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POSITIVE DISCRIMINATION AND AFFIRMATIVE RESERVATIONS IN THE 21ST CENTURY: A SOCIO-LEGAL ANALYSIS

(By Maria Binny Palamattom)

“Equality is treating everyone the same. But equity is taking differences into account, so everyone has a chance to succeed.” — Jodi Lynn Picoult, Small Great Things

ABSTRACT

The purpose and the necessity of the principle of equity, attempted to find its designation in the Indian Constitution, through the development of the system of positive affirmation and reservations for uplifting the citizens of the nation who were scarred with the impacts of caste system, which was a social evil in practice for notably a long period of time. These reservations were included as an invariable element in various sectors of the society, majorly in the educational sector. The mechanism has proven to be both beneficial and detrimental to the targeted category in numerous ways. Irrespective of the demands for reforms in such reservations associating it with their implications has been in rise, especially in the 21st century. Therefore, there arises the need to address the necessity and the implications of the perusal of the reservations policy, on whether it has to be subjected to amendments, in coherence to the dynamistic nature of the progressing society.

However, mere demanding of the reforms in the provision of the Constitution results in the failure of the legislative intention behind the provision which duly calls for the analysis of the current scenario of evolution from what India has been in the occasion of the creation of such constitutional establishments. As the debates against the system triumphantly up brings various arguments including un dignified meritocracy, quality of personnel and further worsened state of the depressed classes, the question on whether, the system has been effective in eradicating the caste based violence and oppression even after the completion of decades after its implementation seeks to address the need for its perusal as well. Thence, this dilemma seeks for a responsive socio-legal analysis.
INTRODUCTION

The demands & deliberations, to both pursue and eradicate the existing stance on Positive Discrimination & Affirmative Reservations have been in existence since time immemorial. This majorly revolves incidents which either proves their undeniable requirement in the 21\textsuperscript{st} century or unwanted existence that results in the weak state people of privileged category are forced to be placed. These arguments, therefore, seek to be resolved with an analysis on the evolution of India, from being a State where, the former was the primacy, to the state India is placed today. The purposes served by the societal setup and the increased exploitation of such set up cannot be ignored.

The major contentions against the perusal of the system are concerned with the education sector. One among the major representations under the theme of positive discrimination and affirmative reservations are identified to be caste based. The classification of the society as SCs & STs, OBC and General, which is meant to raise the conditions of the lower strata comprising of the depressed classes in order to equalize their situations with that of the privileged have sought to be questioned for its continued existence in a demanding manner even in the 21\textsuperscript{st} century. According to the individuals, who are against such policies further, states that in order to bring the depressed classes forward, the people of general category are exposed to undermined opportunities and reluctance of being accepted irrespective of being judged on the basis of their skills rather than the caste they belong to.

On the other hand, such contentions are addressed by a closer look into the real situation of the such depressed classes even after the institutional back up they are granted with to come forth in the society and moreover the evolutions that have taken place in their lives in coherence to the conditions offered. This therefore, seeks for a critical socio-legal analysis on how effective the system has been in procuring such opportunities and addressing the issues at hand along with a precise understanding on what can make a difference to then situations prevalent in the country.

WHAT IS POSITIVE DISCRIMINATION & WHY AFFIRMATIVE RESERVATION?

The concept of positive discrimination majorly aims to address and to an extent eradicate the societal injustices that deny what a person or a community deserved to have received.\footnote{Gary K Clabaugh, \textit{Positive Discrimination}, 73 Educational Horizons 103, 103-104(1995).}
Through, this process the process of discrimination shall continue to persist but is considered to be in favor of ensured justice administration and to prevent further exploitations of the community/category so involved. Therefore, the principle revolves around the finding that, the measures in the present can compensate the injustices and intolerances in the past. This is because the elements who are sought to ripe the benefits of such discrimination belonged to the category that was the worst depressed in the past.

Among numerous arguments against this concept stands the undermining of meritocracy where, positive discrimination ends up being negative towards the so defined privileged classes. Often, the concept is unwelcomed on being a hindrance in the path of progress and ensured equal treatment of people, by re-considering the societal divisions present since time immemorial. Moreover, positive discriminations in countries like India, sustains like a statutory intervention. This is where, either the constitution or the prevalent legislations of a country upholds the concept in its administration apart from the preventive legislations of atrocities against such individuals or communities if any. There comes the concept of Affirmative Actions, including reservations.

The affirmative action undertaken ever since the constitution of India came into force is through reservations. Reservations aim to ensure that the individuals who belong to the depressed classes are given the opportunity to be placed and represented on every strata of the society. This mode continues to prevail without the tiniest scope of being questioned even in the 21st century. The presence of reservation is undeniable present in the entrance exams, job sector, electoral sector and educations sector as a whole. This system when the prevalent situation is in such a manner that these individuals and continue to stay behind where they deserve to. However, unfortunately, for those who both justify and deny the need for the system, looks into a selected category of such individuals. This therefore, leads to misinterpretation and continued oppression of the people who are in need, in the reality.

Out of the above mentioned categories, with reference to the historical debate between Mahatma Gandhi and Dr. B R Ambedkar, the reservations in the political strata or system is

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2 Id. at 1.
one among the few that can left undisturbed, because representation is always meant to ensure that no voices are left unheard and hence, no one id denied of what he/she deserved to receive in every aspects. Moreover, when it comes to electoral politics, the role of caste and related aspects are unquestionably prevalent in the political mobilization, though unfortunate and unreasonable.

**CONSTITUTIONAL & LEGISLATIVE AFFIRMATION**

Every step in pursuance of the betterment of the status, the depressed classes are availed with in adherence and consonance with the legislative response and back up. First and foremost in this are the Constitutional provisions. Apart from the historical origin of the affirmative actions prevalent before and amidst of 18th century at its hard core existence, the movements against similar injustices were led by prominent personalities from the history including William Hunter, Jyotirao Phule, Ramasay Macdonald and several others which later followed by the concept of separate electorates, Poona Pact. The Mandal Commission report of 1991, the Indra Sawney case, 1992, where the Supreme Court held that, *the combined reservation beneficiaries should not exceed 50% of the total population in India*, were as few of such remarkable events that brought forth the issue to its core into the limelight.

Thence, what was the impact of the constitutional insertions and provisions, in ensuring the betterment of the depressed classes in the society? With respect to the electoral reservation, Chapter XVI of the constitution exclusively deals with the same. Primarily, Article 15, strictly prohibits any grounds of discriminating an Indian on the grounds of religion, sex, race, caste, place of birth or any of them. For the members of SC/St sections of society, reservations for sets in Government services are provide under Articles 15(4) and 16(4). In addition to the reservation for acquiring services, the insertion in the 77th Amendment, 1995, further provided for reservation of promotion as well; which was later modified with the consequential seniority for SCs and STs in 2000. With respect to political stance, reservation in the parliament, State Legislative Assemblies, Panchayat, Municipality

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6 *Id.* at 5.
8 Indra Sawhney v. Union of India & Ors. (1994), 1994(2) SCR 644 (India).
9 INDIA CONST. art. 15, cl. 1.
10 INDIA CONST. art. 15, cl. 4.
11 INDIA CONST. art. 16, cl. 4.
12 INDIA CONST. art. 16, cl. 4A.
13 INDIA CONST. art. 330.
and also with adherence to the welcomed claims from SCs and STs for the maintenance of efficacy\textsuperscript{17}.

All the above provisions established, look forth to the purpose of ensuring \textit{equality via establishing equity}. Even if equity is the primary concern, with the ambit of looking forth to make the lower strata move along with the priority strata, these provisions often land in supporting the creamy layer among the depressed classes thereby ignoring the one in real need of help. This has been one among the most criticized aspect of the reservations on a caste based roll. The identification of this thin line between the deserved and under deserved with negative impacts on the real needy and downtrodden. Moreover, the need to establish a casteless society seeks to reconsider, the measures that are to be utilized in the real progress in the society\textsuperscript{18}.

Also, the legislative attempts include the statutes which came into existence in adherence to the constitutional provisions that declare untouchability\textsuperscript{19} as a punishable offence and the power of the parliament to make laws and declare penal offences under the aforesaid article\textsuperscript{20}. The primary law which was enacted, The Untouchability Offences Act, 1955 later renamed as The Protection of Civil Liberties Act, 1955 which governed and penalized the acts that constrained individuals from entrance to temples and other place of public worship is one among such statutes\textsuperscript{21}. Subsequently, the legislations majorly emphasized on prohibiting any sort of discrimination against the oppressed classes include The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989\textsuperscript{22} & The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015\textsuperscript{23}. These enforcements, together ensures to prevent any sort of atrocities, that are caste based and discriminatory in nature.

\textsuperscript{14} \textsc{India Const.} art. 332.  
\textsuperscript{15} \textsc{India Const.} art. 243D.  
\textsuperscript{16} \textsc{India Const.} art. 233T.  
\textsuperscript{17} \textsc{India Const.} art. 335.  
\textsuperscript{19} \textsc{India Const.} art. 17.  
\textsuperscript{20} \textsc{India Const.} art.35.  
\textsuperscript{21} The Protection of Civil Liberties Act, No. 22 of 1955,\textsc{India Code}(1993), VOL.15.  
\textsuperscript{22} The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, \textsc{India Code}(1993), VOL.15.  
\textsuperscript{23} The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, No. 1 of 2016.
JUDICIAL STAND TOWARDS RESERVATION POLICY IN INDIA

The opinions, criticisms, appraisals of the caste based reservation system in India judged and ascertained with the help of legislations and the provisions of the constitution altogether is provided with a different sphere and notion with the help of numerous precedents, that attempted to interpret these provisions in a different way, recognizing the need to reduce the hardships of the suffered sides and on the other hand to reduce exploitation due to the latter.

One such example is the case of Balaji v. State of Mysore\textsuperscript{24}, where the court enlarged the understanding on what determines a caste. It is not the backwardness but the determinants including poverty, occupation and other factors. Mere consideration of the caste in its external outlook wills not serve the purpose of any benefits granted on similar grounds.

Also in the case of Valsamma Paul\textsuperscript{25}, where the court upheld the possibility of misuse of the provisions of the constitution\textsuperscript{26} where citizens claim their rights\textsuperscript{27} for being adopted or married to a backward caste irrespective of not facing any societal backwardness associated with the aforesaid caste; for which the same cannot be justified with the help of constitutional provisions which can lead to unreasonable reaping of benefits, disqualifying another person in genuine need of the same. Similarly, in the case of Sobha Hyamavathi\textsuperscript{28}, the court critically affirmed the claims over rights enshrined by the constitution, on the grounds of distant and indirect relation with the depressed classes, having no backgrounds of undergoing any sufferings as of the individuals who belong to neither the same category nor the justifiable inference to a similar condition.

In the aforementioned cases, the court upheld the possibility of misuse of such reservations and specific access to similar rights by false claims over the same. This can be referred to as a precise look into the real life scenario on the access and basis of claim into such rights. The creamy layer therefore has an increased tendency to take over the accessible equipments leaving the needy unnoticed and helpless in similar conditions without any developments or improvements. The contemporary precedents and precedents in the past equally have realized and admitted the short falls and the need to revise the provisions of such guarantee with a check for its need in the 21\textsuperscript{st} century. The apparent transformations and developments have to

\textsuperscript{24} M R Balaji & Ors. v. State of Mysore, (1963), 1963 AIR 649(India).

\textsuperscript{25} Mrs. Valsamma Paul v. Cochin University & Ors., (1996), AIR 1996 SC 1011(India).

\textsuperscript{26} INDIA CONST. art. 16, cl. 4

\textsuperscript{27} INDIA CONST. art. 15, cl. 4.

\textsuperscript{28} Sobha Hymavathi Devi v. Setti Gangadara Swamy & Ors.(2005), AIR 1963 All 29.
be taken into due consideration and should not be ignored to ensure the dynamic nature of laws of the land.\textsuperscript{29}

\textbf{CONCLUSION & SUGGESTIONS}

The need to protect the depressed classes in the society is a prominent and relevant issue which seeks due care and attention with respect to the enforcement of legislations which have proven to be partially effective; in response to the unchanging cases of oppression in the form of crimes of dominance. However, when the creamy layer these groups are time and again exposed to such provisions, the strata in need of help which is sediment to the this level supplement the scenario at the past and is left unchanged. As numerous judgments suggested in coherence and acknowledgment of the actual determinants of recognizing what a caste based system has done to the society, mere reservations, which have proved not to create much of a difference should be carefully rethought.

The legislations which are established to protect civil liberties need not be revised to the extent when the caste based discrimination eradicates from the society as a whole. But, the current reservation system, including the reservation for promotions should be subjected to reasonable analysis both critically and statistically. The fairness of reservation is associated with the fairness for positive discrimination as foretasted. The concept of meritocracy should not be subjected to any dilution which can only result in underdevelopment or stagnated development of the country as a society. Therefore, justice shall be made accessible for all equally and equitably, after identification of alternatives for the current system of caste based reservation.