

Chapter I

INTRODUCTION

1.0.0 INTRODUCTION

Affirmative action has noble aims, which are consistent with high moral values. It is not intended to discriminate against any group based on their skin colour or their gender; any lessened opportunity faced by a group is an incidental upshot (a ‘collateral damage’?) of addressing a grave issue. It is not intended to simply fill quotas without regard to minimum qualifications; it is merely an attempt to remedy past injustices or oversights, to ensure a better distributive justice. Being man-made, it is not a perfect remedy, for perfection is the monopoly of God the Almighty, for those who believe in His existence. ‘Discrimination’ will continue to exist as long as the sun continues to rise from the east, but we hope it is of the positive kind, like the need to ‘separate the chaff from the wheat’ in our everyday life. Affirmative action is man’s small attempt at containing blatant discrimination, in order to make life more bearable for the majority of peace-loving souls.

Affirmative action is one of the most profound public policies ever introduced by the American legislature in the 20th Century (Soni, 1999)¹ in 1961, President John F. Kennedy signed Executive Order 10925, ruling that federal contractors should “take affirmative action to ensure that applicants are employed without regard to their race,

¹ Soni, Vidu. (1999). Morality vs. mandate: Affirmative action in employment. *Public Personnel Management*. Winter 1999. Vol. 28 (4), pp. 577-598.

creed, colour or national origin” (Shaw and Barry, 2004)². The policy was originally conceived as a way of going the extra mile to attract and retain minority employees (Noe, Hollenbeck, Gerhart and Wright, 2003)³, who hitherto had been underrepresented in the workplace, relative to their proportion in the population. In the American experience, minorities (mainly people of African and Hispanic origin) and women were discriminated against by white employers.

Most African Americans have descended from slaves who had worked in the plantations of the South. Following their emancipation after the American Civil War, they were discriminated in the workplace, in schools and colleges. After affirmative action became law, many white males felt that they were being discriminated against, in favour of minorities and women. To them, affirmative action is “reverse discrimination,” i.e., a discrimination against a majority race in favour of minority races and women.

1.1.1 Discrimination in India - The Caste System

There are many other countries and nations that are characterised by inequalities including social inequalities but in India these inequalities are highly structured in the form of caste. Caste has existed in India for such a long time and has undergone considerable change but it still involves millions of people. The continuation of superiority and inferiority by reason of ones skin colour, religion and economic and social status is a world-wide phenomenon. The caste system was not the creation of a

² Shaw, W.H. and Barry, V. (2004). *Moral Issues in Business*. (9th Ed.) Belmont: Wadworth.

³ Noe, R. A., Hollenbeck, J.R., Gerhart, B. and Wright, P.M. (2003). *Human Resource Management: Gaining Competitive Advantage* (4th Ed.). NY: McGraw-Hill, Inc.

single person like the *raja* (king). To a certain extent it developed out of a system of social practice that became a norm or way of life over several thousands of years.

The issue of caste is a very complex and complicated one. Caste is perceived as "an exclusively Indian phenomenon which is not paralleled by any other institution elsewhere in its complexity, elaboration and inflexibility". Kroeber describes the caste system as a "system of social stratification, examples of ranked aggregates of people, that are usually rigid, birth-ascribed, and permits no individual mobility". In the caste system everyone is classified. The castes, like the system of apartheid and racial discrimination, teach us a fundamental social principle; hierarchy. This classificatory system assumes that certain traits, qualities, functions, characteristics or powers are inherent in and definitive of each of the *varnas*. This system of caste is enormously complicated and not easily understood. The following paragraph attempts to simplify the issue of caste so as to give the reader an understanding of how the system works.⁴

There are many and varied theories about the establishment of the caste system. These include religious, biological and historical theories.⁵ According to the caste system a person is regarded as a part or member of the caste into which he or she is born. Such person therefore remains within that caste until their death, although the exact standing of that caste may vary among the regions of India and over time. Thus, caste is a many-

⁴ Deane T. (2009), "A Commentary On The Positive Discrimination Policy Of India", P.E.R., Vol.1, PP.28-52, ISSN 1727-3781.

⁵ The biological theory of the caste system claims that all existing things have essentially three qualities in different ratios. *Sattva* qualities include wisdom, intelligence, honesty, goodness and other positive qualities. *Rajas* include qualities like passion, pride, valour and other passionate qualities. *Tamas* qualities include dullness, stupidity, lack of creativity and other negative qualities. People with different doses of these inherent qualities adopted different types of occupation. It was this difference in qualities and occupation that was the origins of the caste system. See for instance Buhler "Manu".

layered social hierarchy developed several millenniums ago. In Hindu custom the caste system owes its origins to the four *varnas*.⁶ One of the religious theories gives details on how the four *varnas* were founded.⁷

Accordingly, there are five different levels or categories of this system. They are the *Brahman*, *Kshatriya*, *Vaishya*, *Shudra*, and *Harijans* ranked in accordance of hierarchy. Within each of these categories are the actual "castes" or *jatis*. It is within these ranked categories that people are born, in which they marry, and in which they die. This system has worked well for Indian people in segregating them and even now plays a fundamental role in contemporary India. It therefore becomes interesting to see how positive discrimination has affected the caste system and its people therein.

It has been argued that in the general sense, some societies are actually or were caste-based in nature and these include countries like South Africa during the era of apartheid and the South of the United States of America until the Civil Rights movement. Nevertheless, differentiations arise when comparing caste-like systems in other nations to India. In other countries, like South Africa and the United States of America, the separation between one group and the other was typically along ethnic or racial lines.⁸ In India, the separation was more indistinct as one caste in India would appear very much like another. Like race, caste is something one is born into. However, caste in India is

⁶ Buhler G. (1969), "Manu: The Laws of Manu" in *Sacred Books of the East*, Volume 25 (translated) Dover, New York.

⁷ Doniger W (1991), "*The Laws of Manu*", (translated by Smith KB), Penguin Books: London.

⁸ Sachs A. (1992), "Affirmative Action and Good Government: A fresh look at constitutional mechanisms for re-distribution in South Africa" Alistair Berkeley Memorial Lecture 14-15 November 1991, Cape Town.

more of a social structure, in contrast to the situation in the US, where "race is a fixed and obvious physical condition".⁹

Another theory relating to the beginnings or origins of caste has to do with the time that India was colonised by the British. India was once a British colony. The British left behind them in India a legacy of their ideologies and culture and even today it is evident that English, the language of their oppressors, is a very important and respected language in India. The British influence is apparent even in most of the laws in India. Some laws, as in South Africa, have been directly adopted and adapted from the English laws.

Some researchers propose that the resultant representation of the caste system was to a great extent the product of European racialist theories, and the benefit of colonial rule as a phenomenon grounded in Indian cultural realities. Contemporary researchers further propose that preceding the colonial period castes were much more open and flexible. This proposition is supported by various passages in the Vedas which indicate that the four *varnas* were originally based on occupations and not simply decided by one's birth. It was at a later stage that the present inflexible caste system came into place.

However, with regard to the caste system, the first effect of importance that the British had on the caste system was to reinforce it. It has been argued that the British saw the advantages in preferring some groups to others. As the Brahmins were once very

⁹ Volokh Alexander (1996), "Quotas in India Have Yet to Create Harmony", *Los Angeles Daily Journal*, November 5, 1996, volokh.com/sasha/quotas.html.

powerful in influencing the people of India, they gave returned to the Brahmans special privileges that the previous Muslim rulers had taken away.

Even though privileges were given to certain of the groups in India, for the most part the discriminatory practices that were practised amongst the various groups were completely ignored by the British. Some have argued that this attitude was seen as a form of indirect support for the caste system by the British. The overall British policy towards caste was seen as a policy of non-interference.¹⁰

While researchers hold opposing views on the origins of the caste system in India, they hold the same opinion that it is a very ancient institution that has led to vast inequalities in Indian society. The extreme manifestation of such inequalities in India led to a growing awareness of the need for reform.¹¹ Affirmative action was needed to outweigh the imbalances of the past. In India, affirmative action is known as "preferential treatment", "protective discrimination" or "reverse discrimination". It is known by the name of reverse discrimination because it involves discrimination in favour of those who, until recently, had themselves been the victims of discrimination.¹² The phrase "reverse discrimination" may mean different things to different people. The phrase is sometimes charged with being a term of prejudice and is restricted to refer to those situations where an absolute preference is given to the preferred groups.¹³ In India the term most commonly used is positive discrimination.¹⁴

¹⁰ Lamb B. (1970), *"India: World in Transition"*, Praeger, New York.

¹¹ Anand C.L. (1987), *"Equality Justice and Reverse Discrimination"*, Mittal Publications, Delhi.

¹² Fischer S. (1996) "Affirming Equal Opportunities For White Males", *People Dynamics*, pp.30-34.

¹³ Brounaugh R (ed) (1978), "Authority, Equality, Adjudication, Privacy" in *Philosophical Law Vol.II*, Greenwood Press, London.

¹⁴ Andrews Y. (1992), "Affirmative Action: A Suspected Equaliser?", *SAIPA: Journal of Public Administration*, pp.34-43.

In the preamble to the Constitution of India, negative public discrimination on the basis of caste is forbidden. However, ranking according to one's caste and caste-based interaction have transpired for centuries and it seems that they will carry on doing so well into the predictable future. As stated earlier, caste systems in India and caste-like groups are ranked. Within most communities or townships (villages), the relative rankings of each locally represented caste is known and people's attitudes toward one another are continuously fashioned by this knowledge. The caste system is seen as a closed assembly whose members are strictly confined in their choice of employment and the amount of social involvement. One's status in society is decided by the caste of one's birth and may hardly ever be transcended. A specialised labour group may function as a caste inside a society otherwise free of such distinctions. In general, caste serves to uphold the status quo in the Indian social order.

It is because of this hierarchal construction, with its rising order of opportunities and its sliding order of disabilities, which has been in operation for about 3000 years, that there was and continues to be an overwhelming majority in the nation that are socially, economically, educationally, and politically backward. These victims of entrenched backwardness comprise the present Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs). These classes are generically called the "backward classes", but each class's nature and magnitude of backwardness are not the same.¹⁵

¹⁵ Sharma B.A.V. and Reddy K.M. (eds) (1982), *Reservation Policy in India*, Light and Life, New Delhi.

1.1.2 Reservations

The Indian government has a policy of compulsory compensatory discrimination which comprises various preferential schemes. The policy initiative most commonly utilized by them to offset the inequalities of society is a policy of reservations.¹⁶

Reservations are a type of affirmative action whereby a proportion of seats are set aside for the previously disadvantaged. Reservations take place in the "Parliament of India, state legislative assemblies, central and state civil services, public sector units, central and state government departments and all public and private educational institutions". According to the Indian Constitution the exception lies in the minority and religious educational institutions for the socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes, who are perceived by the government to be inadequately represented in these services and institutions.¹⁷ Therefore the term "reservations" indicates a set allocation of certain public service positions for recognised minorities. This term encompasses the allocation of seats in educational institutions as well.¹⁸

The stated reason for the implementation of reservation is the necessity to advance the needs and interests of any socially and educationally backward classes of citizens, such as the scheduled castes and scheduled tribes, who had been subjected to discrimination for more than thousands of years by the upper caste men of India.¹⁹

¹⁶ Tummala K. (1999), "Policy of Preference: Lessons from India, the United States and South Africa" *Public Administration Review*, pp.495-508.

¹⁷ *Sukhnandan Thakur v State of Bihar* (1957) AIR 617 (Pat).

¹⁸ Although such reservations were declared unconstitutional in various decisions. *Surendra Kumar v State*(1969) AIR 182 (Raj); *Ramachandra v State of Madhya Pradesh* (1961) AIR 247 (Madh Pra).

¹⁹ *Constitution of India*, 1950.

Preferences in India are of three basic types. Firstly, there are reservations. These reservations assign or make possible access to esteemed positions or resources.²⁰ Secondly, there are programmes involving expenditure or the provision of services for e.g. scholarships, grants, loans, land allotments, health care, and legal aid to the beneficiary groups.²¹ Thirdly, there are special protections.²² Reservations together with other welfare initiatives comprise the heart of affirmative action for these previously disadvantaged groups.²³ To indicate the scale of this policy the central government has set aside twenty-seven percent of all government jobs and places in institutions of higher education for the socially and educationally backward classes.²⁴

Specifically, the Constitution of India provides for "reservations" in favour of two disadvantaged groups; namely, the Scheduled Castes (SCs) and the Scheduled Tribes (STs). These reservations exist in the following areas:

- (a) in the state legislatures and the union legislature or parliament,
- (b) in services under the states, and
- (c) in educational institutions.

Apart from reservations in educational institutions, other programmes for the upliftment of the backward classes include:

²⁰ The most important instances of this type are reserved seats in legislatures, the reservation of posts in government service, and the reservation of places in academic institutions.

²¹ Galanter M. (1984), *Competing Inequalities: Law and the Backward Classes In India*, University of California Press, California.

²² These distributive schemes are accompanied by efforts to protect the backward classes from being exploited and victimised.

²³ This policy consists of various schemes allowing preferential treatment, a reservation of a percentage of government jobs and of places in educational institutions being the most important.

²⁴ The Constitution of India provided the legal opportunity for preferential treatment for their benefit even before it was clear who the Socially and Educationally Backward Classes were. The makers of the Indian Constitution left the work of defining, selecting, and listing the backward classes to special commissions in the States and in the Centre.

- (a) exemption from school fees,
- (b) the provision of stipends or scholarships,
- (c) the provision of facilities like book grants, and
- (d) the maintenance of hostels, or assistance to hostels for SC students.

The central government further sponsors the following:

- (a) college scholarships,
- (b) the award of travel grants, and
- (c) a seven-and-a-half percent reservation in favour of SCs in merit scholarships,
- (d) assistance by way of special coaching for the SC students residing in hostels, and pre-examination coaching facilities for SC students appearing in competitive examinations, and
- (e) in some states, reservations in services under the state and in educational institutions in favour of OBCs. Reservations coupled with other welfare programmes constitute the core of affirmative action for the upliftment of these groups.²⁵

In Parliament and in state legislatures political reservation is only for the benefit of the SCs and the STs but not for the other OBCs. Political reservations are written into the Indian Constitution and the provisions make known the uncertainty of the architects of the Constitution as well as of policy makers in modern day India.²⁶

²⁵ Seenarine M. (1996), "Dalit Women: Victims or Beneficiaries of Affirmative Action Policies in India: A Case Study", A paper presented at a brown bag lecture held at the Southern Asian Institute, Columbia University on 10th April, 1996.

²⁶ Galanter, op.cit.

The constitutional provisions relating to political reservations for the SCs and the STs are compulsory. However, when the provisions were made obligatory in 1950, it was determined that this would be valid only for ten years, so they would last for a single decade only. However, since then the Indian Constitution has had to be amended every ten years to continuously extend political reservations for the SCs and STs.

The second category of reservation, which is even more controversial than the first, is identified as job reservations.²⁷ Job reservations pertain mainly to government appointments at union and state level and also to organisations which are significantly subsidised by the government. The provisions for job reservation apply not only to the SCs and STs but also to the OBCs as well. It has happened that over the years there has been an extension of job reservations for the benefit of the OBCs. This has now become the most controversial issue among positive or affirmative action measures in India. The question is whether or not the wholesale expansion of job reservations for the OBCs is in harmony with the will of the Constitution or not. For job reservations, unlike political reservations, the provisions are not obligatory; they are enabling provisions since the Indian Constitution states that the state may take such measures as are necessary for the special benefit of the OBCs.

Finally, the third category of reservation is reservations in education. As far as admissions are concerned, it is possible that the different States of India may grant concessions short of outright reservation to handicapped persons, for e.g., the awarding of stipends and scholarships etc. As there is no legislation mandating the equal and fair

²⁷ Sharma and Reddy, op.cit.

representation of disabled persons in the workforce. these concessions may prove to be inadequate.²⁸ These, again, are debatable, because reservations are present not only in general arts and science courses but also in medical and engineering schools. The reasoning behind reservations in India is that special opportunities should be given for some, over and above the general provisions for equality of opportunity for all.

The key aim for providing reservations for SCs and STs in civil posts and the services of the Government is to provide jobs to some persons belonging to these communities and thereby increase their representation in the services; so as to facilitate their social and economic advancement and make due place for them in society. Article 16(4) of the Constitution specifically empowers the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. With the same end in view, the Constitution envisaged in the Directive Principles of State Policy and elsewhere the economic and educational development of the weaker sections, particularly the SCs and STs.

1.1.3 Quotas

Countries looking to implement affirmative action policies will do well to look at India's affirmative action policies, as India is the country with the most extensive quota system in the world, and it is a country where the government enforces these preferences. Quotas are enforced through this system of reservations, whereby at least forty percent of seats are reserved for persons from the SCs, STs and OBCs. Mitchell describes the quota

²⁸ Andrews (1992). *Op.cit.*, pp.34-43.

system as a "numbers game enforced by a policing system supported by industrial courts" and warns that the quota methods can prove to be counter-productive with companies resorting to filling quotas without developing skills.²⁹

Like the quota system in other constitutions³⁰, seats and jobs are reserved for persons from disadvantaged groups.³¹ This policy of special or preferential treatment of the disadvantaged sections of society is called by the name of "protective discrimination"³² or "protective measures", "compensatory discrimination programmes"³³ or "reverse discrimination".³⁴ These phrases however, have the same import and are not dissimilar to the concept of affirmative action as used in the South African and the US context. The difference is that whereas in the South African context affirmative action means more than just the achievement of numerical goals or targets, the Indian policy of affirmative action subscribes mainly to the policy of the reservations of jobs and the reservation of places for admissions at universities.

As can be seen, reservation policies in favour of the backward classes in India are quite extensive and form the major part of the preferential policies designed for their upliftment.

²⁹ Mitchell G. (1993), "Much Affirmative Talk (and little action)", *Productivity SA*, pp.28-30.

³⁰ This includes the USA.

³¹ Reservations are being made in the services as well as both at the point of initial entry and in promotions. This benefit has been extended to embrace the whole chunk of weaker sections.

³² It is given the name "protective discrimination" because the purpose of special or preferential treatment is not to award any special privileges but to give protection to those who, because of centuries of oppression, are vulnerable to get exploited despite the removal of legal sanctions behind exploitation which has been practised so far.

³³ These programmes are authorised by constitutional provisions that permit departure from formal equality for the purpose of favouring specified groups. See in this respect Galanter (n 27) 41 and 379. Also see the case of *Devadasen v Union of India* (1964) AIR 179 (SC).

³⁴ It is known by the name of "reverse discrimination" because it involves discrimination in favour of those until recently had themselves been the victims of discrimination.

1.1.4 Beneficiaries of affirmative action in India

Like race, caste is something one is born into.³⁵ However, because caste in India is a "social construction", in contrast to the beliefs in the US that "race is an obvious physical condition", it is believed that the "Indian jurisprudence has advanced well beyond American law in constructing and justifying affirmative action in terms of underlying social features".³⁶

Attention has focussed on protective discrimination or preferential treatment for three major classes; the SCs,³⁷ the STs,³⁸ and more recently the OBCs. Included among the OBCs are a few tribal and nomadic groups, as well as converts to non-Hindu religions from the scheduled caste and in some areas the Denotified Tribes.³⁹ The inclusion of the category of the OBCs widens the principle of affirmative action in education and government employment from the untouchables to "socially and educationally backward classes of citizens",⁴⁰ of assisting "backward" groups, "backwardness" or the "depressed classes"⁴¹, it should be understood as a comparison rather than a depreciatory or condescending phrase.⁴²

³⁵ Volokh (1996), op.cit.

³⁶ Cunningham C.D. (1997), "Race, Class Caste? Rethinking Affirmative Action", *Michigan Law Review*, pp.1296-1310.

³⁷ Indian Constitution 24 of Art 366.

³⁸ Indian Constitution 25 of Art 366.

³⁹ The Denotified Tribes, or Vimukta Jatis, are the former Criminal Tribes. They became 'excriminal' when the *Criminal Tribes Act* of 1924 was repealed in 1952.

⁴⁰ Art 15(4) of the Indian Constitution. What is interesting is that in India both traditional low-caste status and economic class are factors in determining whether a group is categorised as an OBCs, but these factors on their own are not considered to be sufficient.

⁴¹ The term backward classes is commonly used in two senses: (a) as a generic term including the Scheduled Castes and Scheduled Tribes as well as the other so-called Other Backward Classes; or (b) as a designation of those backward groups not included in either of the first two categories. See art 15(4) of the Indian Constitution.

⁴² Cunningham (1997), Op.cit., p.119.

Another group that receives preferential treatment in India is women and children. Under clause (3) of article 15 of the Indian Constitution, special provision for the benefit of women and children may be made by the State and such special provision will not be open to attack as contravening articles 14 or 15.⁴³

The making of reservations as "compensatory discrimination" in India does not look to eradicate the caste system; it simply aims to boost some oppressed castes, whether at the bottom or the middle of the caste ranking. The Indian government's model of "affirmative action" is different in a way from that in other Constitutions⁴⁴ as these other societies do not have any inflexible caste-based pecking order of *jati* (the endogamy family) and *varna* (class based on purity level) as the Indians do, but only classes fashioned by economic inequality. In such a culture, the economic progression of an individual, family unit or group brings about a confirmed position in a privileged class.

However, in the Indian system, affluence alone has not improved the status of a caste (*jati*) into a higher *varna*. It is submitted that the reservation of government positions for OBCs should not be construed as a narrow exemption to the constitutional guarantee of equality, but rather as a way of achieving true, substantive equality, notwithstanding the concomitant problems. To combat the problems entailed in the identification of beneficiaries, the identification of a group as an OBC cannot and should not be based on economic criteria alone.

⁴³ *Savitri v KK Bose* (1971) AIR 1974 (HP); *Padmaraj Samendra v State* (1979) AIR 266 (Pat).

⁴⁴ Like the USA and South African Constitutions.

1.2.0 NEED FOR THE STUDY

This subject under research has considerable socio-economic importance. In the society of today the majority people are of illiterate and socially, economically and culturally backward. The aim of the Part-IV of the Constitution of India is to establish a welfare state.

Article 38 envisages “The Constitution “which provides that the state shall, in particular, strive to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different area or engaged in different vocations. The new clause aims at equality in all spheres of life. It would enable the State to have a national policy on wages and eliminate inequalities in various spheres of life”

Article 39 envisages:

- a. “Equal right of men and women to adequate of livelihood.
- b. Distribution of ownership and control of the material resources of the community to the common good.
- c. To ensure that the economic system should not result in concentration of wealth and means of production to the common detriment.
- d. Equal pay for equal work for both men and women.
- e. To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength.