of Canada, "The Daily — Intersectional Gender Wage Gap in Canada, 2007 to 2022", (21 September 2023), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/230921/dq230921b-eng.htm> Last Modified: 2023-09-21.
[294] Joanne D Leck, "Making Employment Equity Programs Work for Women" (2002) 28 Canadian Public Policy / Analyse de Politiques S85–S100.
[295] Lisa Kaida & Monica Boyd, "Revisiting gender occupational segregation trends in Canada: 1991-2016" (2022) 59:S1 Can Rev Social 4–25.

school and kindergarten teachers, nurse aides, educators and assistants.[296] However, this domination has not resulted in fair remuneration for women. Women in care occupations have lower employment income on average which has a cruel irony to it, considering that they are perceived as more proficient than men in counselling, nursing and caretaking. Akin to the Indian phenomenon of feminisation of casual labour, Harish Jain, John Lawler, et al note in their 2010 study that despite the increase in representation of women workers in full-time employment, a sizeable proportion of women (27% in 2004) continued to partake in part-time employment compared to men (11% in 2004).[297] Today, women are twice as likely as men to work part-time (26% versus 13%) owing to "personal preferences" and "caring for one's children" being the predominant rationales.[298]

Another serious repercussion of the conception of the EEA has been the rise in male backlash[299] against special measures. Michael J Sandel pins this resentfulness of some white middle-class men on a "technocratic approach to politics that is tone-deaf to the resentments of people who feel the economy and the culture have left them behind."[300] The resentfulness of some in the face of globalization and immigration in a Neo-liberal capitalist setup regurgitates in two ways – animosity towards immigrants, racial and ethnic minorities and in this case, women, or, anxiety in the face of globalization and technological change.[301]

In my own experience interning at a Canadian workplace, I witnessed first-hand the equity measures in place and the response to such practices. As a racialized woman attempting to establish a legal practice in Canada with my primary legal education fulfilled in India, I quickly realised that "backlash" is a very real and tangible phenomenon. I was consistently perceived as a "diversity hire" by a white male co-intern who found "woke HR practices" as repugnant to the notion of "merit" and "efficiency." While this is a singular anecdotal experience, it fits within the larger

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[296] Statistics Canada Government of Canada, "Women working in paid care occupations", (25 January 2022), online: <https://www150.statcan.gc.ca/n1/pub/75-006-x/2022001/article/00001-eng.htm> Last Modified: 2022-01-25.
[297] Harish Jain, et al, "Effectiveness of Canada's Employment Equity Legislation for Women (1997-2004): Implications for Policy Makers" (2010) 65:2 Industrial Relations 304-329.
[298] Statistics Canada Government of Canada, "Who works part time and why?", (6 November 2018), online: <https://www150.statcan.gc.ca/n1/pub/71-222-x/71-222-x2018002-eng.htm> Last Modified: 2018-11-06.
[299] Joanne D Leck, "Making Employment Equity Programs Work for Women" (2002) 28 Canadian Public Policy / Analyse de Politiques S85–S100.
[300] Michael J Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (New York: Farrar, Straus and Giroux, 2020) at 25.
[301] *Ibid* at 24.

fabric of prejudice against the influx of racialized candidates at workplaces that have historically not been equitably inclusive.

The forthcoming sub-sections deal with the experiences of women from the designated groups at length to determine the shortcomings of the prevailing EEA framework.

I. Indigenous Women

The Truth and Reconciliation Commission constituted in 2007 has been instrumental in revealing the horrors inflicted on Indigenous women and girls in the form of sexual abuse, domestic violence, abductions and murders under the Residential School system.[302] The violence inflicted on Indigenous women during the Residential School era between the 1870s and 1990s has not been eliminated in its entirety. Recent research has demonstrated that Indigenous women are 400% more likely than other Canadians to go missing. Estimates also suggest that around 4,000 Indigenous women and girls and 600 Indigenous men and boys have gone missing or have been murdered between 1956 and 2016.[303] In fact, the remnants of the Residential School-era violence have now translated into deep-seated prejudice, marginalization and ostracization of Indigenous women which have percolated into Canadian workplaces.

Justice Abella was cognizant of the multilayered forms of oppression confronting Indigenous women workers at the time of penning the Report. She noted that due to a paucity of childcare facilities on the Reserves, Indigenous women were less likely to participate in the workforce.[304] While Indigenous Peoples in general were concentrated in low-paying, clerical jobs, the wage gap that Indigenous women were confronting was immense compared to non-Indigenous women (at the time, Indigenous women were earning 71.7% of the average income as against non-Indigenous women).[305] In her exchange with Indigenous communities, Justice Abella recounted hearing that many from the community were hired by corporations but were ultimately not promoted and underwent fear and anxiety to perform better than non-Indigenous workers.[306]

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[302] Truth and Reconciliation Commission of India, *Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 180.
[303] Katie Todd, "Traditional potlatches honour missing and murdered women | CBC News", (4 October 2023), online: *CBC* <https://www.cbc.ca/news/canada/north/watson-lake-potlatches-honour-murdered-missing-women-1.6985688>.
[304] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 35.
[305] *Ibid* at 33.
[306] *Ibid* at 37.

Subsequent to the enactment of the EEA, Kim England, in 2007 noted that the occupational segregation between white men without disabilities and Indigenous women had declined.[307] There was significant progress in the dismantling of occupational ghettos between the period of 1997-2007 when white women without disabilities and other groups of women were compared. However, white women without disabilities made rapid headway into managerial positions with higher wages and higher status even as Indigenous women lagged.[308] Overall, England concluded that within groups of women, there was strong bifurcation in the terms of quality of jobs which led to economic differentiation.[309] This was coupled with the fact that Indigenous women were concentrated in the private sector or smaller markets on the Reserves which reduced their access to unionisation.

Unfortunately, not much has changed since the enactment of EEA and these studies. The EEART Report, 2023 highlights that Indigenous women are undervalued as employees and "feel the need to go above and beyond to receive equal treatment from employers."[310] There is also significant occupational segregation confronting Indigenous women workers in part-time and low-paying jobs which is accompanied by hefty childcare and domestic responsibilities.[311] The immensity of the occupational segregation problem is such that CEDAW has "specifically called for special measures", including quotas at the managerial level.[312] Yet, the current EEA framework does not envisage the institution of quotas.

As stated in the foregoing sections, the EEART Report 2023, has recommended taking a distinctions-based approach towards truly capturing and remedying the distinct challenges affecting the First Nations, Métis and Inuit Peoples. Such an approach is essential considering that the Annual Report to Parliament of 2020 confirmed that the wage gap confronting Registered Indian women on the Reserves earned only 67% of the employment income compared to non-Indigenous women. Further, nearly 47% of Registered Indian women residing on the Reserves were living in a low-income situation compared to only 14.5% of non-Indigenous women whereas

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[307] Kim England, "Women, Intersectionality, and Employment Equity" in *Employment Equity in Canada* (University of Toronto Press, 2014) 71 at 86.
[308] *Ibid* at 87.
[309] *Ibid* at 88.
[310] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 205.
[311] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 135.
[312] *Ibid*.

other Indigenous women such as Métis women were closer to non-Indigenous women when it came to living in low-income situations.[313] The EEART Report observed two distinct phenomena with regard to the working conditions of the First Nations adults – one, a significant proportion of such individuals worked less than 30 hours per week due to a paucity of suitable opportunities on the Reserves and care work and duties.[314] On the other hand, around 22% of individuals also had a "main job" outside the Reserves due to a lack of opportunities, higher wages outside the Reserves, issues of job security and proximity to children's schools or pension plans.[315] Several of these issues such as proximity to *childcare* units and the burden of unpaid care work affect Indigenous women workers on the Reserves disproportionately. Again, these issues have fallen through the cracks and crevices of the prevailing EEA framework.

In addition to these dismal socio-economic conditions on the Reserves, the EEART Report 2023 has also highlighted the problem of a "data gap" since the Canadian labour force surveys are not collected on the Reserves.[316] Currently, the First Nations have control over data collection processes and how the information is shared, interpreted, used or shared and due to a dearth of meaningful consultation between the Indigenous governments on the Reserves and the Federal Government, it appears that there are workforce shortages, even though there is an availability of workers on Reserves.[317] This data gap also deprives us of disaggregated information about the Indigenous workforce based on age, sex, income and region which are essential for framing an efficacious EEA regime. Consequently, the EEART has recommended that the Federal Government must prioritize meaningful consultations with the First Nations, Métis and Inuit Peoples on the issue of data sovereignty.

Aside from the issue of underpayment and occupational ghettoization, the Report notes the prevalence of negative attitudes at the workplace, including erasure, homogenisation, exoticization and "whitening", that is, being complimented on being similar to "White people" in the context of racialized and Indigenous women.[318] However, the prevailing EEA framework does not take into

[313] Indigenous Services Canada, *Annual Report to Parliament 2020* (Ottawa: Ministry of Indigenous Services Canada, 2020) at 35.
[314] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 102.
[315] *Ibid*.
[316] *Ibid* at 99.
[317] *Ibid*.
[318] *Ibid* at 135.

account these qualitative experiences fully and thereby fails to target attitudinal changes at the workplace as an integral component of the reconciliation process.

The EEART Report has emphasized the challenges and complexities of self-identification and verification of Indigenous identities at the workplace in order to truly accommodate and include Indigenous Peoples. At this moment, the Report notes, the First Nations, Métis and Inuit Peoples are having to contend with non-Indigenous individuals claiming Indigenous status.[319] It is obvious that identity fraud by *malafide* actors has an adverse impact on the collection of data disaggregated by sex, age, disability status and so on which prevents the accurate and effective accommodation of Indigenous Peoples at the workplace. The EEART Report highlights that "Indigeneity" can carry various meanings for the Indigenous community such as partaking in cultural activities and ceremonies.[320] Then there are others who claim Indigeneity through distant kinships. Often there is fear of the repercussions of being singled out owing to self-identification. Hence, the EEART has made some meaningful recommendations with regard to a human-rights-based approach to the collection of data while centring the privacy of individuals. Recommendation 2.13 makes self-identification voluntary.[321] There are also further recommendations about creating self-identification surveys and making them mandatory and accessible to all protected members with an option to not self-identify.[322] These suggestions are essential for Indigenous women workers who may experience the fear of being perceived as a token diversity hire.

II. Racialized Women (Visible Minority Women in EEA terminology)

One of the foremost recommendations that the EEART Report has made with regard to racialized workers is the change in terminology from "visible minority" to "racialized workers" as indicated in Chapter 1.[323] The next logical step after this change is the disaggregation of the pertinent data of each sub-group comprising "visible minorities."[324] The EEART Report, in keeping with the principles of data justice, has reiterated the concerns that Justice Abella had voiced that the "clubbing together" of all non-White groups for improving their equitable

[319] *Ibid* at 105.
[320] *Ibid* at 108.
[321] *Ibid* at 71.
[322] *Ibid*.
[323] *Ibid* at 51.
[324] *Ibid* at 159.

participation, without addressing their distinct issues may deflect attention.[325] This "cohesion" of groups invalidates and obscures the distinct experiences confronting Black women workers or, racialized immigrant women, in particular. Even during the drafting of the 1986 Report, the Abella Commission recognized that the Black community was underrepresented in many occupations irrespective of how long they had been in Canada. Whereas "Third World immigrants", despite better educational qualifications than other immigrants, remained underrepresented in managerial, craft and professional categories at the time of the Report.[326]

Today, the Canadian labour market continues to mirror the occupational segregation of the 50s and 70s when Black women from the Caribbean and Southeast Asian women began arriving in Canada where they were then recruited as domestic workers.[327] Today, racialized immigrant women continue to be stereotyped into performing such labour which is often insecure, precarious, part-time and poorly remunerated.[328] They are also far more likely to work in the care sector as childhood educators, nurses and home carers while being over-skilled.[329]

While the disparities and challenges confronting racialized immigrant women are tremendous, it is Black immigrant women, in particular, who experience significantly higher unemployment rates than immigrant men who are either Black or racialized.[330] Black women also have an employment income of 72% of the total population and their unemployment rate is higher across major cities in Canada.[331] They are also less likely to be in managerial positions compared to non-racialized women workers.[332] The 2021 Senate Report on "Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission" had captured the same trends in federal public service and has come down heavily on the harms of "overshadowing" distinct experiences of Black workers caused by the broad term "visible minority".[333] The Report

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[325] *Ibid* at 164.
[326] Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Toronto: Commission on Equality in Employment, 1984) at 84.
[327] CBC Radio ·, "TRANSCRIPT: Secret Life of Canada - Season 2, EP 23: The Nanny | CBC Radio", (18 May 2020), online: *CBC* <https://www.cbc.ca/radio/secretlifeofcanada/transcripts/transcript-secret-life-of-canada-season-2-ep-23-the-nanny-1.5574240>.
[328] Bessma Momani et al, *Knowledge Synthesis Report on Canada's Racialized Immigrant Women and the Labour Market* (University of Waterloo, 2021) at 2.
[329] *Ibid* at 17.
[330] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 143.
[331] *Ibid* at 143.
[332] *Ibid*.
[333] The Honourable Salma Ataullahjan, *Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission*, (Ottawa: The Standing Senate Committee on Human Rights Senate, 2023) at 37.

had urged for the EEA to be modernised to include the Black community as a protected category and for Black equity officers to be appointed as a "legacy building piece" for Canada.[334] These trends belie the myths of an "immigrant takeover" of jobs. The EEART Report notes that there is a steady deterioration of job prospects for racialized women despite racialized workers having more educational qualifications than non-racialized workers generally.[335]

Owing to a paucity of data in 1986 regarding occupational segregation and income disparities, the Abella Commission's suggestions were slightly feeble considering the enormity of the challenge. The Commission had discouraged quotas but had recommended "creative recruitment" in the form of childcare, better transportation systems for remote areas and so on. [336]

However, in line with the principle of data justice, we are capable of identifying the problem far more accurately, thereby preparing more holistic policies and practices. As an example, the Canadian Labour Force Survey began asking respondents to identify their ethnicity for the first time in July 2020.[337] As of March 2021, Statistics Canada has evaluated that racialized women have had a greater unemployment rate compared to White women (10% versus 6%) with Latin American, South Asian and Arab women having the highest unemployment rate.[338] Such close examination of data through the lens of race, gender, ethnicity and national origin is essential for achieving data justice. The EEART Report 2023 through its recommendations has urged governmental institutions to examine why a racialized worker with a computer science degree works as a security agent and then is left out of the calculations of labour market availability.[339] Data justice, thus, requires us to look into the labour market through an intersectional lens and inquire into the underlying cause of disparities and inequalities, thereby enabling us to oversee the progress in remedying such patterns.

Most appreciably, the EEART Report has captured the challenges of Islamophobia confronting Muslim women workers, particularly those who choose to wear the *Hijab* and practise their religion openly.[340] Muslim women tend to be perceived as "victims of oppression" and

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[334] *Ibid* at 35.
[335] *Ibid* at 163.
[336] *Ibid* at 212.
[337] Bolanle Alake-Apata, "Double Penalty: Being a Woman and a Visible Minority", (6 May 2021), online: *LMIC-CIMT* <https://lmic-cimt.ca/double-penalty-being-a-woman-and-a-visible-minority/>.
[338] *Ibid*.
[339] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) 241.
[340] *Ibid* at 174.

lacking agency at their workplaces. Alternatively, they are perceived as "dangerous extremists" which leads to harassment about their religious beliefs and attire. They also experience hardship in licensing requirements and other administrative formalities requiring identification if they cover their faces with the *Niqab* or don a headscarf.[341] Even if quotas were to be introduced, the stigma and stereotypes would remain in place. Therefore, meaningful employment equity legislation must require employers to ask themselves a two-fold question – one, what is the impact of the impugned practice or policy on their most vulnerable workers and two, does the impugned practice or policy help achieve legitimate work-related goals?[342] A transformative reform would entail thorough introspection with an intersectional lens on the part of the employers and meaningful engagement with the representatives of their workforce to rethink their workplace practices. To my mind, as much as employment equity is about stringent oversight mechanisms and accountability, it is also about making private players an integral cog in the wheel of substantive equality. This entails encouraging them to rethink their duties and moral responsibilities towards the marginalized who have historically been excluded in their policies and practices.

III. Women with Disabilities

The Accessible Canada Act came into force in 2019 with the goal of making Canada barrier-free and one of the foremost areas of its focus was employment. In line with a more mature understanding of barriers rooted in substantive equality, the Act spelled out barriers as "anything – including anything physical, architectural, technological or attitudinal...that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive learning, communication or sensory impairment or a functional limitation."[343] Such a comprehensive understanding of barriers confronting PwDs is crucial because it ensures that employment equity does not just become a "number-crunching exercise" by inducting more PwDs into the workforce without reasonably accommodating them. Instead, the task at hand is more colossal. The Convention on the Rights of Persons with Disabilities (hereinafter, "CRPD") outlines that PwDs are to be reasonably accommodated such that they can exercise their right to work with just and fair conditions in a safe and healthy environment with a

[341] *Ibid*.
[342] These are the same questions that the Supreme Court grappled with in *Meiorin* (*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3.
[343] *Accessible Canada Act*, SC 2019, c 10, s 2.

systematic grievance redressal mechanism in place.[344] The Convention explicitly recognizes that women and girls with disabilities experience aggravated forms of discrimination and mandates the ratifying parties to ensure their full development, advancement and empowerment.[345]

Unfortunately, the progress towards these goals has been sluggish and tardy. The 2022 Canadian Labour Force Survey confirmed that PwDs have lower employment rates (65.1%) compared to persons without disabilities (80.1%).[346] Additionally, men with disabilities are more likely to be employed than their female counterparts (68.6% versus 65.7%) and the employment rates decline considerably for persons with disabilities within the age span of 55-64 compared to their counterparts without disabilities (51.1% versus 68.1%).[347] As expected, the effects of disability are more pronounced in the case of women.

The Canadian Human Rights Commission's Report titled "Roadblocks on the Career Path" (2017) has also demonstrated that the EEA regime has not removed the debilitating barriers confronting women with disabilities who are more susceptible to disabilities than men.[348] The Report's results were dismal – more than 30% of Canada's PwDs felt disadvantaged because of their condition, particularly in Ontario and British Columbia.[349] They also believed that they were a burden on their employers and were unlikely to advance in their jobs.[350] This sentiment was exacerbated among women with disabilities. The Report also cautioned that the collection of data was difficult because women with disabilities were less likely to self-identify as disabled owing to fears of negative repercussions.[351] The EEART Report also emphasizes that Black disabled individuals, especially, felt that they had to be "over careful" at all times for fear of committing mistakes which makes data collection with an intersectional lens all the more necessary.[352]

In the 1986 Report, the Abella Commission was sensitive to the barriers confronting PwDs but the Commission had still fallen short of studying and capturing the intersectional and

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[344] *Convention on the Rights of Persons with Disabilities*, 12 December 2006, Sixty-first session of the General Assembly by resolution A/RES/61/106, art 27(1).
[345] *Ibid* at Preamble (q).
[346] Government of Canada, *supra* note 11.
[347] *Ibid*.
[348] Canadian Human Rights Commission, *Roadblocks on the Career Path: Challenges Faced by Persons with Disabilities in Employment* (Canadian Human Rights Commission, 2018) at 9.
[349] *Ibid* at 11.
[350] *Ibid* at 12.
[351] *Ibid*.
[352] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 123.

aggravated forms of discrimination confronting women with disabilities. At the time, the "Obstacles" Report of 1982 had been crucial in understanding the experiences of PwDs for the Commission. The Obstacles Report had called for the Federal Government to introduce a cogent and effective "Affirmative Action Employment Program" seeking special orientation, training, recruitment and job advancement opportunities with stringent timelines.[353] However, even this Report fell short of making specific recommendations for women with disabilities. Keeping in view these shortfalls in past reports, the EEART Report has now suggested some comprehensive changes which fill in these gaps in our understanding of the distinct experiences of women with disabilities.

For one, the Report recommends taking an intersectional approach through the lens of race, gender and ethnicity while coalescing data on disability and determining whether the person had long-term disabilities or acquired them at work.[354] Additionally, the Report has tuned in carefully to the various disability rights groups and organization which have distinct demands of promoting learning, cultivating cultural humility and transparency in the recruitment of PwDs.[355] To me, these goals convey the precise meaning of "reasonable accommodation" of not just an individual but the marginalized group at large. The goals also travel much beyond achieving numerical goals of inducting "X" number of disabled workers in organization without making workplaces barrier-free.

To fulfil these outlined goals of reasonable accommodation, the EEART Report has recommended that the definition of "persons with disabilities" in EEA 1986 comply with the definition of "disability" laid down in the Accessibility Act to state:

"*Disability means any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society.(handicap*)"[356]

This definition has taken into consideration a wide array of disabilities, including intellectual, cognitive and learning disabilities which are all too often overlooked in legislatures

[353] David Smith, *Obstacles- Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: House of Commons, 1981) at 31.
[354] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 123.
[355] *Ibid* at 15.
[356] *Ibid* at 123.

across the world while they frame protective legislation for the PwDs. The definition has also raised the standard from accepting the Neo-Liberal idea of "inclusionism"[357] which is centred on achieving token changes that do not entail any institutional reform. The objective now is to ensure the "full and equal participation" of PwDs, as outlined in CRPD, at par with members without disabilities thereby challenging the normativity of able-bodiedness at the workplace.

Additionally, since women are more vulnerable to disabilities than men and more than 50% of women experience more severe forms of disabilities[358], it becomes integral to redefine how we understand disability in the law and our daily lives. In keeping with this understanding, the EEART Report has placed a special emphasis on "psychosocial or intellectual disabilities" that women might be more vulnerable to since they live longer. The Report has recommended that intellectual disabilities should be examined through an intersectional lens.[359] Barriers such as inaccessible language, lack of time to process information and negative stereotypes challenge prevent the full and dignified participation of workers with intellectual disabilities in the workplace and therefore, must identified and dismantled.[360] It is in this respect that the three-fold suggestions of barrier removal, meaningful consultation and stringent oversight mechanism will be essential in bringing in meaningful reform for PwDs, especially women.

This section of the thesis has been dedicated to understanding the shortfalls of the prevailing EEA framework on particular groups of women who are the most marginalized. Despite tremendous progress, I see that there is more work to be done. The EEART Report's submissions and recommendations have also driven home the point that quotas are only one of the many tools available to governments, institutions and employers to undertake the task of dismantling barriers. As pointed out throughout the course of this thesis, even though quotas are remedying and redressing prevailing disadvantages due to historic patterns of gender and caste-based division of

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[357] David T Mitchell & Sharon L Snyder, "Disability, Neoliberal Inclusionism and Non-normative Positivism" in Simon Dawes & Marc Lenormand, eds, *Neoliberalism in Context : Governance, Subjectivity and Knowledge* (Cham: Springer International Publishing, 2020) 177. In this book chapter, the authors identify "inclusionism" which entails tolerating disability "as long as it does not demand an excessive degree of change from relatively inflexible institutions, environments and norms of belonging; in particular, the degree to which disability does not significantly challenge the aesthetic ideals of a national imaginary dependent upon fantasies of bodily wholeness and, if not perfection, at least a narrow range of normalcy."

[358] Statistics Canada Government of Canada, "Women with Disabilities", (26 May 2017), online: <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14695-eng.htm> Last Modified: 2017-05-26.

[359] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 124.

[360] *Ibid* at 125.

labour, they are falling short in amplifying and involving the voices of the marginalized at workplaces. This is true of both India and Canada where the supervisory, management and executive level positions are cornered by the privileged castes and races. Additionally, the accommodation of difference remains to be surface-level as is seen through the prism of "inclusionism" in a Neo-liberal setup. Structural changes in the form of rethinking and reimagining how we recruit, retain and train individuals from the marginalized communities remain unaddressed by the Indian Reservation System and the EEA regime. To meaningfully implement Fredman's four-fold facets of substantive equality, a model legislation must envisage broad, proactive and macro-level goals which must be reflected in the workplace on an everyday basis with smaller, focused, powerful and targeted policies and practices. This entails a tripartite approach which the International Labour Organization mandates by involving employers, workers and governments at every stage of decision-making. Hence, the next segment will distil the key learnings from the Canadian framework and ultimately present draft legislation for policy enthusiasts, legislators and the public at large.

CHAPTER 5: REIMAGINING EMPLOYMENT EQUITY IN INDIA: CONCLUDING OBSERVATIONS

During the Legal Research and Methodology course at McGill, I was urged to consider the core audience of my thesis. I was clear that while I would like both Indian and Canadian audiences to engage with this work, my key audience is the parliamentarians of India who have the requisite powers to make employment equity a reality for Indian women workers. Therefore, a significant part of the mandate of this thesis is to derive key learnings from the Canadian experience with the employment equity framework and thereafter, present a model legislation. Accordingly, I have identified five core areas which should be reflected in the Indian framework. These areas of focus are derived from my reading of the Abella Commission Report, the EEART Report and other jurisprudence and senate reports. They reflect the three central pillars that Professor Adelle Blackett has recognized in the EEART Report but also extend to data justice and the applicability and coverage of special measures that I have identified that are integral to the Indian context. These areas are to be read harmoniously with the Indian Employment Equity Bill that I have drafted (Appendix A) which provides the technical details of the reforms that I would like to see in the prevailing system. These areas also are in line with the underlying theme of this essay – women are not numbers and special measures are not a number-crunching exercise.

2. **Barrier Removal:** The thesis has identified the insufficiencies of the quotas on three of Fredman's four-fold principles, that is, eliminating stigma and prejudice, redressing disadvantages and accommodating differences and achieving structural changes. The quota system has succeeded in setting critical benchmarks for inducting members of the marginalized castes and increasingly, women in public employment which was erstwhile inaccessible to them. Yet, quota-seeking individuals continue to navigate a labyrinth of regressive practices and policies at workplaces, including unnecessary aptitude tests and entrance examinations which require expensive coaching or, the lack of restrooms and childcare facilities which are mandated at public sector offices by multiple labour law legislation and so on. These inhibit the entry and growth of women workers in the organization significantly and ultimately culminate in high attrition rates.[361] Hence, Section 2(f) of the Indian Employment Equity Bill that I have drafted envisages a broad definition of

[361] Economic Times South Asia, "Government employee burnout levels remain high: Research - ETHRWorldSEA", online: *ETHRWorld.com* <https://hrsea.economictimes.indiatimes.com/news/employee-experience/government-employee-burnout-levels-remain-high-research/99311837>.; "WFO for Women: Back to office isn't working well for women, attrition rates show | Economy & Policy News - Business Standard", online: <https://www.business-standard.com/economy/news/back-to-office-isn-t-working-well-for-women-attrition-rates-show-123062300717_1.html>.

employment equity which comprises positive actions and policies which are aimed at eliminating systemic inequalities and institutional biases, accommodating differences and improving the representation of women employees. As an example in Chapter II of the draft legislation, I have added examples of these proactive policies to include special training and development workshops that prepare women workers for promotions at managerial level positions, reserving seats at supervisory positions and management boards which has been implemented in jurisdictions like Germany.[362] These policies resolve the problem of occupational ghettoization of women in entry-level, poorly remunerated and insecure jobs in the formal sector and thereby remedy the skewed presence of oppressor caste men at higher-level management. Further, to reasonably accommodate women workers from different caste backgrounds, it is not enough that we lower the entrance scores (as is often the case with reservations where the entrance score is lowered for the reserved categories) but also implore employers to question if such aptitude tests are rationally connected to work-related goals and the kind of adverse impact they cause on marginalized communities.

3. **Meaningful consultation and equitable leadership:** The EEART Report grounds meaningful employer-employee consultation in the principle – "nothing about us without us."[363] The lack of communication and consultation around special measure policies at public sector organizations is perhaps the most major blind spot of the quota system. There is little to no participation of employees in the rigid practices of public sector organizations even as trade unions remain male-dominated.[364] Studies capturing women's participation in trade unions have only become a recent phenomenon and they reveal some disturbing trends in the sphere of women's representation, participation and leadership activities. They observe that while Indian women workers possess a favourable towards trade union activities, they feel "inhibited" to undertake any leadership roles and if given an opportunity, pass it on to male members of the union.[365] Several factors have contributed to this inhibition in voicing needs and opinions at the union level, including male-dominated structures which deter women from engaging fully with other members

[362] "Germany: Second Law Establishing Gender Quotas to Increase Number of Women in Company Leadership Positions Enters into Force", online: *Library of Congress, Washington, DC 20540 USA* <https://www.loc.gov/item/global-legal-monitor/2021-09-12/germany-second-law-establishing-gender-quotas-to-increase-number-of-women-in-company-leadership-positions-enters-into-force/>.
[363] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 272.
[364] Sasmita Dash, "Women Trade Union Participation in India- A Qualitative Inquiry" (2019) 55:1 Indian Journal of Industrial Relations
[365] *Ibid* at 29.

and even labour commissioners or management. There is also a legitimate sentiment that their demands were either not received well or simply ignored by the male members.[366] Many women are also advised against unionising by their husbands and other family members.[367]

Even within the public sector organizations, it is unclear whether there are any uniform committees or human resources departments in place that address the grievances of women, specifically. In Chapter 2, I pointed out that central-level public sector organizations have constituted internal committees for preventing sexual harassment in the workplace and maternity leave benefits due to the obligations under the Prevention of Sexual Harassment Act and the Maternity Benefits Act. There are also a few public-sector organizations offering paid menstrual leave.[368] While these practices are instrumental, they are sporadic, infrequent and not implemented uniformly with stringent oversight as has been pointed out by the Indian Supreme Court.[369] Even though they have a tremendous impact on women's productivity, health and safety, it is unclear how such policies are formulated and whether at all women participate in the consultative process. Keeping in view the obscure nature of the operations of the public sector in this context, Section 4(c) of the draft Bill mandates employers to prepare, execute and review the Employment Equity Plans after due consultation with the representatives of employees which is mandated to be as diverse as the workforce they represent. Section 4(d) also mandates employers to apprise all members of the workforce of the finalised plan prepared after comprehensive consultation. Further, the Bill obligates the designation of a female Employment Equity Officer who will be tasked with representing the organization before the government, informing it of the employment equity measures in place and engaging with government officers. The officer will be tasked with submitting the report containing information such as employee demographics and the representation of women from marginalized groups and the salary ranges, hiring, promotion and termination practices and statistics. Thus, the women officers will effectively be ensuring the

[366] *Ibid* at 33.
[367] *Ibid* at 30.
[368] For example, Bihar province in India has instituted a paid menstrual leave policy for workers for 2 days a month since 1992.
[369] "'Sorry state of affairs': Supreme Court on lack of sexual harassment committees at workplace", *The Economic Times* (12 May 2023), online: <https://economictimes.indiatimes.com/news/india/sc-directs-centre-states-to-ensure-constitution-of-sexual-harassment-committees/articleshow/100186640.cms?from=mdr>.

implementation of the provisions of the Bill at the workplace which is a crucial step for the development of leadership and participation skills for other women in the organization, as well.[370]

4. **Regulatory Oversight and Penalties:** In Chapter 3 of this thesis, I highlighted that institutions such as the National and State Commissions for Women, despite having the mandate and powers are severely underutilised bodies. Instead of independently supervising and investigating the dismal socio-economic realities confronting women on all fronts – employment, health, safety, marriage, divorce, and so on, they have become heavily politicised and compliant to the commands of the ruling government.[371] It is time that these institutions be tasked with fulfilling their original mandate. Therefore, the Bill I present, entrusts the Commissions to receive and inquire into the complaints filed by parties who have been aggrieved by the non-compliance of the Bill by their employers. The Commissions, in keeping with their powers as a civil court have been granted the mandate to inquire into the failure of employers to implement positive actions and policies within a reasonable time span and collect, maintain and provide data to the government officers amongst other responsibilities. Section 10(c) lists these powers at length. To give full effect to their powers, they are at liberty to summon and enforce the attendance of any party, receive evidence, inspect documents and examine witnesses.

The 1995 amendment in the EEA regime had incorporated provisions containing penalties to ensure that freedom to implement a broad variety of positive policies and practices for employers does not translate into non-compliance.[372] Thus, the draft legislation envisages monetary penalties for employers for a variety of deficiencies in the implementation of employment equity. These provisions also envisage aggravated penalties for repeated violations and non-compliance with the Bill.

There are two other aspects that are interesting for the Indian context from the EEART Report chapter on "Rethinking regulatory oversights."[373] First, past critique by scholars and the Report observe that the EEA regime had become too centred on the drafting and submitting of

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[370] Dash, *supra* note 355. This aspect is particularly important since the study on women's participation in the unions notes that women members feel inhibited in participating due to a lack of women leaders within the traditionally male-dominated structures of the unions.

[371] "DCW and NCW slam each other over recent gangrape incidents in BJP-ruled states", online: *India Today* <https://www.indiatoday.in/india/story/dcw-and-ncw-slam-each-other-over-recent-gangrape-incidents-in-bjp-ruled-states-1211122-2018-04-12>.

[372] *Employment Equity Act*, SC 1995, c 44, s 35.

[373] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 302.

reports and collection of data (which is separate from data justice). As stated above, employment equity is not a number-crunching exercise and simply entrusting employers and institutions with the responsibility of filing relevant documents deflects attention from the goals of employment equity. To that end, fruitful employment equity legislation must incentivise employers to implement creative policies such that the implementation of employment equity policies proves to be cheaper than the fines and penalties envisaged within the Bill.[374] These incentives could manifest in the form of tax subsidies, public recognition, priority in government tenders and contracts and so forth.[375] The EEART Report is transformative in that it envisages a systemic and proactive implementation of employment equity rather than reducing employment equity to a complaint-based and penalty-based mechanism. In other words, the Report envisions a balance between deterrence and incentivization.

The second aspect is the creation of "Employment Equity Commissioners"[376] or, in my Bill's case the "Compliance Auditor" who is to be appointed by the State and National Commissions with the mandate of inquiring into the progress of organization falling within the ambit of the employment equity bill. Such an officer has the integral task of being the primary enforcer of employment equity. She can assist the commissions in summoning employers or representatives of the organization, inspect documents, examine witnesses and so forth. Further, the officer's task is not only to bring errant employers to book but also, in the first instance, to negotiate with the employers to undertake specific measures to remedy non-compliance as part of the "supportive and sustainable regulatory oversight" that the EEART Report has recommended.

5. **Extending Applicability and Coverage:** Chapter 2 of this thesis has delved into the issue of private discrimination at length and explained how the lack of government intervention in the private sector and expanding informalization in the face of technological change has exacerbated the inferior working conditions of women workers. Therefore, I have advocated for the extension of employment equity to the previously excluded private sector. The conversation around reservations in the private sector will not be new. In and around 2005, the then-United Progressive Alliance-led government in India had proposed a voluntary affirmative action policy in cooperation with the private sector. In fact, the Prime Minister had even gone on to make a

[374] *Ibid* at 303.
[375] *Ibid* at 370
[376] *Ibid* at 337.

seemingly strong statement in favour of reservations in the private sector, "Nobody can prevent an idea whose time has come. Those opposing the move will not be able to do so once a national policy is put in place."[377] Yet, such a policy was dependent on the voluntariness of the private sector to avoid legislative change.[378] Thereafter, due to the lack of support and cooperation from the private sector, the proposal fizzled out. There has been no fresh dialogue with regard to reservations in the private sector.[379] This is despite Article 15(4) empowering the Indian State to make special provisions for the socially and educationally backward class of citizens or the SCs and STs without restricting such action to any particular sector. The provision makes no mention of the public or private sector and leaves the question of special measures open to the government in the realm of the private sector and yet, the private sector has evaded the government's attention when it comes to the equality provisions.

There are other arguments and jurisprudence that have developed in the sphere of affixing the duties of non-discrimination in the private sector. One such approach is the "public actor" approach in favour of subjecting the private sector to the three equality provisions of Articles 14, 15 and 16.[380] This argument propounds that certain private actors possess a "degree of publicness" owing to the nature of the services and goods they provide. For example, housing, health and employment.[381] Certain actors like landlords, employers and "providers of goods and services" possess considerable power and influence over society and in particular, their tenants, employees and consumers, which is why these groups have been historically protected through a variety of legislation (consumer codes, labour codes, et al). Accordingly, these groups in power can initiate a "collective embargo against victims of discrimination", constitutional law scholar Tarunabh Khaitan points out.[382] Applying the same rationale here, I find it integral that a private sector organization with 50 or more employees with considerable influence, power and resources at its disposal become subject to the equality provisions of the constitution. Additionally, larger private sector organizations benefit from public resources and financing. Therefore, they must undertake

[377] G Thimmaiah, "Implications of Reservations in Private Sector" (2005) 40:8 Economic and Political Weekly 745–750.
[378] *Ibid*.
[379] "No proposal to alter existing reservation scheme: Government", *The Economic Times* (7 December 2022), online: <https://economictimes.indiatimes.com/news/india/no-proposal-to-alter-existing-reservation-scheme-government/articleshow/96062688.cms?from=mdr>.
[380] Raj, *supra* note 265.
[381] *Ibid*.
[382] *Ibid*.

some onus and responsibility for the deplorable working conditions or, the exclusion of women workers in Indian society.

In keeping with this understanding, the draft Bill I present binds the private sector organization to institute quotas *and* other forms of special measures to ameliorate women workers' participation in the formal workforce at par with the public sector organization. The organization have been subjected to the powers of the National and State Commissions for Women considering that these organizations deal with a broad variety of complaints concerning the deprivation of women's rights or harassment – including sexual harassment at the workplace and their equal right to participation in education and work.[383] Thus, no change in their mandate is required to extend their jurisdiction over the private sector.

In the EEART Report, the goal of fostering equitable inclusion in decent work has been identified for *all* workers, irrespective of the sector. In order to resolve the tremendous problem of the occupational ghettoization of marginalized workers in precarious work due to a lack of access to "decent, stable and sustainable and supportive employment", the Report has expanded the coverage of the EEA to dependent contractors.[384] Additionally, one of the strongest criticisms against the EEA regime has been its little to no coverage of the vast majority of workers. To remedy this, the Report recommends including employers with 10 or more employees in the federally regulated private sector.[385] Simultaneously, the Report recognises that smaller organizations have fewer resources at their disposal and require support from the government. Therefore, the Report affixes the onus of achieving "reasonable progress" on equitable inclusion of the protected groups on employers with 10-49 employees.[386] On the other hand, employers with 50 or more employees not only have to achieve "reasonable progress" in augmenting the representation of marginalized workers but also are required to carry on their prevailing obligations under the EEA 1995.[387]

As a starting point, private sector organizations with 50 or more employees must be subject to a potential employment equity legislation. Depending upon the success and efficiency of the

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[383] "Frequently Asked Questions (FAQs) for Complaint Registration | National Commission for Women", online: <http://ncw.nic.in/frequently-asked-questions-faqs-complaint-registration>.
[384] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 356.
[385] *Ibid* at 360.
[386] *Ibid*.
[387] *Ibid*.

implementation, the coverage can be extended to employers with 25 or more employees. However, while the technicalities of the application and coverage may differ, it remains clear that the private sector cannot evade its responsibilities under the equality provisions of the Constitution any longer.

6. **Data Justice:** In a panel discussion on the UN Permanent Forum of People of Africa Descent organized at the Faculty of Law at McGill, Professor Adelle Blackett described a human rights approach to data concerning the marginalized communities as comprising the questions – who they are and what support do they need? In other words, without capturing the distinct challenges confronting the several intersectional identities that constitute an individual[388], employment equity would be rendered an artificial exercise that is out of touch with the socio-economic realities of the marginalized citizens.

In the EEART Report the extensive chapter on "Data Justice" asserts that it is the "backbone of substantive equality"[389] and is facilitative in identifying barriers that prevent equitable inclusion at work. In pursuit of dismantling these barriers, the EEART Report suggests taking a human rights-based and distinctions-based approach which takes "specific histories and identities"[390] into account throughout the employment equity process –from the drafting of the plans to the necessary grievance redressal mechanisms. A distinctions-based approach drives employers and institutions away from "clubbing together" marginalized groups under one single umbrella while ignoring their specific needs and wants. As demonstrated in Chapter 4, such an approach in the context of "visible minorities" and Indigenous Peoples has been harmful. Black women workers, women with disabilities and Indigenous women located on the Reserves, in particular, have borne the brunt of having their specific needs and wants overlooked by employers and institutions. As a result, they continue to be stereotyped and ghettoised into performing precarious work based on historic labour patterns even today. To put an end to these recurring patterns, the EEART has recommended the establishment of an Employment Equity Data Steering Committee which is entrusted with the responsibility of meaningful consultation and monitoring, analyzing, expanding and merging data, for identifying discouraged and overqualified workers and collaborating with academics and communities that represent the protected groups.[391]

[388] The Report observes this eloquently by stating "We live intersectional lives" on page 59.
[389] *Ibid* at 55.
[390] *Ibid* at 59.
[391] *Ibid* at 58.

In the Indian context, the data being collected by the various economic and labour surveys is comprehensive across caste categories. However, the data lacks an intersectional approach. For instance, in Chapter 2, I point out that the PLFS data did not record a caste-wise distribution of women workers in the informal sector which is crucial in remedying the problem of *Dalit* and tribal women being cornered into the informal sector owing to caste and gender inequalities and a *laissez faire* economic system. The survey covered the rural and urban divide of labour at length. It also captured the "worker population ratio" along the lines of caste and gender but missed out on capturing other identities, including disability status, trans identities or religion. Additionally, it bunched together "beggars and prostitutes" and "disabled workers unable to work" under the category of "neither working nor available for work."[392] On the other hand, the Indian Census records the specific industries where disabled workers are employed.[393] While it is true that the data and statistics originating from a populated country such as India are mammoth, there seems to be no inquiry into why these labour patterns continue to exist amongst marginalized communities. The EEART Report observes that in order for employment equity to tackle barriers, the right data needs to be collected and for the right reasons.[394] At this juncture, the data being collected is mechanical and is not presented in a manner that can help devise a cogent and efficacious employment equity policy.

As an example, reservations for the OBC community have been implemented infrequently in public employment across provinces and at the union level. Naturally, the impact of this lack of uniformity affects OBC women workers the most. Owing to the frustration amongst various marginalized communities regarding the insufficiency of quota seats and the inability to resolve income disparities, there is now a rising demand for conducting a caste census which will collect data along the lines of caste and its intersection with class, gender and regional identities for expanding access to public and private opportunities and resources. In spite of immense opposition to such a census by the ruling *Hindutva* government and the oppressor castes, the province of Bihar recently conducted the very first caste census and found that the "dominant castes" constituted

[392] Ministry of Statistics and Programme Implementation, *Periodic Labour Force Survey: Annual Report 2022-23*, (New Delhi: Government of India, 2022) at C-6.
[393] "Disability in India | Office of Chief Commissioner for Persons with Disabilities", online: <http://www.ccdisabilities.nic.in/resources/disability-india>.
[394] Professor Adelle Blackett, *Report of the Employment Equity Act Review Task Force – A Transformative Framework to Achieve and Sustain Employment Equity,* (Ottawa: Employment and Social Development Canada, 2023) at 56.

only 15% while 84% of the population was "backward."[395] Yet, quotas are limited to only 50%. Clearly, there is a yawning gap in the number of marginalized citizens in India and the special measures being deployed to fix this marginalization. To my mind, the implementation of a cogent employment equity legislation is dependent on the conducting of the caste-based census which will bring to light the cornering of wealth by the oppressor castes while keeping in view the gender, class and regional identities. A caste-based census is oriented specifically at bringing to light the missing data that has been conveniently hidden from the public eye lest it should lead to nationwide agitations by the marginalized in refining and expanding reservations which can lead to significant political upheaval. To me, a caste-based census is perhaps the Indian version of data justice that the EEART Report has recommended and is *sine qua non* in formulating the Indian employment equity legislation.

The five principles or learnings that I have culled from the study of the Canadian EEA framework are not merely technical aspects oriented towards the government. They speak to a broader approach towards dismantling barriers in employment. Though these principles are aimed towards remedying systemic inequalities at the workplace in India, they are universally applicable to any jurisdiction irrespective of the nature of their legal systems. In fact, aspects such as data justice, and meaningful consultation have the potential to be molded in a manner that suits a country's legal, political and cultural systems the best. The caste census is an example of an "Indianised" version of data justice even though the terminology of "data justice" has not been employed in the coverage of this census. Hence, the aim of employment equity is not only to assist legislators and policy-makers but also to trigger a transformative change in the conscience and language of the Indian people. The goal is to change the way we have historically thought of special measures without doing away with the understanding of the Constitution drafters who devised the special measures as unique to the Indian conditions. This is why retaining quotas but supporting them with other forms of creative policies and effective oversight mechanisms becomes so crucial. And while employment equity for India envisages an overhaul and transformation of systems, it is fair to say that the underlying theoretical framework is already present in the Indian polity as a whole. Chief Justice DY Chandrachud in the *Neil Nunes v Union of India* judgement articulates

[395] "Bihar Caste Survey Shows Every Third Family Poor: Nitish Announces Rs 2 Lakh Aid, Wants 75% Reservation", online: *The Wire* <https://thewire.in/government/nitish-kumar-socio-economic-data-caste-survey-poverty-assistance>.

the goal of special measures succinctly – "reservations must remain a tool to remedy structural barriers."[396] This understanding is akin to the goals enunciated in the Abella Commission Report and the EEART Report.

The bottom line is that employment equity legislation must succeed in providing marginalized citizens with the necessary vocabulary and understanding which will form the basis for demanding rights in the sphere of labour and employment rights. Perhaps in complete contradiction to Friedrich Savigny's theory of the *Volksgeist* which postulates that laws must be a result of the national conscience, I argue that the employment equity legislation will be instrumental in transforming a national conscience rooted in millennia-old casteism and heteropatriarchy to speak the language of justice.

[396] *Neil Aurelio Nunes and Ors v Union of India and Ors,* 2022 LiveLaw (SC) 73.

APPENDIX A

Bill No. of

THE INDIAN EMPLOYMENT EQUITY BILL, 2023

By

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A

BILL

to provide special measures for women workers in the public and private sector organization to improve women's participation in the national workforce and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventy-Sixth year of the Republic of India as follows: -

Chapter I

Preliminary

1. (1) This Act may be called the Indian Employment Equity Act, 2023.

(2) It shall come into force on such date, as the Central Government may, by notification in the Official Gazette, appoint.

(3) It extends to the whole of India.

2. In this Bill, unless the context otherwise requires, -

(a) "aggrieved person" means any employee of the organization who is aggrieved by the non-fulfilment of the mandate of this Act.

(b) "appropriate Government" means, -

in relation to a workplace which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly—

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government.[397]

(c) "discrimination" means any distinction, exclusion or preference made on the basis of religion, race, caste, sex, descent, disability, place of birth or residence, which has the

[397] *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No 14 of 2013, Parliament of India, s 2(b).

effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation; such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organization, where such exist, and with other appropriate bodies.[398]

Exception – Nothing shall prevent the appropriate Government from undertaking any positive actions or policies under this legislation for the welfare of women workers and such action shall not amount to "reverse discrimination" against other workers.

(d) "employee" means any person employed on a part-time permanent basis or, on a permanent full-time basis on wages at a workplace, either directly or through a contractor, to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical, clerical or any other work, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union of India.[399]

(e) "employer" means any person who employs 40 or more employees in a private sector organization or in any organization established, owned, controlled or wholly or substantially by the appropriate government.[400]

(f) "employment equity" means any set of comprehensive positive actions and policies, including quotas, instituted by an organization to eliminate systemic inequalities, redress institutional bias, accommodate differences and ameliorate the representation of women employees.[401]

(g) "General Category" means any class of people not belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes.

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[398] *Discrimination (Employment and Occupation Convention),* C 111, International Labour Organization, 1958, art 1.
[399] *The Code on Social Security, 2020*, No 36 of 2020, Parliament of India, 2020, s 2(26). The definition has been modified to include part-time permanent workers but does not include workers under the Armed Forces as they have their own independent recruitment practices.
[400] *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No 14 of 2013, Parliament of India, s 2(g).
[401] The definition of "employment equity" has been formulated from my own understanding of the term after going through the Abella Report and the EEA.

(h) "horizontal reservation" means an employment equity measure designating jobs, posts or appointments in any organization cutting across the General, Scheduled Castes, Scheduled Tribes and Other Backward Classes vertical categories.[402]

(i) "organization" includes –

(i.) any organization which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority a Government company a corporation or a cooperative society.

(ii.) any private sector organization or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organization, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service with 50 or more employees.[403]

(i) "Other Backward Classes" means socially and educationally backward classes within the territory of India as identified by a Commission appointed by the President of India under Article 340 of the Constitution of India.

(j) "Scheduled Castes" means castes, races, or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 of the Constitution of India to be Scheduled Castes.[404]

(k) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.[405]

(l) "the Commissions", collectively, means the National Commission for Women established under the National Commission for Women Act, 1990 and the State Commission for Women established under the relevant legislation in the Indian states.

(m) "woman" means any person who is of the female sex, transgender, gender non-conforming or queer persons, to whom this Act is applicable.[406]

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[402] *Saurav Yadav & Others v State of Uttar Pradesh & Others*, (2021) 4 SCC 542.
[403] The definition of "organization" is borrowed from the definition of "workplace" under the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No 14 of 2013, Parliament of India, s 2(o).
[404] *The Constitution of India*, 1950, art 366(24).
[405] *The Constitution of India,* 1950, art 366(25).
[406] *The Right to Menstrual Hygiene and Paid Leave Bill, 2019*, Bill No 292 of 2019, Lok Sabha, s 2(w).

Chapter II

Employment Equity

3. Employer's Duty

(a) No employer shall discriminate against an individual solely on the grounds of religion, caste, sex, descent, place of birth, residence, disability or any of them in hiring, training, promotion and remuneration.

(b) Every employer must identify and eliminate systemic employment barriers against women employees, in particular, those from the Scheduled Castes, Scheduled Tribes and Other Backward Classes categories;

(c) Notwithstanding Clause (a), every employer must institute such positive policies and practices and make reasonable accommodations for women employees to ensure their representation at each occupational level of the organization that reflects their representation in the Indian workforce or those segments of the workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably draw candidates.

Illustrations

I. The organization can institute special training and development workshops for women employees in order to prepare them for appointments at the managerial and executive levels of the organization.

II. The organization can impose quotas for women, not below 33% in supervisory and management boards.

(d) As nearly as may be, every employer must make provision for the horizontal reservation of one-third of each appointment or post in favour of women employees in each of the vertical categories, namely, the General, Scheduled Castes, Scheduled Tribes and Other Backward Class categories[407];

(e) Nothing in this article shall prevent the employer from making any provision in favour of women employees while maintaining the efficiency of administration at an organization;[408]

[407] Bill No 124 of 2023, *The Constitution (One Hundred and Twenty-Eighth Amendment) Bill, 2023*, Lok Sabha, 2023.
[408] *The Constitution of India*, 1950, art 15(3).

(f) For the purpose of implementing employment equity, every employer shall –

(i) Collect information and conduct an analysis of the employer's workforce in accordance with the regulation, in order to determine the degree of the underrepresentation of women employees from each category, namely, the General, Scheduled Castes, Scheduled Tribes and Other Backward Classes categories;

(ii) Conduct a review of the employer's employment systems, policies and practices, in accordance with the regulations, in order to identify employment barriers against women employees that result from those systems, policies and practices.[409]

4. Employment Equity Plan

(a) Every employer shall prepare an employment equity plan that –

(i) Specifies the comprehensive positive policies and practices instituted or continued by the employer in a given financial year for the equitable hiring, training, promotion and remuneration of women employees and for making reasonable accommodations for women employees;

(ii) Confirms the designation of one-third horizontal reservation at all occupational levels and

(iii) Sets out long-term goals for increasing the representation of women employees, particularly, from the Scheduled Castes, Scheduled Tribes and Other Backward Classes categories in leadership positions and the employer's strategy for achieving these goals.[410]

(b) The employer shall ensure that its Employment Equity Plan would if implemented, constitute reasonable progress towards implementing employment equity to fulfil the mandate of this Act.[411]

[409] *The Employment Equity Act,* SC 1995, c 44, s 9.
[410] *Ibid* at s 10(1).
[411] *Ibid* at s 11.

(c) The employer shall ensure that its Employment Equity Plan is prepared, executed and reviewed after consulting with the representatives of employees who shall be representative of the diverse workforce.[412]

(d) The employer shall inform all the employees at the organization after the plan has been prepared and finalised subsequent to an exhaustive consultative process.[413]

5. Implementation, Reviewing and Monitoring of the Plan

Every employer shall –

(a) Make all reasonable efforts to implement its Employment Equity Plan and

(b) Review and monitor the implementation of the plan on a regular basis to achieve its goals.[414]

6. Employment Equity Records

Every employer shall, in accordance with these regulations, establish and maintain employment equity records in respect of the employer's workforce, the employer's Employment Equity Plan and the implementation of employment equity by the employer.[415]

7. Designation of Employment Equity Officers

(a) Every organization within the meaning of this act, shall, within one hundred days of the enactment of the Act, designate an officer as the Employment Equity Officer, who shall be a woman within the meaning of this Act and will be respo to provide information to the appropriate Government regarding employment equity measures under the mandate of the Act.[416]

(b) Every Employment Equity Officer shall, on or before April 1, be responsible for filing with the State Commission for Women a report in respect of the preceding calendar year containing information in accordance with the prescribed instructions, and indication, in the prescribed manner and form:

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[412] *Ibid* at s 15(1).
[413] *Ibid* at s 14.
[414] *Ibid* at s 12.
[415] *Ibid* at s 17.
[416] *The Right to Information Act*, No 22 of 2005, the Parliament of India, s 5.

(i.) the industrial sector in which its employees are employed, the location of the employer and its employees, the number of its full-time and part-time employees and the number of women employees, specifying those who are members of the Scheduled Castes, Scheduled Tribes and the Other Backward Classes;

(ii.) the occupational levels in which its employees are employed and the degree of representation of women in each occupational level, in particular those from the Scheduled Castes, Scheduled Tribes and the Other Backward Classes;

(iii.) the salary ranges of its employees and the degree of representation of women in each range and in particular those from the Scheduled Castes, Scheduled Tribes and the Other Backward Classes and any other information in relation to the salary of its employees that may be prescribed; and

(iv.) the number of its employees hired, promoted and terminated and the degree of representation in the numbers of women, in particular those from the Scheduled Castes, Scheduled Tribes and the Other Backward Classes.[417]

(c) The Employment Equity Officer shall render all assistance to the appropriate Government in the collection, maintenance and analysis of the employment equity records and the report. As such, the Employment Equity Officer shall be liable for the exchange of communication and information with the appropriate Government and other relevant entities to fulfil the mandate of this Act.

Chapter III

Compliance Mechanism

8. Compliance Audits

(1) The State Commission for Women is responsible for the enforcement of the obligation imposed on employers under Sections 3-7.

(2) The State Commission may, while discharging its responsibility, appoint Compliance Officers in order to conduct annual audits of the Employment Equity Plan, the records and the report.

[417] *The Employment Equity Act,* SC 1995, c 44, s 18.

(3) For the purposes of ensuring compliance with the abovementioned provisions, a compliance Officer may conduct a compliance audit of an employer and for that purpose, may:

(a) at any reasonable time, enter any place in which the officer believes on reasonable grounds there is anything relevant to the enforcement of any of those provisions; and

(b) require the Employment Equity Officer to produce for examination or copying any record, book of account or other document that the Officer believes on reasonable grounds contains information that is relevant to the enforcement of any of those provisions.[418]

9. Employer Undertaking

Where a Compliance Officer is of the opinion that an employer

(a) has not collected information, conducted an analysis or conducted a review under Section 3(f);

(b) has not prepared an employment equity plan referred to in Section 4;

(c) has prepared an employment equity plan that does not meet the requirements of Section 4;

(d) has not made all reasonable efforts to implement its employment equity plan;

(e) has failed to review and revise its employment equity plan in accordance with Section 5;

(f) has failed to provide information to its employees in accordance with Section 4(d),

(g) has failed to consult with its employees' representatives in accordance with Section 4(c), or

(h) has failed to establish and maintain employment equity records as required by Section 6,

the Compliance Officer shall inform the employer of the non-compliance and shall attempt to negotiate a written undertaking from the employer to take specified measures to remedy the non-compliance.

10. Powers and functions of Commissions

(1) Subject to the provisions of the Act, it shall be the duty of the National Commission for Women or the State Commission for Women, as the case may be, to receive and inquire into a complaint from the aggrieved person(s) or the Compliance Officer for:-

(a) Failure to implement positive actions and policies as specified in the approved Employment Equity Plan of the organization within a reasonable time span;

[418] *Ibid* at s 23(1).

(b) Failure to reserve one-third of appointments and posts at all occupational levels for women employees across the vertical categories of Scheduled Castes, Scheduled Tribes and Other Backward Classes as mandated by this Act;

(c) Failure to appoint an Employment Equity Officer within one hundred days of the enactment of the Act;

(d) Failure to collect and maintain employment equity records and prepare the Employment Equity Plan with due consultation with the representatives of the employees;

(e) Failure to file the relevant report of the immediately preceding calendar year containing such information as specified in Section 7(a)(i) by April 1;

(f) Failure to render assistance or refusal to provide relevant information to the appropriate Government, including the National Commission for Women or the State Commission for Women;

(g) Non-compliance with directions and orders of the National Commission for Women and the State Commission for Women.

(2) The National Commission for Women or the State Commission for Women, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while adjudicating a complaint filed by an aggrieved person, namely:-

(a) Summoning and enforcing the attendance of persons and compelling them to give oral or written evidence on oath and to produce the documents or things;

(b) Requiring the discovery and inspection of documents;

(c) Receiving evidence on affidavit;

(d) Requisitioning any public record or copy thereof from any court of office;

(e) Issuing summons for examination of witnesses or documents; and

(f) Any other matter which may be prescribed.

11. Appeal Mechanism

(1) Subject to the provisions of this Act, any person aggrieved by the conduct of the employer or the organization at large may approach the Employment Equity Officer for grievance redressal.

(2) In the event of the failure of the Employment Equity Officer to resolve the complaint within thirty days, may approach the State Commission for Women. The State Commission for Women shall resolve the complaint and issue an order within forty-five days from the date of the receipt of the complaint.

(3) A final appeal against the decision of the State Commission for Women shall lie, within ninety days from the date of decision, with the National Commission of Women. The National Commission for Women shall resolve the complaint and issue an order within forty-five days from the date of the receipt of the complaint.

(4) The decision of the National Commission of Women or State Commission of Women, as the case may be, shall be binding on all parties.

Chapter IV

Penalties

12. (1) Where the National Commission for Women or the State Commission for Women, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the employer, without any reasonable cause, refused to comply with duties as provided in this Act or *malafidely*, denied the request for information or knowingly give incorrect, incomplete or misleading information or destroyed information or obstructed in any manner the inquiry conducted by the appropriate Government or refused to render assistance to the appropriate Government, shall be subject to a penalty not exceeding the amount of fifty-thousand rupees.

(2) Upon repeated non-compliance, the employer shall be subjected to a penalty not exceeding the amount of one lac rupees.

13. The Central Government may, by notification, in the Official Gazette, make rules for carrying out the purposes of this Act.

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