

AFFIRMATIVE ACTIONS IN INDIA AND U.S.: A CHALLENGE TO RESERVATION POLICY IN INDIA

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ABSTRACT

The problem of caste in India and race in U.S.A are often compared due to their institutional similarities and also because these categories form the social basis on which the affirmative action program in the two countries is based. The exploitation and oppression of certain classes of people including original inhabitants, SCs, STs and more particularly women, is a global phenomenon.

Affirmative action, even today, continues to remain lesser understood and highly debated political philosophies throughout the world and the proponents of the policy themselves are still at divergent opinion as how to implement the policy of affirmative action most effectively.

This paper intends to study the need for Affirmative Action and compare the Affirmative Action policies of India and USA. The object of the research is to critically examine and compare the two systems, to evaluate them and also provides some comments on what might be a system better suited for India now.

Key Words: Affirmative Action, Reservation, Caste, Race, Women.

1. INTRODUCTION

The terms affirmative action and positive action refer to policies that take race, ethnicity, or gender into consideration in an attempt to promote equal opportunity or increase ethnic or other forms of diversity. The focus of such policies ranges from employment and education to public contracting and health programs. The drive towards affirmative action is twofold: to maximize diversity in all levels of society, along with its presumed benefits, and to redress perceived disadvantages due to overt, institutional, or involuntary discrimination.

1.1 Object

This paper intends to study the need for Affirmative Action and compare the Affirmative Action policies of India and USA. The object of the research is to critically

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examine and compare the two systems and evaluate them. This paper also provides some comments on what might be a system better suited for India now.

1.2 Methodology

This paper has been written using the doctrinal method of research. The empirical method also has been applied to a limited extent by the author in showing the principles being applied in two situations.

2. AFFIRMATIVE ACTION IN INDIA - RESERVATION

In India, the first preference policies to target disadvantaged castes were promulgated by the British, who were interested in developing indigenous groups that could counter the looming threat posed by the Indian National Congress. The British hoped that by disbursing benefits on the basis of certain groups, they could keep India divided enough to prolong their own rule. In the ensuing years, “reservation” policies were frequently the focus of political battles in India at both the national and state levels. India has a quota based affirmative action programme, which is called the ‘reservation system’.

2.1 Historical Background of Reservation in the Indian Constitution

In the draft Constitution, Article 16(4) figured as Article 10(3). There was huge criticism amongst many members of the Constituent Assembly on the use of the term ‘backward’ as it appeared vague and unidentified to them and also that it could lead to litigation later.² In the original draft, under Article 10(3), reservation was allowed for “any class of citizens” who were not adequately represented in the services. The word “backward classes” was added by the Drafting Committee to ensure that the size of reservation was kept small. Moreover, the use of the word “class” and not “caste” clearly implied that people were not to be treated as “backward” on the basis of any caste origin.

Initially it was the pre-independence British rule which introduced affirmative action policies to India and has kept on growing ever since. India has a quota based affirmative action programme, which is called the ‘reservation system’. Reservation normally implies a separate quota which is reserved for a special category of persons.³ It has two components, which are targeted separately towards SC/ST and OBC groups. 22.5 percent of all

² U. C. Agarwal, “The Constitution and Reservations in Services”, in S.C. Kashyap (ed.): *Reforming the Constitution*, pp. 85-86, at p. 85.

³ *Indra Sawhney v. Union of India*, AIR 1993 SC 477 at para 55 & 56.

government jobs, seats in educational institutions that have complete or partial government funding and electoral constituencies at all levels of government are reserved for SC and ST persons. This quota is generally proportionate to their share in the population. While this was enshrined in the Indian constitution, adopted in 1950, via Article 15 (4)⁴ and Article 16 (4)⁵, this program has a history that precedes independence. In some areas, such as parts of present day Kerala and Karnataka, the British introduced quotas almost a hundred years ago.⁶

2.2 Provisions for Reservation under the Indian Constitution

The framers of the Constitution of India made certain arrangements for the backward classes to enable them to enjoy a humane life and for their upliftment. The reservations for the backward classes can be broadly categorized into: political, educational and employment. For the first, the Constitution provides for reservation of seats in proportion to their numbers for the SCs and the STs in the Lok Sabha (The Lower House) in its Article 330, and in the Legislative Assembly of the State in Article 332. These provisions do not exist for the OBCs, which indicate that the principal categories for the affirmative action are the SCs and STs according to the Constitution.

For the second, an implication exists in the constitutional provision - Article 15(4), which allows the state to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the SCs and STs.

For the third, the Constitutional provisions as modified and simplified from time to time are, Articles 16(4), 16(4-A), 16(4-B), 320(4) and 335. These articles provide explicitly for reservation in educational institutions for the backward classes and the authority of the State to make any required changes as and when required.

Article 15(3) provides special power to the Parliament to make special provisions for women and children and Article 15(4), to make special provisions for the advancement of socially and educationally backward classes. Similarly, Article 16(4) of the Constitution provides that the State can make special provisions for the reservations of appointments or posts in matters of public employment 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. These provisions under the Constitution are not exceptions to the general rule of equality laid down

⁴ Reserve places for the under privileged in state run educational institutions.

⁵ Reservation of government jobs.

⁶ [1997] S.C.R. 241.

under Article 14 and more specifically under Article 15(1) and Article 16(1) but an instance of classification permitted by Clause 1.⁷

The President of India, by notification, specifies castes and tribes to be included in the Scheduled Castes and Scheduled Tribes categories. He is also empowered to appoint a commission from time to time to recommend who should be designated as belonging to the Other Backward Classes category. However, translating any special preferential provisions for these categories into actual numbers (quotas or ratios) is left to the legislatures.

However, in the name of efficiency, as enjoined in Article 335 of the Constitution, and believing that any “unreasonable, excessive, and extravagant” reservation would restrict general competition, the Supreme Court in 1963 said that total reservations for all three categories shall be less than 50 percent of positions.

2.3 Creamy Layer Doctrine

The intention of the Constitution-makers was to make reservation for backward classes of citizens not adequately represented in services. It was to be only for a minority of seats and for a limited period only. Any large-scale, caste-based reservations as suggested by the Mandal Commission are against the intention of the constitution-framers, who wanted to establish equality and fraternity and not separation and discord.⁸

On April 10, 2008, the Supreme Court of India⁹ upheld the Government’s 27% OBC quotas in Government funded institutions. The Court categorically reiterated its prior stand that “Creamy Layer” should be excluded from the ambit of reservation policy and private institutions are also not to be included in. The verdict produced mixed reactions. Several criteria to identify creamy layer has been recommended, which are as follows:

Those with family income above Rs 250,000 a year should be in creamy layer, and excluded from the reservation quota. Also, children of doctors, engineers, chartered accountants, actors, consultants, media professionals, writers, bureaucrats, defence officers of colonel and equivalent rank or higher, high court and Supreme Court judges, all central and state government Class A and B officials. The court has requested Parliament to exclude MPs’ and MLAs’ children, too.

⁷ *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

⁸ Thomas Sowell, “Preferential Policies: An International Perspective”, New Haven, Conn. William Morrow and Co. (1990), at p. 41.

⁹ *Ashoka Kumar Thakur v. Union of India*.

2.4 Execution of Reservation Policy in India

Unlike in the USA, in India there is no national enforcement mechanism for the reservation system, even though there is a Ministry for Social Justice in the Central Government. While civil action is not an available remedy for denial of due benefits, the alternative is in the form of a writ jurisdiction under Article 32 and 226 of the Indian Constitution.

The quota-based scheme in India is similar to a guaranteed minimum scheme, in that quotas are supposed to be filled first and the rest of the seats are allocated on “merit”. Thus, the total number of SC/ST individuals in a job or educational institution will overestimate the actual amount of preference, if some members of the target groups get in without availing themselves of affirmative action.

The one area where caste based quotas are completely fulfilled is the electoral sphere. Thus, constituencies that are designated “reserved” can only elect SC/ST candidates as the case may be. Coming to the two other spheres of affirmative action, government jobs and education, the picture is more complex. In Delhi University for the academic year 1999-2000, of all the undergraduate students, only 8.6 percent were SC (with a quota of 15 percent) and 1.8 ST (quota of 7 percent). Of the post-graduate students, 5.5 percent were SC and 2 percent ST. Thus, quotas are grossly under fulfilled. The situation in the teaching posts is even worse. Teachers in various Universities have bitterly opposed the introduction of affirmative action, even though it is a constitutional provision. As a result, reservations were introduced as late as 1996.

2.5 Judicial Decisions

*M.R. Balaji v. State of Mysore*¹⁰ the court held that social and educational backwardness not the sole test for determining reservation and later in *State of U.P v. Pradip Tondon*¹¹ the court also held that poverty is not the sole criteria for backwardness.

In *State of Kerala v. N.M Thomas*¹², the Supreme Court argues that Article 16(4) of the Indian Constitution is not an exception to Article 16(1) to be interpreted narrowly but rather clarifies and explains that classifications based on backwardness are permissible under Article 16(1)). The Thomas Court concludes that “the quality and concept of equality is that

¹⁰ AIR 1963 SC 649.

¹¹ (1975) 1 SCC 267.

¹² AIR 1976 SC 490.

if persons are dissimilarly placed they cannot be made equal by having the same treatment.” In *Indra Sawhney v. Union of India*¹³, the Court holds that Article 16(4) of the Indian Constitution was not an exception to 16(1) but rather merely an explicit statement of classifications and provisions for backward classes that were already implicitly stated in Article 16(1). By interpreting affirmative action not as the exception to equal treatment but as part of equal treatment itself, India has adopted a substantive notion of equality.

Whereas the Supreme Court of India, in *P. A. Inamdar v. State of Maharashtra*¹⁴ on August 12, 2005, gave a clear verdict against reservation of seats for the Scheduled Castes, Scheduled Tribes and Other Backward Classes (SCs, STs, and OBCs) in the un-aided private and minority higher education institutions, the UPA government is bent on extending access to higher education and technical skills to these groups by reserving up to 49.5% of seats in all central universities, prestigious professional schools, and elite colleges, such as the Indian Institutes of Technology (IITs), Indian Institutes of Management (IIMs), and National Institute of Fashion Technology (NIFT).¹⁵

*Ashoka Kumar Thakur v. Union of India*¹⁶ is a public interest litigation case challenging the conclusion of the Mandal Commission that about 52% of the total population of India belonged to Other Backward Classes classification. The National Sample Survey Organisation had estimated the OBC segment to be 32 per cent.

In April 2006, the government decided to reserve nearly 27% of seats for students from the OBC segment in institutes of higher learning in India. This would have reduced the seats for a general, unreserved candidate to about 50% (after taking into account other reserved seats). The Indian Parliament passed a bill to bring out an amendment in the constitution in this regard. Thakur challenged the validity of the amendments.

The Supreme Court of India in response to the PIL refused to stay the constitutional amendment but issued notice to the government. The government which had faced strong anti reservation protests on its turn stated that that the reservation policy would not be implemented until a bill (The Central Educational Institutions (Reservation in Admission)

¹³ AIR 1980 SC at pp. 477& 539.

¹⁴ AIR 2005 SC 3226.

¹⁵ Asha Gupta, “Affirmative Action in Higher Education in India and the US: A Study in contrasts”, Centre for Studies in Higher Education, University of California, Berkeley (2006). Available at <http://www.escholarship.org/uc/item/5nz5695t>, last accessed on 17th of June, 2013.

¹⁶ Writ Petition (Civil) 265 of 2006.

Bill, 2006) introduced in the parliament in August 2006 for this purpose becomes a law. The bill was later approved by the parliament.

The Supreme Court, as an interim measure, stayed the operation of admission to medical and professional institutions for OBC's under the 27% quota category for the year 2007-2008 and directed that the case should be listed for the third week of August for final hearing and disposal on the issue. The Court held that the 1931 census could not be a determinative factor for identifying OBCs for the purpose of providing reservation. However, it clarified that the benefit of reservation for the Scheduled Castes and Scheduled Tribes could not be withheld and the Centre can go ahead with the identification process to determine the backward classes.

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The Creamy layer principle is one of the parameters to identify backward classes. Therefore, principally, the "Creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves and as such, principle of exclusion of Creamy layer is applicable to OBC's. Preferably, there should be a review after ten years to take note of the change of circumstances. A mere graduation (not technical graduation) or professional is itself deemed to be educationally forward. The Supreme Court also held that the determination of SEBCs is done not solely based on caste and hence, the identification of SEBCs is not violative of Article 15(1) of the Constitution.

3. AFFIRMATIVE ACTION IN USA

3.1 History

Racial inequality continues to be a major problem in American society. After the end of the Civil War in 1865, the US Congress passed the 13th and 14th amendments to the Constitution outlawing slavery and prohibiting all states of the Union from discriminating against persons on the basis of race. Despite these measures, many southern states passed what became known as "Jim Crow" laws, which mandated separate facilities for whites and non-whites. The Supreme Court upheld "separate but equal" facilities in the infamous case of

Plessy v. Ferguson (1896), where a man who claimed to be seven-eighths white was required under a state law to ride in a separate train car from whites.

In reality, such facilities were not equal, and upholding segregation laws amounted to government-sponsored racism. It took nearly sixty years for the Supreme Court to reverse its ruling in *Plessy* in another landmark case, *Brown v. Board of Education* (1954). The Court struck down the separate but equal practice, here in the context of lawsuit regarding segregated state-run public schools. The ruling sparked an era of social upheaval in the US.

The term “affirmative action” was first introduced by President Kennedy in 1961 as a method of redressing discrimination that had persisted in spite of civil rights laws and constitutional guarantees. It was developed and enforced for the first time by President Johnson.¹⁷ The Affirmative Action Programme in USA was primarily mooted to remove the difficulties and suppression of the natives and the African-Americans who were brought as slaves to the mainland from Africa.

The US Supreme Court even went to the extent of holding that, “*Blacks, not just slaves but all Blacks, were incapable of obtaining the citizenship, because they were not members of the ‘the people of the United States’ identified in the Preamble of the Constitution.*”¹⁸ In its tumultuous 45-year history, affirmative action has been both praised and pilloried as an answer to racial inequality.

3.2 Development of Affirmative Action in USA

The XIII Amendment of the US Constitution abolished slavery and the XIV Amendment guaranteed equality to all its citizens. The ‘Separate but equal’ doctrine evolved in 1896¹⁹ was overruled in two landmark decisions rendered in 1953.²⁰ However, in reality discrimination persisted and the Civil Rights Act, 1964 was passed.

While it is not possible to discuss the development of the law in America, it is interesting to note the development of the case of “Reverse Discrimination” in the case of *Bakke*²¹, where a white man could not get admission for two consecutive years in a medical college but members of minority races who had scored less marks than him gained admission.

¹⁷ Brunner Borgna, Beth Rowen, “Affirmative Action History- A History and timeline of Affirmative Action”. Available at <http://www.infoplease.com/spot/affirmative1.html>, last accessed on 20th of June, 2013.

¹⁸ *Scott v. Sanford*, 19, Howard 393, 1857.

¹⁹ *Plessey v. Ferguson* (1896) 41 Law Ed 256.

²⁰ *Brown v. Board of Education* (1953) 98 Law Ed 873; *Bolling v. Sharpe* (1953) 98 Law Wd 888.

²¹ *Regents of the University of California v. Allan Bakke*, (1978) 57 Law Ed 2d 750.

3.3 14th Amendment

The Fourteenth Amendment declares that, “*No State... shall deny any person within its jurisdiction the equal protection of the laws.*” It was proposed on June, 13th 1866 and ratified on July 9th, 1868. The legislative history of the fourteenth amendment is not only relevant to but dispositive of the legal dispute over the constitutional standards applicable to race-conscious affirmative action plans. From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favoured the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

The Supreme Court most recently addressed at length the constitutionality of affirmative action in *Fullilove v. Klutznick*.²² *Fullilove* upheld by a vote of six to three a provision of the Public Works Employment Act of 1977 requiring that ten percent of all federal grants for local projects be channelled to minority firms.

The interpretation of the XIV Amendment’s limitations on affirmative action should turn, however, not on whether a majority of the present Supreme Court would have voted for these race-conscious Reconstruction programs, but on the fact that the thirty- ninth Congress repeatedly chose to do so.²³

3.4 Civil Rights Act, 1964

The Civil Rights Act of 1964 introduced the principle of ‘affirmative action’ into the political, judicial and administrative spheres of American society. The institutions set up under the 1964 Act, together with other Supreme Court rulings, were to define the American affirmative action program, which is not quota based. The Civil Rights Act was followed by a series of executive orders, issued by the Lyndon B. Johnson administration, to promote

²² 448 U.S. 448 (1980).

²³ Eric Schnapper, “Affirmative Action and the Legislative History of the Fourteenth Amendment”, *Virginia Law Review*, Vol. 71, No. 5 (Jun., 1985), pp. 753-798, at p. 770.

equality in employment and education. The legal authority for affirmative action in its original form was embedded in Titles VI and VII of the Civil Rights Act of 1964. These two titles ban discrimination (whether negative or positive) on grounds of race, colour, religion, sex, or national origin, in federally assisted activities and in employment, respectively.²⁴

3.5 Working of Affirmative Action Policy

In the United States, the first affirmative action policies were implemented within the Executive branch by Presidents interested in appealing to black voters, but wary of Congressional opposition. Once Court-ordered desegregation and realignment mobilized and empowered black voters, more sweeping affirmative action policies were possible. Discrimination against Blacks is a feature of contemporary American labour markets, leading to a very strong case for affirmative action.

Through the 1970s, however, affirmative action policies have been increasingly contested. Until recently, the most critical case in the sphere of education was that of Alan Bakke, who sued the University of California at Davis Medical School for denying him admission even though his qualifications were superior to the Black students who were admitted. The Supreme Court issued its decision in 1978 that ruled out the use of quotas in admissions. It is to be noted that the *Bakke case*²⁵ ruling diluted affirmative action but did not rule it out completely.

From the mid-1990s, however, some university regent actions, a few state referenda and several federal lower court rulings struck down affirmative action in admissions – not just quotas but also other forms of preferences. However, in 2003, the Supreme Court gave its ruling on two lawsuits filed against affirmative action admission policies at the University of Michigan.

3.6 Judicial Decisions

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In another landmark case of *Brown v. Board of Education* (1954), the Court struck down the separate but equal practice, here in the context of lawsuit regarding segregated state-run

²⁴ John M. Alexander, “Inequality, Poverty and Affirmative Action: Contemporary Trends in India”, *Jnanodaya: Journal of Philosophy*, vol. 11 (2004), pp. 5-24, at p. 20.

²⁵ *Supra* No. 20.

public schools. The Court's decision cited sociological studies in an attempt to demonstrate that the separate facilities were inherently unequal and irreparably harmed blacks. The ruling sparked an era of social upheaval in the US.

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The backlash from affirmative action has climaxed in an U.S. Supreme Court ruling. The Court by a majority of one (5-4) has rolled back much of the victory of the civil liberty movement. States, schools, and colleges, ruled the Court, can no longer be sued for policies that have an adverse and discriminatory effect on minorities - the Blacks, the Latinos and other groups. The ruling itself comes as a response to a case wherein Spanish speaking residents had sued Alabama for adopting an English-only policy for driving tests. The Court has struck off major portions of the important Civil Rights Act of 1964, even as it bases its judgment on a technical distinction between intention- regarding policies and outcome- regarding policies. Civil rights laws do not apply to any legislation that results in racial discrimination ruled the Court. They only apply to legislation that intends deliberate discrimination. Whereas agencies that receive federal funding can be sued for intentional discrimination against racial groups, they cannot be so sued if their policies have an adverse effect on minorities.

In a landmark 2003 case involving the University of Michigan's affirmative action policies-one of the most important rulings on the issue in twenty-five years-the Supreme Court decisively upheld the right of affirmative action in higher education. Two cases, first tried in federal courts in 2000 and 2001, were involved: the University of Michigan's undergraduate program²⁷ and its law school²⁸. The Supreme Court (5-4) upheld the

²⁶ *Regents University of California v. Allan Bakke*, 438 U.S. 265 (1978).

²⁷ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

University of Michigan Law School's policy, ruling that race can be one of many factors considered by colleges when selecting their students because it furthers "a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Supreme Court, however, ruled (6-3) that the more formulaic approach of the University of Michigan's undergraduate admissions program, which uses a point system that rate students and awards additional points to minorities, had to be modified. The undergraduate program, unlike the Law Schools, did not provide the "individualized consideration" of applicants deemed necessary in previous Supreme Court decisions on affirmative action.

In the Michigan cases, the Supreme Court ruled that although affirmative action was no longer justified as a way of redressing past oppression and injustice, it promoted a "compelling state interest" in diversity at all levels of society.

The policy must promote a "compelling state interest" through a means that is necessary to achieve the goal. In the 1978 case *Bakke v. Regents of the University of California*,²⁹ a plurality of the Supreme Court held that a university's desire to achieve a diverse student body was a compelling state interest. However, admissions officers were prohibited from using quotas to achieve this goal; instead, the Court specified as constitutionally permissible a "plus" system where students of colour competed equally with whites for all available positions though they could be given additional weight based on their race. Thus, "race could be considered as a plus factor in a candidate's application" but only insofar as the purpose was to achieve diversity among the student body.³⁰

In *Fullilove v. Klutznick*,³¹ the Court upheld, uneasily, a congressional statute reserving to minority-controlled businesses ten percent of federal funds spent on local public works. Chief Justice Burger's plurality opinion rested on "an amalgam of Congress's specifically delegated powers," including its power to spend public funds for the "general Welfare," its power to regulate commerce, and its power to "enforce" the Constitution's equal protection clause. In view of that authority, the Court thought it permissible for the National Legislature to target a

²⁹ 438 U.S. 265 (1978).

³⁰ Meera E. Deo, "Affirmative Action Rationales & Outcomes: A Comparative Analysis of the United States & India", Paper presented at the annual meeting of the American Sociological Association, Montreal Convention Center, Montreal, Quebec, Canada, (2006). Available at http://www.allacademic.com/meta/p104489_index.html, last accessed on 25th of June, 2013.

³¹ 448 U.S. 448 (1980).

modest slice of federal funds for minority businesses as a way of compensating for “the present effects of past discrimination.”³²

3.7 Criticisms against Affirmative Action Policy

Affirmative action was initially established through an executive order based on the idea that the executive and the judiciary would be more likely to “get it right” than the legislative branch, with its process of public debate and compromise. Yet three recent court decisions on affirmative action in education suggest that judicial support may be waning. In *Hopwood v. Texas*,³³ the Fifth Circuit ruled against race-based preferences in law school admission. In *Podberesky v. Kirwan*,³⁴ the Fourth Circuit struck down merit-based scholarship programs limited to minority students. And in *Taxman v. Board of Education*,³⁵ the Third Circuit ruled against race-based preferences in firing teachers.

The central argument against affirmative action is that it is a “quota system” that confers automatic preferences on women and racial or ethnic minorities regardless of their qualifications. According to this line of argument, affirmative action means having to choose an unqualified person to meet rigid quotas, and therefore affirmative action compromises merit and lowers standards.

3.8 Evaluation of the Affirmative Action Policy

The AAP of USA has resulted in the increase in black students from 0.8 percent in 1951 to 6.7 percent of the entering class in 1989. However, the affirmative action program needs to be strengthened since income disparities continue to be important. About half of the progress in the median income of people of colour from 1996 to 2000 was wiped out in the following three years. After slowly increasing from 55% of white income in 1988 to 65% in 2000, black median income fell again to 62% of the white median in 2003. These institutions are representatives of elite schools that have used affirmative action, and with a wide range in their selectivity of admitting students.³⁶

³² U.S. Const. amend. XIV, Section 5.

³³ 78F. 3d 932 (5th Cir. 1996).

³⁴ 956F. 2d 52 (4th Cir. 1992).

³⁵ 91F. 3d 1547 (3rd Cir. 1996).

³⁶ Ashwini Deshpande, “Affirmative Action in India and the United States”, Equity & Development, World Development Report 2006, Background Papers, Revised: January (2005). Available at https://openknowledge.worldbank.org/bitstream/handle/10986/9038/WDR2006_0012.pdf?sequence=1, last accessed on 27th of June, 2013.

4. AFFIRMATIVE ACTION IN INDIA & USA- COMPARISON

American courts and many in the general public in the US have realized that there is a fine balance between redressing past wrongs while maintaining principles of equality for individuals instead of groups. Importantly, the US Constitution protects all citizens equally from government factors. Positive discrimination in public sector educational and work settings has limits, as evidenced by the American judiciary consistently disallowing the use of quotas or reservations. Though the American private sector has been required by federal and state statutes not to discriminate, the decisions of how best to institute anti-discrimination policies have in large part rested with private parties.

This flexibility means that they can institute a greater degree of “positive discrimination” if they see fit. However, companies have also realized that explicit quotas or reservations creates resentment amongst staff and can negatively impact productivity as it seen as a barrier to advancement. Considering ‘equal opportunity’ while hiring allows access to a broader talent pool and fosters a positive image while maintaining meritocratic standards. Many companies have, as part of their stated employment practices, proactively recruited and mentored talented underrepresented minorities.

The US experience shows that implementing reservations for minorities in private sector will be of little help to Indian scenario. If such an issue were to be taken to US courts, there would be absolutely no doubt about the outcome reservations would not be allowed. Therefore before embarking upon the journey of implementing reservation in the private sector for the minorities, simply by aping the U.S.A.’s affirmative action policies, without actually understanding and evaluating them, would do a great disservice to India and hence proponents of private sector reservations in India should refrain from looking to the US for support.

The important difference which lies between the USA and India is that affirmative action is not enshrined in the constitution of the USA, nor is it quota-based. Thus, as a result, the effect is that even executive orders and/or court judgements can either strengthen or dilute the affirmative action program with the passage of time.³⁷ The program encompasses a large number of activities that are designed to improve the presence of minorities and women in the workforce and thereby raise their standard of living. Thus, an obligation to seek selection criteria that did not disproportionately screen out minorities and women was imposed on the

³⁷Ibid.

employer. Starting with the inclusion of the label “equal opportunity employer”, measures to ensure that selection procedures incorporated compensatory correction to ensure adequate representation of minorities came to comprise the affirmative action program.³⁸

People of U.S, being more aware of their rights, are in a position to seek legal remedies in the Court of law and also seek enforcement of their rights in case the employers acted discriminately. Whereas in India, people belonging to S.T/S.C., are hardly aware of their rights, as a result of which, the chances of their going to the Court of law and seeking enforcement of their rights, seems a view which is unaware of the reality. Moreover, as administration of justice in the U.S. is much faster than in India. So, in India, even if a person makes an attempt to seek remedy and enforcement of his right in the Court of law, there are all chances that the litigation may prolong over a decade, making the purpose of litigation, meaningless.

The Indian Constitution proclaims equality as a sovereign virtue. But realizing that equality in India has to be achieved against a historical background of entrenched social, economic and political inequalities created and justified by a caste-based hierarchical social order, it stipulates a number of affirmative action or positive discrimination policies and programs in the areas of politics, public employment and education for overcoming these inequalities.

In United States, firstly there was nothing like equality of opportunity in matters relating to public employment. Secondly, the situation was actually opposite because of the existence of “spoils system”, which was based on the theory that no one had the right to public employment and hence, it was far from the idea of public employment being a matter of right. The framers of our Constitution were aware of the existence of the spoils system in the U.S. Constitution. So, if the doctrine of equality as contained in the U.S. Constitution were to be imbibed in the Constitution of India, the result would be that it would be restricted to its general application only and would not go any further to extend the equality doctrine in the matters of public employment. And so, the right to public employment was expressly conferred by way of Art.16 as the Indian Constitution had not adopted the spoils system.

4.1 Advantages and Disadvantages of the Two Systems

To sum up, in India, affirmative action policies have a much longer history than the US, are constitutionally guaranteed (for SC/ST), and take the form of quotas in government jobs,

³⁸ Ibid.

educational institutions, and electoral seats at each level of government. In the US, the program is around 40 years old, not constitutionally guaranteed, and quotas are ruled out. The strength of the Indian program is that being constitutionally enshrined, it cannot be challenged legally and is practically irreversible. Also, its applicability to government seats has ensured SC/ST representation in the political sphere much more strongly than in the US. Several important political leaders, chief ministers of states, ministers in the Central government cabinet are from the backward classes. However, the implementation of the program in government jobs and educational institutions is mechanical and insincere. Most institutions get away by simply stipulating the mandatory quota; given the lack of a monitoring agency.

Further, with liberalization of the economy, quotas in government institutions are becoming increasingly redundant because of the drive towards privatization. Thus, there is now a strong demand for reservations in the private sector that is predictably being opposed by the corporate world.

The US program is much younger than its Indian counterpart and relies a great deal on voluntary efforts. While in principle, the quasi-voluntary element could lead to innovative measures to further strengthen affirmative action, in reality, the result could be exactly opposite. Plus, litigation can be, and has been, used to effectively dilute affirmative action. However, the presence of an enforcement mechanism is an important strength of the US program. Also, while the black middle class has grown substantially as a result of AA in education and jobs, black representation in government bodies, is insignificant.

Canada, like India, has adopted a unified approach to its equal protection scrutiny and applies the same standard to sex-based classifications as it would to any other classification. Although less permissive than the United States and Indian analyses in establishing what grounds qualify for equal protection review, the Canadian approach is more inclusive than the Indian approach under Article 15, permitting analogous grounds in addition to those enumerated in the Charter to qualify for review. However, when compared to United States standards, the Canadian standard represents an interesting mix of strict scrutiny and rational basis review that does not arise under the Indian Constitution.

5. CONCLUSION

Affirmative action policies and programs are in principle a digression from a strict interpretation of equality of opportunity for all in order to achieve a more substantial equality of all citizens in the future. It is backward-looking insofar as it seeks to remove people's disabilities that were the results of the erstwhile hierarchical caste system. It is forward-looking because the reservation policies and programs are pursued with a view to creating a more egalitarian Indian society where individuals will be valued and respected for their intrinsic worth rather than for their affiliation to a particular group or caste.

We must however be aware that the regime of affirmative action cannot be maintained forever. Not only will the resentment of the non-beneficiaries continue to create unwanted backlashes but also the arguments in favour of equality of opportunity are likely to prevail one day. The founders of the Constitution were well aware of these undercurrents. That is the reason why they never thought of affirmative action as a permanent feature of Indian society. Given these realities, it is extremely important that affirmative action policies and programs are implemented impartially and efficiently while there are still some opportune moments for doing so. Not castes, but poor and disadvantaged families should receive benefits of reservation. The Government should formulate a policy whereby, there should be progressive de-reservation.

Although India has borrowed from the United States in creating and interpreting their equal protection provisions, it has failed to adhere to the American perspective on women's equality. While this has both positive and negative aspects, it will be interesting to watch for the resolution of various equal protection issues as India continues its attempt at a more secular legal and social system that provides more equality for women.

Affirmative action, not reservation, is the need of the hour, say education policy makers. Think-tanks have come out against the quota policy, asserting that the government should find more practical solutions to the problem of social justice in India. When reservation was made for SC/ST after Independence, the plan was to taper it off.

The suggestions that I put forward are that the implementation of the Affirmative Action Programme for the upliftment of the native-Americans, African-Americans is seen to be more effective than the Reservation Policy of India. There needs to be a total revamping of the existing reservation system in India to suit the present social scenario. A well planned step

should be taken by the government where in the spirit of the Indian constitution will be maintained.

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