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AFFIRMITIVE ACTION: INDIA AND USA

Affirmative action is a long debated issue, it basically means positive discrimination it is done by the state to protect certain groups of citizens which were historically discriminated, mistreated and often lacked public support. The government by some affirmative action's try to bring such individuals on equal pedestal by providing educational facilities, reservations, Job opportunities. Further the nature of affirmative action of different countries can be different. Philosophers, politicians and even the general public still debate that whether affirmative actions should be provided or not and if provided through what kind of policies should it implement. India and USA both countries are seen to be the same on the grounds that both the countries faced caste discrimination and also both the countries have somewhat same institutional structures. India faced the problem of untouchability and USA faced racial discrimination against Black skin colored population. But the affirmative action policies of both the countries are a lot different. Further if we see in 21st century the competition as well as opportunities and challenges are increasing in higher education. So, there are certain instances when there is a dire need to protect the disadvantaged groups of the society and thus, both the countries have adopted different policies to address this problem and provide certain privileges to the weaker sections of the society. Further it is also important to note that reservation is not only provided to the disadvantaged group of the society but also to the most often discriminated gender of the society that is Women. But the other problem arising due to positive actions is reverse discrimination which means that due to positive action, some of the general category students and employees who are comparatively more deserving and have better educational qualification are often left out and are not given equal standing. Which is becoming a very big reason for why Affirmative actions are criticized and it is often believed that these policies should either be scraped off or there should be better terms and policies to ensure that no one is discriminated and equality i.e. a fundamental right must not be violated.

KEYWORDS: Discrimination, Reservation, Affirmative, Collective Empowerment, Cast, Race

I. INTRODUCTION

Affirmative action is a very vital topic in today's world, many controversies are surrounding the same issue. Some people argue that it will help in removing the discriminatory practices followed whereas some argue that this will lead to rise in discrimination. But the main question which arises is that what do you mean by affirmative actions. Affirmative action is defined as a set of policies and practices which are adopted to ensure the inclusion of a particular caste, color, creed , gender in cases when they are not equally represented. These policies are generally made to bridge the gap between the disadvantaged group of society and the existing societies. These affirmative policies are also introduced to redress the issues of past atrocities and discrimination against such group of people. Another important thing to note is that affirmative action to remove discrimination has become an important sustainable agenda goal which is to be achieved by 2030 and the main goals of these affirmative policies is to bridge the gap between haves and have nots. To remove the existing social inequalities present in the society and further improve the social as well as economic status of people and additionally it will also provide equal educational opportunities even to the disadvantaged group of the society.

Different countries have different ways and policies through which they formulate their affirmative policies. Some countries provide altogether a separate reservation and some countries provide preferential treatment to its citizens.

This paper tries to analyze the need for affirmative policies and the different type of policies adopted by India and USA and how well these policies are working at the present.

II. AFFIRMATIVE POLICIES IN INDIA

In India affirmative policies are also known reservation policies. But what was the need of these reservation policies in India?

❖ HISTORY

India is characterized by high rates of discrimination and structural inequality. India had followed the caste or Jati based system. Brahmins were considered to be the highest of all and the most influential and knowledgeable of all whereas Shudras were considered as polluted and untouchables. They were discriminated against and they were subjected to inhumane conditions and torture. In this context the reservation was introduced in the British Era itself alongside the freedom movement reservation was also introduced. Reservation has embryonic origin after 1909 (Morley-Minto Reform) and government of India Act, 1935 further emphasized on need for reservation. In Poona Pact which was ratified by Dr. B.R. Ambedkar and Mahatma Gandhi, there were some seats which were reserved for the weaker/ lower class of the society.

❖ POST INDEPENDENCE AND CURRENT SCENERIO

The constitution of India came into force in 1950, The preamble as well as the constitution stressed a lot on equality, The preamble mentioned the that the country is committed to ensure equality. Further the constitution of India under article 14-18 i.e. fundamental rights ensure that every citizen is provided with basic human rights to ensure that there is no discrimination. Further article 46 of the Indian constitution which is DPSP also states that The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Article 330 and 332 reserve certain seats in the parliament for the SC, ST and other weaker sections of the society. Whereas Article 340 of the Indian constitution says that the President has the power to appoint a committee with the aim of investigating the conditions of backward classes in India to help provide the benefits of reservation to the needy(Reservation for Other Backward Classes).

There are several judicial decisions also which talked about reservation in length. One of the first case on the lines of this issue was State of Madras v. Champakam Dorairajan (1955,SCC

351) in which it was held that students in the medical and engineering colleges will not be provided with any sought of reservations.

Later in in M.R. Balaji v. State of Tamil Nadu {1963 Supp (1) SCR 439}, where the Mysore government reserved seats for the backward classes and the reservation percentage was 68% the court in this case that providing reservation was not a wrong step but reservation percentage should exceed 50% in any scenario.

Following this judgement in T. Devdasan v. Union of India another important point was elaborated that the reservation cannot be carried forward to the next year.

Further in case of State of Kerela v. N.M. Thomas (1976 2 SCC 310) it was held that the reservation in cases of promotion was not unconstitutional.

Another important point to note is establishment of Mandal Commission (1979), it was a political movement which advocated for the inclusion of socially and economically disadvantaged group of the society . It is also called the second commission on socially and economically backward society. This commission was headed by B.P. Mandal it submitted its report in 1980 and was implemented later in 1990. The commission reported that the 52% was from OBC but this was going against the 50% cap decision as was decided in the M.R. Balaji case. Further the commission suggested that the OBC should be provided with 27%. This reservation should be provided in the public sector and government jobs. The recommendations of Mandal Commission were finally implemented in year 1990, but there was widespread dissatisfaction as well as conflicts about the same, there were arguments that already almost 22.5% reservation was provided to the SC and ST.

Soon after the reservations for OBC was challenged in case of Indira Sawhney v. UOI (1992 Supp (3) SCC 217) , The 9 judge bench of the supreme court upheld the 50% cap on reservation and Indra Sawhney case also mentioned that reservation cannot be provided in the cases of promotion and it overruled the judgement given in Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India, ((1981) 1 SCC 246). The concept of creamy layer was also introduced in this case and further it was said that the carry forward rule can be also applied

but the cap could not be increased from more than 50%. Further, these reservations were held as constitutional in case of *M. Nagraj v. Union of India*, (2006) 8 SCC 212.

Recently *Janhit Abhiyan v. Union of India*, 2022 SCC SC 1540, has upheld the constitutional validity of the Constitution (One Hundred and Third Amendment) Act, 2019. 103rd Amendment act talked about does not mandate but enables 10% of reservations for economically weaker sections, in addition to the existing reservation.

Reservations are provided in higher educational institutions owned and managed by central and state government under article 15(4), further 16(4) talks about reservation to be provided. Further reservation is also provided in political institutions through article 330, 332 and 334.

But the reservation policy of India has few disadvantages also, it was highlighted in national survey that only 0.7% entire population gets scholarships through merit and rest are reserved. Students studying hard and from General Category don't have a bright chance to grab the opportunity so sometimes people are deprived of their well deserved opportunities and this is not only the case in educational institutes but also at offices. Reservation has also led to increased caste based system, it has not reduced the discrimination rather it has increased the gap between two groups and many more arguments are put forth rejecting and criticizing reservation system and policies followed in India.

III. AFFIRMITIVE ACTION POLICIES FOLLOWED IN USA

❖ HISTORY

USA has been following race conscious admission policies from a very long time. It was done because there was a long history of racial discrimination. It is important to note that the affirmative action policy was not mentioned in the constitution as it was mentioned in The Indian Constitution, 1950 rather in the USA the policy was notified about by a notification about an executive order given by John F. Kennedy. Kennedy.

Before this the affirmative action was taken indirectly also as it was done in *Brown v. Board of Education* (May 17, 1954; Records of the Supreme Court of the United States; Record Group

267; National Archives), here in this case 14th amendment was introduced through which segregated schools based on the racial discrimination were vehemently forced to integrate.

The notification wanted the government contractors to affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin. It could be also assumed that this notification was due to the civil right movement that was taking place in the USA. This notification was further taken forward during the President Lyndon's Johnson Regime.

Thus, the first on paper affirmative action policy was drafted and passed through an executive order in year 1965. Which was based on Historic Civil Rights Act of 1964.

Further certain steps were also taken by Richard Nixon in 1969 , and these policies were getting undisputable support from all the political parties as well as all the citizens.

Further in 1984, University of California v. Bakke, the U.S. Supreme Court strikes down a UC policy that reserved admission slots for minority applicants, ruling that it was a violation of the Equal Protection Clause of the 14th Amendment.

Whereas later in 1980s , the supreme court started imposing certain restrictions on the reverse discrimination and the court limited the use of racial preferences by states that were tougher than those it applied to the federal government, gave more weight to accusations of reverse discrimination, and prohibited the use of minority set-asides in situations where earlier racial discrimination could not be proven. Federal affirmative action programs were declared unlawful by the court in Adarand Constructors v. Peña (1995) unless they served a "compelling governmental interest."

❖ CURRENT SCENERIO

No doubt that these affirmative action policies have various positive effects and there are various empirical studies conducted to prove the same. But in year 2022 the apex court of USA ruled that now affirmative action would not be used further. In case of Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, the judges to the ratio of 6-3 ruled that the

admission policy of both the university is violative of equal protection clause as mentioned in the 14th amendment.

They further argued that this one of the significant challenges to these ethnicity-based admissions practices was that they did not contribute to an increase in the total number of individuals with access to higher education. It merely aided in the admission of more prestigious universities to those who already had access to them. Another problem faced was that these policies may taint the accomplishments of successful students as future employers may link their success to their race rather than their intellect.

IV. COMPARISON BETWEEN THE AFFIRMATIVE POLICIES OF INDIA AND USA

The major differences between the affirmative policies of the two countries are that the reservation system of India was made to basically uplift the socio-economically backward section of the society. The main targeted groups for the policy were SC, ST and OBC (Now economically weaker section of the society also). Mainly the reservations were provided in the field were in politics, education and in government owned and operated workspaces. The reservation was provided through fundamental rights enshrined under the constitution under article 15 and 16. The reservation percentage/ Quota was fixed at 50%. The reservation could not exceed beyond the 50%. Earlier the reservation policy was made only on a temporary basis and not for the permanent scenario, but even after 75 years of independence the affirmative policies are not withdrawn till date. There are many popular conflicts also surrounding around the same issue. Still Patels and Jats are revolting against the current reservation policies and are demanding reservation for them.

Whereas in USA the affirmative policies were made to address the historical discrimination based on race. The main benefited groups of these policies were African Americans, Hispanics, Native Americans, Asian Americans. The origin of these affirmative policies was Civil Rights Act of 1964 which ban discrimination on various grounds and there was no fixed percentage of reservations which were provided it was depended on the educational institutions. But their widespread dissatisfaction among the population as it was believed that this reservation system was used misappropriately.

V. DISADVANTAGES OF AFFIRMATIVE POLICIES

Critiques have also argued affirmative policies should not be awarded and few reasons for discontentment are: These policies would increase discrimination against individuals and groups who do not fall into the impoverished category is the outcome of affirmative action. Talented people could not have equal opportunities if they do not belong to a minority group. It could also cause hostility between the dominant and minority communities. Another issue is a vital system called meritocracy which aims to persuade more talented individuals to seek higher education in order to provide them with the knowledge and means to make meaningful changes in the world. Because affirmative action forces colleges to admit more students of a certain race, nationality, or gender, it may work against meritocracy in higher education. Further members of underrepresented groups may find that their accomplishments are more the result of affirmative action than of their own hard work, which can be demeaning to their sincere efforts and self-assurance.

VI. CONCLUSION

There is no doubt to the fact that there have been evidences that there are instances of discrimination and inhumane treatment against certain group , and they were deprived of even their basic rights like right to education and were not even provided with equal representation at political sphere and not even at employment. Further to remove these inequalities from the society affirmative policies were employed to uplift the racial and caste based discrimination. Even in India and USA affirmative action policies were adopted. Though the ways in which these affirmative action policies were adopted were quite different and the present scenario in which they are implemented and executed are very different. But it is also seen the affirmative action policies have not completely achieved what they actually intended to. There are critiques which argue that the reservation policies adopted have rather caused reverse discrimination. Further changes need to be made to accommodate to the current scenarios. it is critically important that policymakers and legislators must come together to frame a society-oriented affirmative action plan to give benefit to the most eligible categories of people and also extend

the ambit of affirmative action from the public to the private sector. If not, inequality will continue to persist, and affirmative action will fail to serve those that could benefit the most.

ENDNOTES:

- Charles Potters, *What Is Affirmative Action? How It Works and Example*, (Sept. 30, 2023), <https://www.investopedia.com/terms/a/affirmative-action.asp>.
- *A Brief History of Affirmative Action // Office of Equal Opportunity and Diversity // UCI*, https://www.oeod.uci.edu/policies/aa_history.php.
- *History of Affirmative Action*, AAAED https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp.
- *Affirmative Action For Castes In India*, (Apr. 10, 2020), <https://mgcub.ac.in/pdf/material/202004101120317f4a32b19c.pdf>.
- *Economic Times, Affirmative action in USA: What is it? All you may want to know*, *The Economic Times* (June 30, 2023), <https://economictimes.indiatimes.com/news/international/us/affirmative-action-in-usa-what-is-it-all-you-may-want-to-know/articleshow/101401571.cms?from=mdr>.
- *Affirmative Action in India and the United States: The Untouchable and Black Experience*, <https://mckinneylaw.iu.edu/iiclr/pdf/vol3p101.pdf>.
- *The legal basis for affirmative action in India*, (Apr. 7, 2024), <https://www.econstor.eu/bitstream/10419/267824/1/1809927579.pdf>.
- *BPSC-104E.xps*, (Aug. 11, 2020), <https://egyankosh.ac.in/bitstream/123456789/66645/1/Block-6.pdf>.
- <https://ijlljs.in/wp-content/uploads/2015/01/AFFIRMATIVE-ACTIONS-IN-INDIA-AND-US.pdf>.
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