

JURISPRUDENCE OF CASTE SYSTEM AND RESERVATION IN INDIA

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Caste system is the cause of social stratification in India which further gives rise to various social stigmas such as untouchability. To put an end to discrimination based on caste, and to redress the wrong in the past, the Indian Constitution makers introduced the reservation system and legitimized quota system by virtue of Article 15 and 16 of the Constitution. This paper would look into the jurisprudential aspect of the caste system in India and a comparison would be drawn between caste discrimination in India and racial discrimination in America. The researcher would also critically analyse the reservation system followed in India and as to whether this policy was brought up to eradicate caste based discrimination or as a policy to appease the public in order to secure vote bank. Further, the moral arguments for and against affirmative action and reservation would be put forth.

Keywords: Caste System, Distributive Justice, Jurisprudence, Utilitarianism.

INTRODUCTION

The concept of equality traces back to the natural law doctrine of Stoic which in the name of universal reason, brought in the concept of individuality, race and nation. Aristotle's concept of "Distributive Justice" demands equal treatment to be given to those who are equal before the law. Legal inequality between men and women, black and white, upper caste and lower caste are positions of the world democracy, yet we do not find a society that has completely eradicated these social inequalities.¹ Swiss women still have no right to vote; Great Britain has only recently abolished political and educational disqualification due to the religion; despite the Fifth and the Fourteenth Amendments² of the U.S Constitution, Negroes still remain deprived of basic rights; in spite of Article 15(5) and Article 16(4)³ of

¹ W. FRIEDMAN, "LEGAL THEORY", 416 (5th ed.2013).

² Fifth Amendment of the US constitution-The Federal Government should not deprive the citizens of life, liberty and property, without due process of law and an implicit guarantee that each person shall receive equal protection of the laws.

Fourteenth Amendment of the US Constitution- Prohibits states from violating the due process of law and equal protection. It limits the state and the centre government to discriminate employees and job applicants on the basis of race, sex or religion.

³ Article 15(5) of the Indian Constitution- Special provision by law for the advancement of socially and educationally backward classes in relation to admission educational institutions including private educational institutions.

the Constitution of India, Scheduled caste and scheduled tribes lag behind with their developments. In India, caste and class are the main forms of social stratification; it is usually these two factors that decide the position of a person in a society. Caste system is a unique feature of India but this uniqueness is not something to be proud of by the Indians. The Sanskrit word for caste is “varna” which means colour.⁴ There is usually a general thought that the people who belong to the upper caste are fairer than the lower caste. Thereby, a relation between discrimination based on the caste system in India and racial discrimination between the whites and the Blacks can be inferred. Caste is closely connected with Hindu philosophy and religion, custom and tradition, marriage and manners. In India, we find more than 2800 castes and sub-castes. Of these, the major castes were Brahmins, Kshatriyas, Vaishyas and Shudras.

India to eradicate caste based discrimination and for the upliftment of the socially and economically backward classes, brought up the concept of reservation. India has firmly embraced the concept of protective discrimination in favour of the deprived people. The reservation policy in India originated through the Indian Council Act, 1909, where four different communities were for the first time provided reservation in politics. Later the Government of India Act, 1919 extended reservation to ten communities and the Government of India Act, 1935 expanded it to seventeen communities. The Indian constitution now provides reservation in favour of scheduled caste, scheduled tribe, other backward classes and women.⁵

CASTE SYSTEM IN INDIA

Caste system is defined by *Sir Herbert Risely* as “a collection of families, bearing a common name, claiming a common descent, from a mythical ancestor, human and divine, professing to follow the same hereditary calling and regarded by those who are competent to give opinion as forming a single homogeneous community⁶. Caste leads to a hierarchical division of society. A sense of highness and lowness is associated with the gradation or ranking. The Brahmins are usually regarded as pure, while the Harijans are regarded as untouchables as they fall in the lower position in the gradation. The status of an individual is determined by his birth and not by a person’s individual achievement. The membership of the caste is therefore unchangeable, unacquirable, non-transferable and unattainable. Each caste has its own set of customs, traditions, and occupations.⁷

However, industrialisation has brought a change to the traditional caste based occupation because of the increase in job opportunities. There have also been radical changes in the

Article 16(4) of the Indian Constitution- Special provision by law for reservation regarding the appointment and promotions in favour of socially and educationally backward classes.

⁴ C.N. SHANKAR RAO, “PRINCIPLES OF SOCIOLOGY WITH AN INTRODUCTION OF SOCIAL THOUGHT”, 289 (1st ed.).

⁵ MYNENI, “TEXT BOOK ON SOCIOLOGY FOR LAW STUDENTS”, 260 (1st ed. 2008).

⁶ C.N. SHANKAR RAO, *Supra* note 4, at 290.

⁷ *Ibid*, at 291.

caste status due to several social, economic and political institutions which causes social mobility among various caste groups. There have been changes in the concept of pollution and purity as now the people belonging to different castes sit beside each other and dine.⁸ But these social changes that have occurred with regard to caste system do not point out at the eradication of social stigma and social problems that have been associated to it. Initially the people belonging to the lower caste were not considered a legal personality.⁹ But now there is no discrimination with regard to the caste of a person, every person in India irrespective of whether or not he belongs to the upper or lower caste is a legal personality. These are few changes and a lot has to worked upon to achieve an egalitarian society.

Does caste system in India follow the biological theory of Herbert Spencer?

According to Herbert Spencer, the adaptation of the individual to social conditions is hereditary. An individual inherits a social instinct from his ancestors, including ideas of morality, obligation, rights and justice. Therefore, he states, that different sociological groups evolve differently and so do their laws.¹⁰ According to the traditional caste system that was followed in India, the people of the higher caste such as the Brahmins hold a higher level of position in the society with greater rights compared to the people of the lower caste. Is the feeling of inferiority and superiority due to the hierarchy in caste system passed on by the ancestors? If the theory put forth by Spencer is true, then it would mean that every person who is born in the lower caste inherits from his ancestors the feeling that he is inferior to the higher caste with comparatively fewer rights. But, rather a person born in the higher caste is taught that he should not drink water from or touch a person belonging to the lower castes. Therefore, subjugation of the lower caste is taught and passed on to every generation due to interaction with the society.

RESERVATION IN INDIA

Discrimination of people whether due to caste, creed or race not only hampers the mobility of a particular society but also causes degeneration of the society. It would lead to half the society being represented in the public while the other half remains unrepresented, leading to all the benefits of the society being enjoyed only by the represented caste. To answer the issue of inhuman subjugation such as bonded labour of the lower castes, the government has to come up with a strategy for the inclusion of the minorities in the mainstream.¹¹ Affirmative action means positive steps that are taken to increase the representation of women or other minorities in areas of employment, education and culture from which they

⁸ MYNENI *Supra* note 5, at 95.

⁹ To have legal personality means the capacity to have legal rights and obligations within a certain legal system such as entering into contracts.

¹⁰ N K JAYAKUMAR, "LECTURES IN JURISPRUDENCE" 78 (2nd ed,2010).

¹¹ Queen Kaur Bijral, "Affirmative action: the system of reservations and quotas in India", (October 7 2015), <http://thelogicalindian.com/story-feed/awareness/affirmative-action-the-system-of-reservations-and-quotas-in-india/>.

have historically been omitted.¹² But, India does not follow affirmative action as in the USA but rather follows a reservation system wherein quota is provided to the lower caste for their upliftment. Reservation was brought to allow equal opportunities to those castes which had been excluded in admissions to educational institutions because of caste discrimination. Though the concept of reservation was directed to have stay in force only for a very short duration of time but it does not seem to have an end now, rather we realise that everyone wants to benefit from reservation by including themselves in the category of oppressed though in reality they are not oppressed.¹³

Reservation in India for SC, ST and OBC

Mandal commission was established in India on 1979 by the Janata Party government under Prime Minister Morarji Desai with an aim of identifying the socially and educationally backward.¹⁴ In 1980, the commission's report affirmed the practice of reservation under the Indian law, whereby quotas in the field of government job and education was increased from 27 per cent to 49.5 per cent.¹⁵ The Mandal commission adopted 11 criteria's that was grouped under social, educational and economic for determining if the caste was backward.¹⁶

A few criteria's laid down by the Mandal commission were not legitimate criteria's. For example one of the social criteria's for a caste to be regarded as an Other Backward Class (OBC) is that at least 25 per cent of the females and 10 per cent of the males above the state average get married at the age below 17 years in rural areas and atleast 10 percent females and 5 per cent males do so in urban areas.¹⁷ Social practices such as child marriage is prevalent in India; even people of a lot of economically and educationally well to do castes till this date get their children married below the age of 17 and continue such a practice because it has traditionally been followed but they would still reap benefits under the reservation policy.

Comparison of the affirmative action in America and Reservation in India

America provides for affirmative action though not expressly as has been provided by Article 15(5) and Article 16(4) of the Indian Constitution. Judith Jarvis Thomson¹⁸ in her book "Preferential Hiring", supported the claim of affirmative action stating that it is a

¹² Robert Fullinwider, "Affirmative Action", (September 17, 2013), <http://plato.stanford.edu/entries/affirmative-action/#6>.

¹³ Quleen Kaur Bijral, *Supra* note 11.

¹⁴ Arkoday Roy, Creamy Layer: The Mandal Commission View- The Present Day Exclusion, (February 13 2011), <http://www.legalservicesindia.com/article/article/creamy-layer-the-mandal-commission-view-535-1.html>.

¹⁵ LALITA SHARMA, "SOCIAL MOVEMENTS IN INDIA" 39 (1st ed. 2014).

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ Judith Jarvis Thomson is an American moral philosopher and metaphysician. She is known for her defence of moral objectivity, her account on moral rights, her view about the incompleteness of the term "good". She is known for her famous essay "The Defence of abortion".

redress for the past wrongs that have been committed and Thomson Negal in “Equal treatment and compensatory justice” has stated that preference may work as a social good without violating justice.¹⁹ But affirmative action benefits individuals who are least likely to be harmed by past wrongs and it rather burdens the individuals least likely to be responsible for past wrongs. For example, it benefits the African and women while it harms the young generation Americans. In the Indian scenario the reservation policy harms the new generation forward caste students though they were not responsible for the past practice of untouchability.

There is another view by Marry Anne Warren,²⁰ who states that it is okay for an individual men’s career to be set back now because of preferential treatment that is given to the women because at the past men were benefitted at the cost of the women due to gender inequality.²¹ If that is the case in India as well then it would mean that it is acceptable for a person belonging to forward caste who is not economically stable to lose a medical seat despite of having scored well because a OBC student who has scored very much lesser than her takes in her place due to reservation . Is this morally permissible?

In the case of *University of California v Blake*²² , sixteen of hundred seats were allotted for the minorities. Allan Blake was denied admission though his score was better than those who were admitted through the special programme. The reasons for which the medical school brought up this policy was according to them

- To reduce “the historic deficit of traditionally disfavored minorities in medical schools and the medical profession;”
- To counter “the effects of societal discrimination;”
- To increase “the number of physicians who will practice in communities currently underserved;”
- To obtain “the educational benefits that flow from an ethnically diverse student body”

The courts held that though the medical school brought in this policy for governmental interests yet it was unconstitutional.²³ Justice Powell who gave the majority judgement stated that the American Constitution cannot tolerate two-class theory²⁴ of equal protection. Brennan who gave the dissenting opinion agreed to what Justice Powell stated but he also said that the same rule applied in different circumstances would not give the same result. Justice Brennan also differentiated between malign and benign discrimination. Malign discrimination is when the basis of discrimination is harmful whereas benign

¹⁹ Robert Fullinwider, *Supra* note 12.

²⁰ Marry Anne Warren was professor of philosophy in San Francisco state University who is well known for her writings on abortion.

²¹ Robert Fullinwider , note 12.

²² 438 U.S. 265 [1978]

²³ Robert Fullinwider, *Supra* note 12.

²⁴ In *Hernandez v. Texas*, 347 U.S. 475 (1954) it was held equal protection under the 14th amendment is not available only to the discrimination faced by the blacks in the hands of the while, but it available to all nationality and races in the U.S.

discrimination is where the basis of discrimination is not harmful. The Jim Crow laws²⁵ are examples of malign discrimination because the purpose of the law was to put one group inferior to another. This policy by the University of California is benign discrimination held Justice Bernnan because the basis of the policy of special reservation for the minority has its underlying principle as public policy. In India the practice reservation guaranteed under Article 15(5) and 16(4) is considered to be benign discrimination. But, is it in reality, benign discrimination?

Morality argument of affirmative action by Richard Wasserstrom²⁶

He began with what is meant by programmes on preferential treatment based on race. Though he explained it with the help of race, any other determinant that gives preference can be used as well. We would be substituting caste in the place of race for this experiment. In his first premise he stated that race is still an important factor in American society and that the blacks still face disadvantages. He then put forth a question asking that if you would want to be born as a white or as a black. He stated that being a white would give more advantages if I would want to prosper in life.²⁷ But if the same question is put forth to any aspiring medical or an engineering student in India, asking if he would want to be born in the backward caste or the forward caste. The answer would not be that of forward caste but that of backward caste. The youth population of today in India would want to term themselves oppressed because they would then reap the benefits of reservation. The percentage of reservation has increased to such an extent that the best of the students who belong to the forward caste have to get their house mortgaged for the sake of paying the capitation fee of sixty lakh for a medical admission. Citizens in India forge their community certificates for getting themselves registered as a person of the backward caste because according to them at the end of the day even though they top their secondary school examinations they would not get into a medical college because they belong to the forward class. In *Dr. Neelima v Dean of P.G Studies A.P Agricultural University*²⁸ a forward caste girl after marrying a scheduled tribe boy sought admission under reservation stating that she would now belong to the scheduled tribe. The main motive of bringing in the concept of reservations was to help the people of the lower caste but because of the quota system followed in India though the girl was socially and economically well to do, she wanted to reap the benefits of reservation. This has only further proved my above mentioned thoughts. Has the purpose for which affirmative action was brought up in India lost its

²⁵ Jim Crow laws also called as the black code enforced racial segregation in all public facilities. Any law passed had different application for whites and blacks. The laws were based on the theory of white supremacy.

²⁶ Richard Wasserstrom from New York has given lectures on morality of affirmative action, morality of abortion and has published the book "The Judicial Decision: Toward a Theory of Legal Justification, philosophy and social issues".

²⁷ Croline Russel, "Richard Wasserstrom's lectures on the morality of affirmative action", (April 24, 2007), <http://www.hamilton.edu/news/story/richard-wasserstrom-lectures-on-the-morality-of-affirmative-action>.

²⁸ AIR 1993 SC 229. Also see AIR 2006 SC 597.

cause? His second premise was that the system of racial disadvantage will perpetuate itself unless African Americans gain greater representation and positions of authority in important social institutions. Also inequality is preserved if only the dominant are in power.²⁹ Therefore it is good that India to prevent further perpetuation of caste disadvantage the legislature formulated the Untouchability offenses, 1955, The Protection of civil rights Act, 1955 and Scheduled Caste and Scheduled Tribes (Prevention Of Atrocities) Act, 1989. But does the reservation provision in the Constitution of India³⁰ completely suppress the people of the general category?

Moral arguments against affirmative action in India

If it is wrong to historically use caste as a determinant in such a way that it disadvantages backward class then it is also wrong to use caste system as a determinant that advantages them. The second moral argument is that instead of taking backward caste as a basis for reservation, economical status is to be taken into consideration. In the US, though a black is economically well to do he still faces discrimination but in India if a person of the lower caste is economically well to do he does not face discrimination because there is no *prima facie* physical difference in appearance. One of the main reasons that there is no difference is also because of *sankritization*. wherein people belonging to the lower caste try to adopt the cultural values and lifestyle of the upper caste.

The third argument is that reservation strikes on the merit of students in a programme. Those who go against this argument, question as to why is it that there is no objection to reservation for people of disability. The theory of *Relative deprivation* by Merton states that relative deprivation is the feeling of being deprived of something that he believes to be entitled to have. A more precise concept that would describe the thought process of the forward caste students who are deprived would be fraternalist relative deprivation. Fraternalist relative deprivation is the deprivation caused by comparison to other better off social groups.³¹ Though the backward castes are not considered better off groups by the society when compared to the forward castes, with states like Tamil Nadu having 69% reservation³² tends to bring in the feeling of deprivation in the forward caste thinking that the backward castes are better off because they have the advantage of reservation. Reservation has now exceeded to such an extent giving in space for the evolution of reverse discrimination in India.

Does affirmative action provide justice?

The basis of affirmative action is distributive justice. Distributive justice is the fair allocation of resources among diverse members of the society. Equality, justice and need

²⁹ Croline Russel , *Supra* note 24.

³⁰ Article 15(5) and 16(4) of the Constitution of India.

³¹ Samstung, "Relative Deprivation", (November 20, 2010), <http://relativedeprivation.blogspot.in/>.

³² <https://www.quora.com/In-Tamilnadu-theres-currently-a-69-reservation-and-this-is-totally-against-the-supreme-courts-judgment-Then-why-do-Tamilnadus-people-not-oppose-it>.

are the common criteria's that are used for allocation through distributive justice. Affirmative action is based on the criteria of need.³³

Affirmative action and Aristotle's concept of justice

According to Aristotle, distributive justice should proceed according to merit. But he also states that the concept of merit differs with each society. If merit in a society is based on proficiency then affirmative action would not provide justice. If merit is based virtue, that is whether a person is virtuously good or not, the concept of affirmative action would have no relevance. But if merit is based on equity, then the concept of reservation would hold good according to Aristotle.

Affirmative action and Rawls concept of justice

John Rawls second principle of justice is called the difference principle which states that a policy is just if it provides benefit for the least advantaged group and if the access to privileged position is not blocked by discrimination on the basis of irrelevant criteria. Rawls theory of Justice completely supports the policy of affirmative action³⁴ but he does not give an extent to which this principle of justice would hold well. According to Rawls each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.³⁵

Affirmative action and criteria of distributive justice by John Finnis

John Finnis lays down the criteria for distributive justice. He states that equality is the residual principle. According to him the objective of justice is not equality but common good. If at the expense of wine more people can be preserved from illness, educated, defended then such redistribution is the requirement of justice.³⁶ The following are the criteria's given by Finnis

- Need- Since the fundamental component is that of common good, if an individual is in need then, distribution of justice should take place. Therefore through analogy it can be inferred that if a SC (Scheduled Caste) student wants to pursue college education, seat should be reserved for him
- Capacity- According to him if higher education is to be made available, either through public or through private initiative, it should only go to those who are capable of benefitting from it.³⁷

³³ Michelle Maiese, "Distributive Justice", (June 2013), <http://www.beyondintractability.org/essay/distributive-justice>.

³⁴ Dr. Jan Garrett, "Rawls mature theory of social justice", (August 24, 2005), <http://people.wku.edu/jan.garrett/ethics/matrawls.htm#2prin>.

³⁵ KLAUS R SCHERER, "JUSTICE:INTERDISCIPLINARY PERSPECTIVES" 18 (CAMBRIDGE UNIVERSITY PRESS).

³⁶ JOHN FINNIS, "NATURAL LAW AND NATURAL RIGHTS", (2nd ed. 2011).

³⁷ Ibid.

Therefore, according to the second criteria, an implied requirement of merit is put forth by Finnis. By a combined reading of the criteria of need and capacity, it would mean that distributive justice must be procured to those who are in need of it and those who have the capacity of benefitting from it. Therefore, if this criterion is applied to the reservation system in India, it would mean that merit cannot be compromised with to a great extent. But in India the difference in merit component between a Forward caste candidate and a backward caste candidate is huge due to the reservation. Therefore, the present form of reservation practice in India does not bestow justice.

Utility of Affirmative Action

There are two distinct senses in which a community is said to be better off as a whole, in spite of the fact that certain of its members are worse off. It may be better off in the utilitarian sense where collective welfare is improved though the welfare of certain individuals falls. The second argument is that it could become better off in the ideal sense that is it is more just and brings an equal society, irrespective of whether the average welfare has improved or not.³⁸ The utilitarian argument would be that, by increasing the number of lower caste lawyers in the society, the average welfare would increase. The ideal argument is that with the increase in the lawyers of the lower caste it would lead to an egalitarian society.

Utilitarianism is measured by looking into the pleasure and the pain of the people the policy is directed to. But the problem with utilitarianism is that the measure of psychological pleasure and pain is difficult since it is not common for a vast number of people. In the case of utilitarianism by preference according to which any policy that is put forth have people who prefer that particular policy and people who do not prefer that particular policy as well. For example, the people belonging to scheduled caste, scheduled tribe, and other backward caste would prefer the policy of reservation used in the field of education but the people of the forward caste would not prefer them. At the first sight, it seems to be an egalitarian argument but it is not because preference may be personal and external. Personal preference is the preference for a person's own enjoyment of goods or opportunities, while external preference is the preference for the assignment of goods and opportunities to others. For example, a forward caste student may not prefer the concept of reservation, either because the policy decreases her own chances of opportunity or because of his hatred for the lower caste people.³⁹

Therefore, the argument of utilitarianism that is usually used to support affirmative action is flawed with regard to the above argument since external references in preferential utilitarianism might lead to the impotence of garnering the exact amount of pleasure and pain.

CONCLUSION

³⁸ RONALD DWORKIN, "TAKING RIGHTS SERIOUSLY" 232 (5th ed. 2010).

³⁹ Ibid, 234.

India in the past has been considered as one of the most socially backward and under developed countries and has finally tried to come out of its uncultured practice of untouchability and degradation of the lower castes by way of reservation that is sanctioned by the Constitution of India. But this policy has now gained political concern that it is being used as a way to secure votes rather than as a method of social upliftment.

Instead of providing reservations in college education, the importance of schooling must be increased⁴⁰ and the standard of public schools must be compatible with that of the private schools. By way of providing reservation during schooling, the concept of merit also need not be compromised with. Also due to an increase in the quota of reservation, the public feel rejected leading to traveling abroad for work which causes brain drain in India.⁴¹ A policy that was to be time limited so that it could come to an end when the society is sans any of these discriminations now is not even nearing its end, rather we find groups that want to consider themselves as socially backward like the Patidar reservation agitation and the Jat reservation agitation. The Indian society with this regard is not moving forward but rather is moving backward.

Reservation is nowadays used to deny rather than respect the right to equality. The preferential admissions programme will not have the effects their advocates believed they will. We should make sure that the equal protection clause is not misused to cheat ourselves.⁴²

⁴⁰ LALITA SHARMA, *Supra* note 15 at 56.

⁴¹ Quleen Kaur Bijral, *Supra* note 11.

⁴² DWORKIN, *Supra* note 38 at 239.