AFFIRMATIVE ACTIONS IN INDIA AND UNITED STATES: A CHALLENGE TO RESERVATION POLICY IN INDIA

G.Manoj, L.L.M (Constitutional and Administrative Law), CHRIST (Deemed to be University)

ABSTRACT

The issue of caste in India and the practice of race in the United States are equally comparable though it is not entirely similar. The issue of caste in the society and the inequality faced by the coloured people in the United States is not based on the economic capacity or the financial status of the citizens. It is merely because of the different belief on the birth of the equal citizens which is not radical or rational in any period of time. The difficulties and issues faced by the people of two countries are similar in nature. The persecution and exploitation of the people of certain social standards including the origins of the land which is scientifically true when we search back to the history of the jurisdiction as well as the evolution of mankind. In both the countries, the doctrine of equal treatment is not forbidden only to the people of different social standards but also to the different gender and more particularly women, is a global occurrence. Affirmative action, even in the present scenario, follows and it is still lesser understood by the common people and always as the debatable topics in all political and philosophical standards. Throughout the world still the law makers as well as the executives still stepped into great difficulties while implementing the policies regarding affirmative action. In this research paper the researcher intends to learn about the need of the Affirmative Action and the comparison of the public policies regarding the affirmation actions between India and the United States. The main aim of the research is to compare the two systems of governments, to examine what might be a system better adaptive for India.

Keywords: Affirmative Action, Reservation, Caste, Race, Women.

INTRODUCTION:

The concept of affirmative action and the positive discrimination towards the policies that take caste, race or gender into positive development for the welfare of the persecuted class of people in an attempt to provide an equal opportunity and social equal treatment as a way to uphold the code of equity in the society.The aim of such policies which holds an affirmative impact in the society ranges from the admissions in educational institutions, opportunities in employment facilities, health policies etc. The concept of affirmative action is aimed to develop and implement the code of equity in the society and the equality among the people. Positive discrimination helps the people of the oppressed class to improve their standard of living and to participate in the race of social development with all the people who belong from different social standards.

AFFIRMATIVE ACTION IN INDIA - RESERVATION:

In India, the concept of caste was first categorized by the British while the country was under colonial rule. The British divided the people of India by implementing the concept of 'Divide and Rule' in a way of categorizing them into different groups that could help the British Rule in the country to establish further. The British enjoyed the benefit of categorizing the people and made an inequality between the people. It also helped the British to stop and put a break on the development of the Indian National Congress in the country it helped in lacking the spread of their ideologies in the society. In revisiting the past history of India, the concept of reservation is more focused on the political benefit of the political parties contesting the elections in both the state and union levels. India holds the quota based affirmative action which is established as the reservation system in India. In India, not only did a caste system exist and existing the British also implemented the gender discrimination policy which rapidly slowed down the development of the country. It gave an open pool to discriminate against women on various levels. As Justice Krishna Iyer once said in his judgments that "Women are not domestic slaves to be sold for a dowry and beaten up by alcoholic husbands, They are equal and eligible to wield public power. Women can be economically independent and be the guardian of minor children under the law."[1]

[1] Justice At Heart - Life Journey of Justice Krishna Iyer

HISTORICAL BACKGROUND OF RESERVATION IN THE INDIAN CONSTITUTION:

In the draft of Indian constitution, Article 16(4) was got into huge criticism in the Constituent Assembly by the members of the constituent assembly on employing the word 'backward class' that word leads to lot of ambiguity there was no clear definition mentioned for the word in the past draft.[2] The word 'backward classes' was employed in the drafting committee to ensure the quantity of the reservation in the society. In addition, the employ of the "class" not as "caste" removes the ambiguity in interpreting the words as that the people were not subject to being treated as "backward class" solely on the basis of caste. In analyzing history, the concept of affirmative action was introduced even during the pre-independence era. It was further developed and developed through our lawmakers as well as by the judicial pronouncements as per the case by case before the courts of India. It is a growing concept in India which the constituent makers aimed for a short period of time. India adopted the concept of quota based affirmative action which is known as the reservation policy system. [3]Reservation normally provides a separate category of method for the separate category of people. In India the reservation system has been categorized into two different categories such as a reservation for the people falling under the category of Scheduled Caste and Scheduled Tribe and Other Backward classes or groups such as. In India 22.5% of all the government jobs and educational seats in all the educational institutions are reserved to the people who fall under the category of SC/ST. This concept of reservation is adopted under Article 15(4) and Article 16(4) of the Constitution of India.

As following the recent Judgment of the Supreme Court it enabled the new category of reservation that never existed before or implemented on the enactment of the Constitution of India. As per the recent judgment 10 percent of the reservation is reserved to Economically Weaker Sections; it is considered as a third category of reservation policy to the recent development of laws in India.

CREAMY LAYER DOCTRINE:

The framers of the Constitution never intended to provide the reservation policy for the

[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

people of backward class eternally. The constitution makers aimed to provide reservation to the backward classes only for a limited period of time. It was aimed only at the people who fall under the category of the minority class. There was a commission formed under the recommendation of the government to make a laws for the reservation policies which was famously known as 'Mandal Commission' the recommendations which were put forward are actually against the intention of the constitution makers, they wanted to establish the brotherhood around the country without any differences on the basis of equality.[4] The makers of the constitution never aimed for the separation of people into different categories that too in the name of affirmative action which was employed and implemented as the reservation policy in India.

In the case of Ashoka Kumar Thakur vs Union of India[5], The apex court of the country validated the legislative decision of providing 27 percent of reservation to the people who belong to other backward classes in the institution where the fund was sponsored by the governments. In this case the court took a different stand that the "Creamy Layer" should be diminished from the concept of reservation as along with the non - government funded institutions shall also be excluded from the reservation policy.

The Hon'ble Apex Court of India has provided various recommendations to recognize the creamy layer and the people who fall under such creamy layer doctrine were recommended to exclude from the concept of reservation system, the recommendations are categorized as follows:

1. The families of the country who earns above the limited income of Indian Rupees which is two lakhs and fifty thousand in a year.

2. The heirs of doctors and other professionals such as CA, actors, engineers, judges of Supreme Court and High Court and all central and state government Class of A and B officials.

3. The heirs of the Members of the Parliament as well as the Members of Legislative Assembly.

[4] Thomas Sowell, "Preferential Policies: An International Perspective", New Haven, Conn. William Morrow and Co. (1990), at p. 41.
[5] Ashoka Kumar Thakur v. Union of India.

JUDICIAL DECISIONS:

In the case of **M.R. Balaji v. State of Mysore**[6], the court held that social and educational backwardness was not the sole test for determining reservation and later in **State of U.P v. Pradip Tondon**[7], the court also held that poverty is not the sole criteria for backwardness.

In the case of **State of Kerala v. N.M Thomas**[8], 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 Court held that "the quality and concept of equality is that if persons are dissimilarly placed they cannot be made equal by having the same treatment."

In the case of **Indra Sawhney v. Union of India**[9], 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 the case of **P. A. Inamdar v. State of Maharashtra**[10] 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 unaided 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).

In the recent Supreme Court decision in the case of **Janhit Abhiyan v. Union of India**, the Hon'ble court of law upheld the validity of 103rd constitutional amendment in the ratio of 3:2 and held that the reservation solely based on economic criteria is valid in nature and the

[6] M.R. Balaji v. State of Mysore AIR 1963 SC 649.
[7] State of U.P v. Pradip Tondon (1975) 1 SCC 267
[8] State of Kerala v. N.M Thomas AIR 1976 SC 490
[9] Indra Sawhney v. Union of India AIR 1980 SC at pp. 477& 539.
[10] P. A. Inamdar v. State of Maharashtra AIR 2005 SC 3226

persons who fall under such criteria mentioned in the 103rd amendment can claim the benefit in educational institutions and employment opportunities. They also stated that the 103rd constitutional amendment strives to achieve the goal mentioned in the preamble that justice equates to social, economic and political. Promoting the economic weaker section is not alien to our constitution; it is mentioned in our preamble as well as the Article 46 of the constitution which allows the government to create any laws which promote the citizens. The judgment clarified it on considering economic weaker sections into a separate class and to promote them to attain economic, social and political justice.

The main contention was raised against the amendment as the provisions are violative of the basic structure doctrine which was propounded in the case of Kesavananda Bharati Vs. State of Kerala. The central government contended that the reservation policy mentioned in amendment 103rd is not an end, it is a way to attain social justice. In the way of validating the 103rd amendment he contended that it was a new way to identify the people of backward class for verification.

The concept of affirmative action in the name of reservation was implemented in India in order to promote the disadvantaged people who faced discrimination in history with regard to caste and other social differences. Making provisions with regard to the promotion of disadvantaged people in other ways is not a violation of the equality code. The provisions with regard to the economic weaker sections are provided in the constitution itself.

AFFIRMATIVE ACTION IN UNITED STATES:

HISTORY

The concept of racial discrimination is not new in American History. It is a species of the thought process of white supremacy in America. At the conclusion of the American Civil War in the year of 1865, the supreme legislative body of the country passed the 13th and 14th amendments to the Constitution of America which excludes the concept of slavery and which enforce the law to all the union of states to implement the amendment which prohibits the discrimination against any person on the basis of race.Though the legislative body of the America known as congress which took an affirmative action for the society against the discrimination many state law which famously called as “Jim Crow” law which implemented the doctrine of Separate but equal.

In the case of **Plessy vs Ferguson**[11] the Supreme Court of America validated the doctrine of "separate but equal" in the case where the white man claimed to have a separate train for the white if it is not claimed as it is a violation of his right guaranteed by the state.

The Hon'ble Supreme Court of United States reversed its decision which prominented the doctrine of 'separate but equal' in the case of **Brown vs Board of Education**[12], the Hon'ble court of law reversed its prior decision and voided the doctrine of 'separate but equal'. In the United States of America, the concept of affirmative action was very first time promulgated by its past president Mr. John F Kennedy as a concept or a relief of reducing the racial discrimination among the people and providing social justice to the coloured people. [13]

DEVELOPMENT OF AFFIRMATIVE ACTION IN USA:

The United States of America abolished the concept of slavery in their 13th and 14th amendment of the constitution which provides equality to all the citizens of the United States . which guaranteed that no person shall be subjected to inequality in name of discrimination. The Historical 13th and 14th amendments provide equality to the persecuted class of people. Though the discrimination was not completely abolished, the amendment gave a legal right to the extorted class to claim their right if it is violated.

Once the America's famous Trial advocate Clarence Darrow quoted that " If the negro is a man, then all the people, high and low alike, should demand for him all the privileges and rights of every other citizen; should judge him for what he is, and not on the color of his skin"[14]

The concept of reverse discrimination was stated to develop in the case of **Bakke**, where the college administration decided the admission of the white in a medicine institution but as the result of reverse discrimination principle a member of the minority community availed the admission though he scored a couple of marks lesser than the white man.

IMPLEMENTATION OF AFFIRMATIVE ACTION IN USA:

The first affirmative action in the United States were implemented on the scope of the

[11] Plessey v. Ferguson (1896) 41 Law Ed 256
[12] Brown v. Board of Education (1953) 98 Law Ed 873.
[13] 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.
[14] The Devil's Advocates - Michael S Lief and H.Mitchell Caldwell

powers limited under executive order which the President of the State intentented in the right to vote to the black citizens of the country. Before the executive action taken by the President of the State, the discrimination against the black citizens was considered as the right of the white people. The discrimination against the black people was an contemporary issue at that period of time in the United States. The discrimination encountered by the coloured people in the labor markets leads to the development and growth of affirmative action in the United States.

Till in the year of 1970, the affirmative policy and actions have been subjected to a lot of debate in the congress. Until the judicial decision in the case filed by Mr.Alan Bakke, who filed a case against the University of California at Davis Medical School for defying the admission of the petitioner though his credentials are higher than the other coloured students who availed the admissions. The Hon'ble Supreme Court of the United States delivered its verdict in the year of 1978 which ruled out the use of quotas in the admission process. The verdict delivered in the Bakke case eliminated the policy of affirmative action but it doesn't invalidate the affirmative policy entirely.

From the beginning of 1990, some of the universities adopted regent action on affirmative policies, not particularly quota systems but the other affirmative policies on the admission process. In the year of 2003, the Hon'ble Supreme Court of the United States delivered its two rulings regarding the affirmative actions in the case of University of Michigan.

In this case the Hon'ble Supreme Court of the United States upheld the right of affirmative policies and its implementation on the high education system. The Hon'ble Supreme of United States in the ratio of 5:4 delivered a verdict regarding affirmative action, ruled that race can be considered one of the factors for admission of candidates in the admission process, it further held that the compelling interest in obtaining the educational benefits in the process of affirmative action should flow from the diverse body of students.

In the other case of University of Michigan on admitting the undergraduate students the Hon'ble Supreme Court applied a more formulaic approach that while admitting the students the universities shall grant the additional points with regard to the safeguard of the minority students.

In this Michigan case the court attempted to place a view in front of the common people

that the concept of affirmative action and policies with regard is no more connected to the suppression and oppression which are connected to the historic facets of racial discrimination. The concept of affirmative action is more with connection to the public interest in the course of development of the country, both economically and socially.

The aim of the affirmative action and policy is to develop "compelling state interest"

In the case of **Fullilove v. Klutznick**[15] the court upheld the constitutional validity of congress statute which permits the state to reserve ten percent of the federal government funds to spend on local administration. The court of law justified the spending of federal funds on the minority business as the way to provide justice to the past discrimination faced by the minorities in the country.

CRITICISM AGAINST THE AFFIRMATION POLICY IMPLEMENTATION IN USA:

The concept of affirmation policy and action was initially implemented through the order of executive as well as the judicial precedents. The court of law has passed three verdicts against the affirmation policy and as it is against the rule of equality.

In the case of **Hopwood v. Texas**[16], the fifth circuit bench concluded against race based reservation with regard to law school admissions.

In the case of **Podberesky v. Kirwan**[17], the fourth circuit bench which stuck down the merit based scholarship programs for the minority students.

In the case of **Taxman v. Board of Education**,[18] the third circuit bench ruled against the race based preferences against firing teachers in the educational institutions.

The congress argued that the affirmative policy implementation is the quota system that confirms the preferences to the women, minorities or race irrespective of their academic qualifications. The drawback on implementing the affirmative policies which leads to the

[15]Fullilove v. Klutznick 448 U.S. 448 (1980)
[16]Hopwood v. Texas 78 F.3d 932 (5th Cir. 1996)
[17]Podberesky v. Kirwan 838 F. Supp. 1075 (D. Md. 1993)
[18] Taxman v. Board of Education 91 F.3d 1547 (3d Cir. 1996)

compromises and low standard of people while admitting the candidates into educational institutions as well as the employment opportunities.

AFFIRMATIVE ACTION IN INDIA AND USA COMPARISON:

The people of the United States are better able to assert their rights when an employer has engaged in discrimination because they are more aware of their rights and may seek legal remedies in court. The possibilities of S.T./S.C. individuals in India coming to court to have their rights enforced, however, appear to be unrealistic given how little knowledge they have of their rights. Additionally, the U.S. court system operates far more quickly than India's. Therefore, even if a person tries to seek redress and the enforcement of his rights in court, there is a good risk that the lawsuit will go on for more than a decade, defeating the purpose of litigation.

According to the Indian Constitution, equality is a fundamental value. It does, however, specify a number of affirmative action or positive discrimination policies and programmes in the areas of politics, public employment, and education for overcoming these inequalities because it recognises that equality in India must be achieved against a historical backdrop of entrenched social, economic, and political inequalities created and justified by a caste-based hierarchical social order.

CONCLUSION:

In order to eventually reach a more substantive equality of all people, affirmative action laws and programmes inherently depart from a rigid understanding of equality of opportunity for everyone. Insofar as it aims to eliminate people's limitations brought on by the former caste system's hierarchical structure, it is retrograde. The policies and initiatives on the reservations are progressive because they aim to create a more equal Indian society where people are appreciated and valued for who they are as individuals rather than for their membership in a certain caste or group. Though affirmative action supports the disadvantaged people, it is difficult to ignore that the affirmative policy opens a road to low standard qualified degree holders. And it affects the interests of people in general category.

India has drawn from the US in the creation and interpretation of its equal protection measures, but it has not adopted the US viewpoint on women's equality. It would be fascinating

to see how this plays out as India continues its efforts to create a more secular legal and social structure that gives women more equality, despite the fact that this has both positive and negative components.