

AFFIRMATIVE ACTION IN INDIAN HIGHER EDUCATION: MYTHS AND REALITIES

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I. INTRODUCTION

Higher education in India has, of late, been at the heart of a tumultuous conflict of interests threatening the very fabric of the societal egalitarianism that the Constitution sought to weave since its adoption. The traditional disagreement in ideology between the defenders of meritocracy and the champions of social justice, on issues ranging from the Constitutional Amendment reserving seats in unaided non-minority educational institutions to the introduction of caste-based quotas in all institutions funded by the Central Government, reached dangerously volatile levels, as evidenced by vociferous protests against the government's uncompromising stance by the student community last year.

The topic at hand is complex and requires delicate handling- the proverbial 'prickly pear to pick' for a student of law or a legal practitioner. The argumentative Indian, however, has thus far failed to appreciate the nuanced nature of the debate. What has been opined in the media has largely been informed by a set of pre-conceived notions, acrimony, caste stereotypes and a pathological mistrust of the system of reservations. It may be clarified at the outset that this paper does not argue in favour of quotas for any particular caste or class but looks at reservations in higher education as a tool for redressing the larger issue of social disadvantage. In this regard, arguing in favour of the system of reservations in Indian higher education, this paper exposes fallacies of the arguments of merit and efficiency, rejects the import of American affirmative action into pluralist India and examines the 'creamy-layer' issue.

Preliminarily, however, given the chosen topic, the distinction between "reservations" that are prevalent in the Indian education system and "affirmative action" in America must be highlighted.

The framers of the Indian Constitution consciously applied what is now called 'Rawls' Substantive Theory of Justice' to create a social order based on justice wherein socio-economic equality was guaranteed, subject to the exception that inequality be permitted in cases where it produced the greatest possible benefit for those least well-off in a given scheme (the difference principle and equality of opportunity).¹ Accordingly, the

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1 Rawls, J., *A Theory of Justice*, (Cambridge, Massachusetts: Harvard University Press, 1971, Rep. 2000) 11.

programme of protective discrimination ensured that a fixed number of seats in government jobs, educational institutions and Parliament were reserved exclusively for specified groups. Thus, the combination of quotas and lower eligibility criterion marked the provisions of protective discrimination in India.

“Affirmative action”, on the other hand, was a term first used by American President John F. Kennedy with regard to the Civil Rights Movement in 1961, eleven years after the adoption of our Constitution. Unlike Article 15 of the Indian Constitution, which sponsors reservations in higher education, the American Constitution has no such express enumeration of the policy of affirmative action. Individualized affirmative action is directed at race and gender, the guidelines not specifying which races are to benefit from such policies. Further, affirmative action rejects exclusive quotas and lower eligibility criterion², and voluntary adherents give preference to women and Afro-American candidates only when their qualifications are equal to other candidates. This means that rather than being an overt measure for social correction, *ceteris paribus*, affirmative action only acknowledges existing status by way of preferential treatment. Thus, the *raison d'être* of reservations and affirmative action differs fundamentally; the former correcting historical inequalities and hierarchies, the latter finding compelling State interest in diversity. It is, therefore, submitted that as the two concepts are necessarily different, the term ‘affirmative action’ in the Indian context used to describe reservations in higher education is a misnomer.

It is with this background that this paper shall proceed to examine the familiar myths that surround the system of reservations in higher education in India and the corresponding truths.

II. MYTHS AND REALITIES OF RESERVATIONS IN INDIAN HIGHER EDUCATION

Coming to the crux of the matter, this section examines the common misconceptions that surround the model of reservations followed in Indian higher education. Although a large amount of literature and much time has been devoted to analyzing the form of protective discrimination practiced in India, it is unfortunate that reservations are still viewed with suspicion by much of the upper strata of society. Concerns that ‘the Other’ shall swamp elite educational institutions and a desire for the maintenance of the *status quo* are an indication of the latent casteism that argues against reservations. It must, however, be recognised at the outset that reservations aim at achieving social justice, which is characterized by the recognition of a greater good without deprivation or accrual of rights to anybody.

² *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978); *Grutter v. Bollinger*, 539 U.S.(2003).

Affirmative Action in Indian Higher Education: Myths and Realities

The most common argument used against reservations is that they undermine merit. The first myth that this paper seeks to dispel is that merit is a static, absolute concept which is destroyed by following a policy of reservation, resulting in reduced efficiency and quality. For this, it would be pertinent to briefly investigate the concept of merit itself.

Merit is not easy to measure, quantify or compare. Nonetheless, merit in India is seen as having intrinsic value, deserving of reward. The concept of merit and its rewards, as theorized by Amartya Sen, however, depends upon the criteria a society uses to measure its successes and failures.³ For example, a society that sees success in removing inequality, would recognise that rewarding merit has a propensity to generate economic and social inequality. In such a case, the rewarding of merit would not be done independent of its distributive consequences. Therefore, in seeing the rewards of merit as intrinsic entitlements or deserts, the idea of merit as an instrument of producing better overall results is being overlooked by the current debate.

In the particular context of Indian higher education, the most widespread gauge of merit is performance in entrance examinations conducted by institutions such as the IITs, IIMs and the National Law Universities. The question that begs to be asked is whether successfully qualifying in such an examination is a complete indicator of inherent aptitude and intellectual superiority that automatically translates into quality. The mushrooming of coaching centres which charge exorbitant fees is unequivocal acknowledgment that these tests, far from comprehensively assessing intelligence, are more a measure of skills that can be inculcated.

Merit being supreme in a society such as India, which is based on inheritance of private property and privilege related to birth, is clearly a disingenuous argument, simply because it is meant to measure the distance traversed by students from the same starting point to the end point. The argument in favour of quotas is that without reservations and a lower eligibility criterion to compensate, there is indisputably a wide chasm in the relative starting points of the general populace and the disadvantaged, the latter being unable to access mechanisms to gain such 'merit', owing to their socio-economic position. Thus, a merit-centric system of admission, while excluding the socially and economically disadvantaged, only creates a sort of reservation for the privileged class which can afford to spend the resources of time and money on ensuring streamlined preparation for entrance examinations.

Further, the merit so heavily relied upon, is not of the pioneering, revolutionary variety

3 Sen, A., "Merit and Justice", in Arrow, K., Bowles, S., Durlauf S. (ed.), *Meritocracy and Economic Inequality*, (Princeton: Princeton University Press, 1999) 14.

but is of the traditional rote-learning and regurgitation brand, illustrated by an acute scarcity of original path-breaking discoveries by Indian engineers on whose behalf such pitted battles are being fought! It is also strange that while reservations for backward castes and classes are seen as a massacre of merit, the upper caste/class phenomena of widespread donations, NRI quotas, capitation fee and hereditary businesses are seldom questioned.

Another myth related to merit, that of reservations producing professionals of reduced quality and efficiency, too, collapses on closer examination. It is often argued by anti-reservationists that following a policy of protective discrimination allows degrees and qualifications to be awarded to less than deserving aptitude and performance.

Firstly, this rests on the faulty and completely unfounded assumption that the institution of higher education does not contribute to development of the capabilities of the students gaining admission via reservations but is simply a mechanism to separate students who met the requirements of the entrance test from those who did not. Premier higher educational institutions are meant to inculcate merit, not quantify it through admission tests. The absurd implication of the anti-reservation line of thought is that students are neither taught nor tested once admitted to the premier educational institutions of our country!

Secondly, the experience of states in southern India, notably Karnataka and Tamil Nadu, which have a high percentage of reserved seats in institutions of higher learning, has not evidenced that reservations have reduced institutional standards. To the contrary, it is widely acknowledged that some of the finest minds in the country come from these institutions.

Thirdly, the 'economic theory of discrimination' asserts that in its ultimate outcome, a society which follows exclusionary practices, has lower economic efficiency (owing to factors such as labour immobility, occupational segregation, stigma attached to polluting jobs etc), than posited in the model of a perfectly competitive market.⁴ As borne out by the example of Malaysia, which combined astonishing economic growth with drastic reservations for several decades, the logical corollary to the above proposition is that employing reservations which seek to correct market imperfections caused by class/caste based discrimination induces competitiveness and growth. In simple words, if the disadvantaged are included in mainstream higher education through the inclusive medium of reservation we would be moving towards a more efficient competitive economy!

4 Thorat, S., "Why reservation is necessary", paper presented at *Redressing Disadvantages: A symposium on reservations and the private sector*, May 2005; available at <http://www.india-seminar.com/2005/549/549%20sukhadeo%20thorat.htm> (last accessed on 10 July 2007).

Affirmative Action in Indian Higher Education: Myths and Realities

Having examined and successfully discarded arguments related to the 'murder of merit', some thought must be devoted to misapprehensions regarding the aim of reservations in higher education institutions. In this regard, it is significant that in the recent furore over OBC quotas in institutions of higher learning, reservations were projected mainly as a method to eliminate poverty. Others contemplate reservations in education as an instrument for creating a middle class of dalits and OBCs. Although this view in itself is questionable, it is perhaps close to the truth. Reservations, as envisioned by our Constitution makers, were not a humanitarian measure involving relocation of economic resources or upliftment by way of charity, as the current debate would have us believe. Reservations, by assuring those who had been institutionally shut-out a certain standing in society, were seen by them not merely as a remedy for economic deprivation but as an instrument of creating an egalitarian society. Hence, rather than looking exclusively at the economic situation of downtrodden Indians, reservations were a means of addressing long-standing social practices of pollution and purity and inducting the oppressed into the mainstream. Thus, the chief endeavour of reservations is to sponsor social mobility by moderating the 'double disadvantage', i.e., the historical exclusion of persons from accessing education on the basis of class and caste. The reduction of poverty is, therefore, a happy spin-off indicative of the social-equalization process.

Another common refrain of anti-reservationists is that while quotas are unacceptable, the American policy of affirmative action should be imported into Indian education. Following this view, the creation of equal opportunity would be limited to anti-discrimination measures. Thus, while there appears to be some level of consensus as to the common goal – that of building a more socially inclusive education system – the most effective instrument for doing so is vehemently disputed.

Elaborating upon the conceptual differences between the American affirmative action model and the Indian reservation model highlighted in the introduction to this paper, it is opined that it is highly unlikely that the policy of affirmative action in higher education will work better than reservations in the Indian context.

Firstly, affirmative action is individualized rather than directed at groups. Indicators of social disadvantage such as income and wealth are skewed along caste lines in India.⁵ This challenges the notion that disadvantage is randomly distributed between castes and thus, establishes a case for focusing on groups, rather than individuals, as targets for policy-making.

5. Deshpande, A. "The Eternal Debate", *Economic and Political Weekly*, 17 June, 2006, 2444.

Secondly, an important factor contributing to America practicing affirmative action is that all persons applying for admission into Universities have had, irrespective of class, creed and colour, access to a primary and secondary public school system, both free and compulsory. In India, however, a poor public education system has meant that the number of school-going children in poorer and oppressed communities has continued to remain negligible. In such a scenario, it is not affirmative action which presupposes an opportunity to access primary/secondary education, but reservations that are unquestionably the better mode of correcting such social inequities.

Thirdly, affirmative action in American higher education draws its legitimacy from the idea that diversity improves the academic experience. Although it is desirable that diversity be respected, what is imperative in India is the elimination of caste and class hierarchies and the attendant powerlessness of certain communities in society. Further, in a pluralist country such as India, the immense administrative costs of evolving comprehensive criteria for identifying denial of access to education, in order to ensure diversity, make the simple quota system attractive for policy-makers to adhere to.

Fourthly, while universities in America take it upon themselves voluntarily to follow a policy of affirmative action, universities in India have been averse to bearing the burden of increasing the representation of disadvantaged groups and have done so extremely unwillingly. This has been compounded by the recent trend of privatization of higher education. Hence, a constitutionally endorsed, state-imposed quota stands a better chance of improving the lot of the underprivileged than an approach dependent on the inclination of institutions.

In addition, it is a distinct possibility that the limited political imagination of political parties in India would refuse to sponsor the western concept of affirmative action in Indian higher education.

Thus, the core issue being how to level the playing field in order to give genuinely equal opportunity to the disadvantaged in higher education, it may be conclusively stated that the pragmatic machinery of reservations merits preference over the policy of affirmative action in the unique Indian situation of caste/class disparities.

The picture of reservations in higher educational institutions painted thus far would be misleading without addressing the argument that the creamy layer of the lower castes corners all reserved seats, depriving both persons from the unreserved category of seats as well the lower levels of the lower castes, and, hence, does not benefit the real targets of the system. Even the latest "Central Educational Institutions (Reservations in

Affirmative Action in Indian Higher Education: Myths and Realities

Admission) Bill, 2006” which was introduced in the Lok Sabha last year, does not exclude the creamy layer as has been done with reservations in employment⁶.

It is not disputed that most of the beneficiaries of India’s reservation policies in University admissions still come from the ‘creamy layer’. However, evidence surveyed suggests that the average socio-economic status of SC, ST and OBC students is still significantly below that of other students even when the creamy layer is included.⁷ The case made out by anti-reservationists, that of reservation policies benefiting upper levels of the lower castes/classes at the expense of lower layers of University applicants from the rest of the population, thus, appears to be a rather dubious one.

Further, although such a trend is not desirable, there is considerable writing on the indirect benefits that accrue to the general population of the disadvantaged through the creamy layer phenomenon. Most importantly, it is argued that it enables the relatively comfortable beneficiaries of reservations to play a stronger, more independent and participative role in upliftment of their communities. It has been observed by the eminent sociologist M. N. Srinivas that this is due to the sense of identification with one’s own caste, and also a realization that caste mobility is essential for individual or familial mobility.⁸ Such a phenomenon thus promotes effective representation of the interests of the socially disadvantaged. Expounded by Dworkin as the concept of “personal preference”⁹, this serves the dual purpose of recognizing their standpoint as well as their status as participants in public life, which is the ultimate aim of having reservations in higher education. Although such an argument may be refuted by scholars, it is still worth careful consideration.

III. CONCLUSION

This paper thus examines the utility of all kinds of reservations in higher education as an instrument for social empowerment, dispelling some of the mist that surrounds the system to reach a conclusion that given the unique Indian situation, the judgment of our Constitution makers can still make for sound practice. A few concluding remarks as to the logical implications of the above discussion pertaining to reservation in higher education in India, may be appropriate.

6 *Indira Sawhney v. Union of India*, AIR 1993 SC 477 Para. 86.

7 Deshpande, A. “The Eternal Debate”, *Economic and Political Weekly*, 17 June 2006, 2445; See also Deshpande, S. and Yadav, Y. “Redesigning Affirmative Action”, *Economic and Political Weekly*, 17 June 2006, 2419; Weisskopf, T.E., “Impact of reservations on Admissions to Higher Education in India”, *Economic and Political Weekly*, 25 September 2004, available at <http://www.epw.org.in/> (last accessed on 29 March 2007).

8 Srinivas, M.N., *Collected Essays*, (New Delhi: Oxford University Press, 2002) 196-197.

9 Dworkin, R., *Taking Rights Seriously*, (Cambridge, Massachusetts: Harvard University Press, 1977, 2nd rev. 1978) 194.

Firstly, the current exclusionary conception of merit and the importance being given to it is completely divorced from the vision of an egalitarian India that our forefathers nurtured. Merit, in order to gain universal legitimacy, must evolve from being a limited, marks-oriented idea to a concept that contributes to the nation's productivity and ensures participation of emancipated communities.

Secondly, if the recent imbroglio regarding reservations for OBCs is to be viewed in terms of their social disadvantage as argued in this paper, rather than being a contest between the victimized rich and the scheming, political poor, it would take on a completely different hue. It is acknowledged that reservations are influenced by vote-bank politics and flaws with reservations, it is submitted, lie in implementation, not in conceptualization. In this regard, given the current paucity of data, a systematic Government survey of the social condition of backward classes, would go a long way in forestalling claims of unjustified inclusion/exclusion. The exclusion of the creamy layer as a policy decision would also be desirable in educational reservations.

However, although reservations are theoretically the most pragmatic method of achieving substantive equality, they must be used cautiously and must necessarily be supplemented by other methods of laying the foundation for an egalitarian society; such as measures of agrarian reform, an improved public primary/secondary education system etc.

Therefore, rather than condemning reservations, Indians would be better served if they acknowledged their expediency in higher education, rectified lacunae in their implementation and worked towards making them successful – paradoxically, the path leading to eventual liberation from such measures.

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