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AFFIRMATIVE ACTION IN HIGHER EDUCATION IN INDIA AND THE US: A STUDY IN CONTRASTS

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ABSTRACT

The 21st century has brought new challenges and opportunities for higher education. In the wake of the transition from elitist to mass education, universities worldwide are under pressure to enhance access and equity, on the one hand, and to maintain high standards of quality and excellence, on the other. Today the notion of equity not only implies greater access to higher education, but also opportunities for progress. In recent debates on higher education, the notions of equity and access go beyond minority to diversity. Affirmative action, too, has become race-exclusive and gender-neutral. The following paper makes an attempt to understand the nuances of a caste-based reservation policy in higher education in light of recent controversies, court verdicts, a subsequent amendment to the constitution in India; and affirmative action policies, court verdicts, and alternatives to affirmative action in certain universities in the US. The objective is to bring out commonalities and contrasts between the two countries in terms of legal, political, socio-cultural, economic, and psychological perspectives.

The Context

Of late, higher education in India has been very much in the news, whether it is the controversy over fee cuts in the prestigious business schools, popularly known as the IIMs, or the issue of reserving spaces in private higher education institutions in the wake of 93rd Amendment in January 2006. "Reservation" indicates the allocation of a certain percentage of seats to some individuals or groups on the basis of fixed criteria other than academic merit. There is a lot of antagonism over the reservation issue between the legislative and judicial wings of the government. Whereas the Supreme Court of India, in *Inamdar vs. State of Maharashtra* 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 un-aided 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).

The reservation issue has generated a polarized debate. Whereas the HRD Minister is defending it in the name of access and equity, the non-beneficiaries are vehemently opposing it in the name of quality and meritocracy. Those who are against quotas or reservations in educational institutions and public services for the SCs, STs, and OBCs, despite sixty years of national liberation, have questioned the policy on the following bases: Why not have quotas for the judiciary and armed forces? Why not fill up the posts of President, Prime Minister, Ministers, and Judges on the basis of quotas? Why should the very same government develop cold feet when women ask for 33% of seats to be reserved in the Parliament? Why should we continue with the quota system when it is quite obvious that it could not deliver benefits to the targeted group beyond 2 to 3%? Won't it amount to a national loss in terms of brain drain and the loss of billions of dollars if middle-class parents are forced to send their wards to foreign universities charging exorbitant fees? Won't it deprive the really meritorious and talented from jobs and access to quality education? and won't it blunt India's knowledge edge? ("Quota is No Solution," *The Times of India*, 24 April 2006: 1).

Those who are in favour of extending reservations for the SCs, STs, and OBCs in private jobs and higher education have argued that in a caste-ridden polity and hierarchical society, it is only natural to find out some ways and means of affirmative action to provide social justice and economic opportunities to all those who were deprived of the same due to their socio-cultural backwardness, economic deprivation, regional or gender based disparities—through "no fault of their own". The welfare state came into being for these very reasons. Reservations or quotas can help the deprived sections of society get their due either on the basis of injustice meted out to them in the past or continued discrimination on the basis of caste, class or creed, unfair placements given to them in proportion to their number or population, minority status, etc. Countering the argument that a caste-based system might go against globalization, Narendra Yadav, an economist and advisor to the Reserve Bank of India, and author of the book *Untouchables*, remarked:

Our dream to become an economic powerhouse can be realized only if all Indians get an equal opportunity to realize their own potential. Given the high asymmetric pattern of opportunities we have inherited, this would necessarily involve giving the SC/ST/OBCs a helping hand so that they can compete with others. Reservations are needed because of the innate inability of Indian society to be just and fair by itself to all its constituents. (Punwani, 2006:24)

Similarly, resisting the fear on the part of general public that reservations would only nullify merit, Amrith Lal wrote in a column in the *Times of India* (April 10, 2006:28):

Affirmative action policies including caste reservation can have a positive impact in making a society egalitarian... Social indicators reveal that southern states and parts of western India have fared far better socially and economically than the rest of the country despite having caste-based reservations for decades. High levels of social and political consciousness, in comparison to other parts of India, which did not follow

policies of affirmative action, have been largely responsible for these achievements. Access to education contributed significantly to this. In short, affirmative action did not compromise on merit, but instead empowered a wide spectrum of population to aspire for social and economic mobility... A society where the portals of merit are restricted to a privileged minority, especially when the privilege is determined at birth, is a regressive society.

India provides a unique example where the oppressor and oppressed groups may belong to the same caste or ethnicity, unlike most other heterogeneous societies where sharp polarization prevails on the basis of race, color, gender, religion or region. Earlier, those in "commerce" (*vaishey*) or manual jobs (*shudras*) were treated as lower in hierarchy in comparison to the "warriors" (*kshatriyas*) and "priests and highly learned" (*brahmins*). Gradually occupation degenerated into caste or *jati* to be determined on the basis of the birth into a family. Even today caste plays an important role in the socio-cultural, political, psychological and economic under-development of an individual, region or society as a whole.

No wonder, then, that despite sixty years of independence and remarkable progress made in the fields of science and technology, only 9% of the youth in the cohort of 17-23 year-olds have access to higher education. That is very low in comparison to the world statistics both in developed and developing countries. In advanced economies the percentage of youth enrolled into higher education varies from 50% to 70%, and even more. If India wants to be categorized as a "developed country", this percentage has to be at least 20%. Therefore, some sort of affirmative action is a necessity.

Why Affirmative Action?

The biggest problem of the 21st century is rapidly expanding diversity, along with stubbornly persistent inequities in terms of status and power based upon caste, race, ethnicity, class, language, citizenship or region. Though the economic integration and breath-taking innovations in information technology and communication have compressed the economic and learning space to some extent, they also have enhanced the competition for wealth and power between the "haves" and "have-nots", putting greater pressures on higher education, both public and private, to deliver the goods by preparing the ever-growing number of students not only for long-term employability and life but also directly for immediate market needs and a seamless path to work. The universities and colleges are under tremendous pressures from the students, faculty and administration and others to transform themselves from elitist institutions to mass-oriented in the shortest period of time (Gupta, 2005).

Universities around the globe are required to play an increasingly vital role in bridging the gaps between the students coming from diverse socio-cultural, economic and regional backgrounds through student and faculty exchange programs and internationalization of the curricula to serve global markets and world society. They play a critical role in the harnessing of human resources through the personal development on the part of the students as individuals and the socio-economic and civic development of their countries through them. The higher education institutions provide the space where students coming from diverse backgrounds interact, overlap, exchange and

collaborate in preparedness for the scarce resources in the knowledge-based and technology-driven economies of today.

No wonder, we find a sudden surge in the demand for higher education and technological skills worldwide. The universities and research centers are passing through a difficult time in view of conflicting demands and constant pressures on them to change or transform. They are no longer the sole contributors to the creation and dissemination of knowledge, as there are many other stakeholders and providers at the local, national and global levels. This has unleashed corporate and market forces into the higher education sector, converting it into a big market itself and transforming the students as future citizens into prospective customers/clients. That is why universities worldwide are feeling themselves under pressure to address the past problems of equity and access so as to convert them into investment in human capital for future gains.

It is but natural that under the rapidly changing world scenario, the universities and training centers are in greater demand than ever before. Quite surprisingly, higher education is being castigated as a private, quasi-private or quasi-public good and therefore not a fit case for merit-based subsidies. On the other hand, we also find governments and the courts intervening in admission processes worldwide, either in the name of protecting the interests of minorities or promoting diversity on campus. Affirmative action today has taken universities beyond the stage of “non-discrimination” on the basis of caste, class, creed, gender, ethnicity or socio-economic status, to “positive discrimination” or “reverse discrimination” in order to provide access to the vast number of underrepresented sections of society to pursue higher education and training in an enabling environment.

In the past, personal, social and economic development was seen as an end in itself in which the state played a role as agent. The focus used to be on resource inputs as symbols of progress and commitment to the neglect of outputs and performance. Today the universities are required to promote equity, fairness and justice, on the one hand, and maintain efficiency, quality and public accountability, on the other. Earlier, higher education catered to the needs of the elite class with an eye towards social leadership. Today with the massification, vocationalization and privatization of higher education, universities are under pressures to deliver both public and private good by preparing their students for a seamless transition to work and immediate market needs, local or global though they may be.

Moreover, it makes business sense to provide access to higher education and skills to the vast majority of youth if any nation today wants to compete in the global economy and job markets. Therefore, higher education is not only the gateway to personal, social and economic development, but also to tremendous business opportunities. Higher education today has become a three to four trillion-dollar business in itself, second only to defense and health. It is difficult to say whether business is promoting mass participation in higher education or mass participation into higher education is promoting business in education. But one thing is certain—that massification and internationalization of higher education has transferred the power from the nation-state to the global consumer.

It is also true that the rise in demand for higher education and technological skills has brought the issues of access and equity to the forefront. Affirmative action is being promoted as an important means of enhancing both access and equity. In fact, it not

only serves the interests of the underprivileged but also those of the elite as well. It provides legitimacy and justification to them in a democratic polity. We hardly find any examples of affirmative action, positive discrimination, reverse discrimination, reservations or quotas in any non-democratic system, whether past or present (Yang, D'Souza, Bapat and Colarelli, 2006).

Affirmative action is usually deployed to win over the support of the marginalized or under-represented sections of society. The public policies in support of affirmative action are generally justified in the name of equity, justice or democracy. The underlying goals said to be served by affirmative action policies in higher education generally are compensation to the victims of past discrimination and maltreatment, redistribution of resources and opportunities from the privileged sections of society to those worse off, motivating students from lower socio-economic and disadvantaged classes to aspire for better positions in society, better appraisal of students in terms of potentiality and productivity, higher quality education and learning due to prevailing diversity on campuses, better access to social capital in terms of useful contacts and networks for improving career opportunities, improved chances of integrating the societal elite in terms of race and ethnicity, fostering a more legitimate and vital democratic order, etc. (Weisskopf, 2006).

Affirmative action can be seen as a peculiar outcome of socio-cultural, ethnic, geographical, historical, political, demographical circumstances rather than of common psychological predispositions. In India we find caste and gender based discriminations quite deeply entrenched in our socio-cultural, political and psychological upbringing. We find Article 17 of the Indian constitution, prohibiting untouchability, under the category of fundamental rights (Right to Equality). In rural India, those born into lower castes are still looked down upon as *achhuts* (outcastes or untouchables) or scavengers. Today the lower castes prefer to call themselves *dalits*, implying "broken or reduced to pieces" or "oppressed". Surprisingly, in modern India, many people belonging to other castes or religions are also vying with one another to be included under the category of OBCs or "minorities" in order to benefit from reservations or quotas in government jobs and educational institutions (now, after the 93rd Amendment Act, in private higher education as well).

In fact, the whole concept of reservations, quotas or affirmative action can be seen as a social contract between "the winners" and "the losers". It can be seen as an outcome of the psychological mechanism towards reciprocal altruism amongst the non-kin. Under this mechanism people are encouraged to extend certain benefits and services to non-kin on the understanding that the benefactors would reciprocate those benefits at some time in future. The target groups are those classes disadvantaged on the basis of socio-cultural status, ethnicity, economics, education, geography or gender.

They may or may not be always visible like the "blacks" in the USA or the "whites" in South Africa. But they may be found to be more "segregated" or "ghettoized" (Jain, 2002). Unless and until there are direct links between costs and benefits, policies such as 'affirmative action in higher education' or 'redistribution under the welfare state' cannot be sustained. These days we find a lot of resentment of the free-loaders on the part of the taxpayers and of mediocrity from the meritorious. In fact, the human mind can accept positive discrimination only if it can be made to realize that altruism can also be in its self-interest (Gupta, 1994: 71-74).

Social contract algorithms are a set of programs designed 'for solving the intricate computational problems inherent in adaptively engaging in social exchange behavior.' The essential characteristic of a social contract algorithm is 'reciprocity', which is a foundation of ongoing social exchange relationships. The logic of reciprocity is based on a conditional rule—if benefits are to be received, then costs should be paid (Cosmides and Tooby, 2004: 100). The sentiments of "right" or "wrong" are natural in the case of affirmative action policies put into practice worldwide. Most affirmative action policies emanate from an intimate desire for justice—those discriminated against in the past should be compensated in future. Those who are opposed to such policies find 'reverse discrimination' unfair and undemocratic (Jones and Goldsmith, 2005).

For instance, whereas Kapil Sibal, the Minister for Science and Technology in the Union Cabinet, is against all such policies that dilute excellence in Indian research and educational institutions, Arjun Singh, the HRD Minister, seems bent on extending reservations for the SCs, STCs and OBCs up to 49.5% in central and elitist universities—which may be due to the needs of the coalition government to reap political dividends. Whereas Arjun Singh can be blamed for prematurely making public his government's intentions, Sibal can be blamed from publicly airing his reservations against reservations in higher education itself against the well-established norms and practices of parliamentary democracy (*The Times of India*, April 27 and May 1, 2006).

What is Affirmative Action?

Reservations or quotas can be methods for promoting affirmative action but are not affirmative action *per se*. Affirmative action is different from a reservation or quota in that it is open-ended and without any fixed number. Yet all such devices aim at serving as a "corrective" for past governmental, social or individual bias against women, certain individuals, groups or minorities based upon caste, class, creed or ethnicity. The disadvantaged groups have often been subjected to unfair, derogatory or discriminatory treatment for no fault of their own. Scope for affirmative action may or may not be provided for in the constitution itself but it is common for the lawyers to speak of "affirmative action" or "positive discrimination" in the sense of providing justice to those who are ill-treated, discriminated against or under-represented due to inherent socio-economic and cultural traits or of preventing those in power from doing any further wrong to caste/class/creed-based minorities (http://en.wikipedia.org/wiki/Affirmative_Action).

Though affirmative action has been in practice in India for a long time, it is only 45 years old in the USA. Historically, it was associated only with race, gender or lower socio-economic status but the civil rights movement in the early 1960s gave it a new meaning and purpose. Today, it implies "positive" or "reverse discrimination" in favour of the oppressed, whether the working class, women, minorities, immigrants, or people from lower socio-economic strata or disadvantaged areas. Affirmative action is no longer confined to either caste or class. In a paradigm shift from minority to diversity, it has extended well beyond the concerns and actions of a particular interest group based on caste, class, creed, ethnicity, gender or region. The human rights movement has also given a new meaning and content to the notion of affirmative action based upon equity, justice, accessibility, neutrality with respect to gender and/or to physical or mental disability, fairness and other liberal democratic ideals.

By opening its gates to vast majorities of the youth with diverse socio-economic, cultural and regional backgrounds, universities and research institutes have enhanced not only accessibility but also equity. In fact, the very notion of equity encompasses access and the rise in access has in turn led to diversity. In the era of globalization, diversity on campuses is seen as a cardinal value in itself. It promotes cross-cultural understanding among the students, faculty and administrators. Such an understanding is beneficial if one has to succeed and survive in a multi-national work environment and highly heterogeneous society. Whereas quotas and reservations help only those who get access to higher education, affirmative action or positive discriminatory policies aiming at promoting diversity help both the beneficiaries of affirmative action policies and others who are not direct beneficiaries.

In the USA, affirmative action originated as a response to the civil rights movement against discrimination in educational and job opportunities for the non-whites in general and African Americans and women, in particular (Ricucci and Rosenbloom, 1989). The earliest use of the term "affirmative action" appeared in an Executive Order 100925 in the USA in 1961. It declared discrimination in employment practices based upon race, color, religion, sex or national origin unlawful. Similarly, President Lyndon Johnson's Executive Order 11246 in 1965 made it mandatory for federal government and federal contractors with fifty or more employees and a contract of the value of US \$50,000 or more to ensure that minority groups comprised of the Blacks, Native Americans, Latinos, Asian Americans and women got adequate representation in their workforce (Crosby et al., 2003: 95).

In the USA, affirmative action programs are designed to benefit African Americans, Hispanic Americans, Native Americans and women. Asian Americans are not amongst the beneficiaries at most universities because of their higher performance rate at universities and colleges than other racial groups. Affirmative action programs provided some relaxation or bonus points for admission purposes and/or financial assistance or scholarships. In the USA the courts ruled against using reservation or quota systems in higher education. For instance, in the *Regents of the University of California vs. Bakke* (1978), the Supreme Court held that the UC Davis Medical School violated the "equal protection clause" of the XIV Amendment of the US Constitution by fixing quotas for underrepresented minorities. According to this verdict, race and ethnicity could be considered as "one factor among many", but not as "a dominant factor". One can give some weight to race or gender or any other factor, but that cannot be the sole criteria for admission to a college or university in the USA (Douglass, 2005: 112).

Similarly, in *Gratz vs. Bollinger* (2003), the Supreme Court ruled on the admission policy of the University of Michigan which took race into account numerically, finding it to be "too mechanical" and hence unconstitutional. It rejected the policy of granting a 20-point bonus on a 150-point scale to blacks, Hispanic and American Indian applicants. But in *Grutter vs. Bollinger* (2003), it gave a green flag to the policy of considering race as one of the criteria for admission into the law schools in order to reap the benefits accruing from a diverse student body. It held in a 5:4 decision that Michigan's efforts to maintain a "critical mass" of minority students did not amount to using an illegal quota, as it granted admission based on individual considerations and not on a group basis. According to Mark B. Cohen, an attorney who filed an *amicus* brief on behalf of Pennsylvania legislators:

The cumulative effect of the Bakke, Grutter, and Bollinger cases is that no one has a legal right to have any demographic characteristic they possess be considered a favorable point on their behalf, but an employer has a right to take into account the goals of the organization and the interests of American society in making decisions. This is a moderate, inclusive opposition that ably balances the various legal interests involved. (Schmidt, 2003)

In a paradigm shift from "minority" to "diversity", the affirmative action policies in higher education in the USA have created a new vision for universities. It has taken them from promoting the equality of opportunity to a proactive role in selecting students from the underrepresented strata in order to promote diversity. Diversity on the campuses is seen as important for not only for the students and faculty, but also the entire nation *per se* for three different reasons: (1) it makes the blending of ethnicities, cultures, races, religions and genders possible in an enabling and inclusive environment of civility, collegiality and mutual respect; (2) it makes good business sense to provide quality education to the fastest growing segments of society if a nation wants to compete in the global economy effectively; and (3) it helps the hitherto unrepresented and underrepresented sections of society in realizing their best potential. Standardized testing is not adequate to tap such a vast pool of human resource (Alger, 1998).

In the era of globalization and rapid technological innovations, it is economic politics that dominates political markets. In an advanced economy like the USA, affirmative action does not simply mean quotas or preferential treatment based on race, ethnicity, or sexual orientation, but rather indicates a good personnel policy. In an ever-shrinking world, where people of all races and genders are participating in a global community, a highly qualified and diverse workforce is an absolute must. In today's multi-ethnic, multi-linguistic and multi-cultural world, universities are duty-bound to prepare their students not only for a seamless path to work but also for economic vulnerabilities and other vicissitudes of life. The intermingling of students and faculty from diverse backgrounds helps to inculcate a spirit of empathy, tolerance and mutual respect, so vital for social justice in any given polity. Defending affirmative action in higher education, Mary Sue Coleman, the President of the University of Iowa, held:

Affirmative action, as practiced in contemporary research universities, is not the rigged system that our worst critics believe it is. It simply means that institutions take positive action to diversify the pools of applicants who compete for university positions, and to ensure that applicants of different backgrounds are included in interview processes. Then the best applicant is hired...I know why affirmative action is so important. I think of richer diversity and inclusiveness that has made the University of Iowa and so many other great American universities far stronger and vibrant than they were when I was a graduate student. I know what affirmative action has accomplished, and can continue to accomplish in the future.

In the same vein, Gerhard Casper, President of Stanford University, remarked:

Affirmative action is based on the judgment that a policy of true equal opportunity needs to create opportunities for members of historically underrepresented groups to be drawn into various walks of life from which they might otherwise be shut out. Barriers continue to exist in society, and

therefore affirmative action asks us to cast our network widely to broaden the competition and to engage in more active efforts for locating and recruiting applicants.

It means taking into consideration students from diverse backgrounds. It also means extending the definition of “merit” to include not only stringent academic grades and test scores but also unquantifiable human qualities and capacities, including artistic or musical talent, athletic ability, strength of character, leadership qualities, participation in extracurricular activities and community service, as well as promoting geographical diversity, etc. The Association of American Universities recognized these ideals in a statement on the “Importance of Diversity in University Admissions” (*The New York Times*, April 1997).

Revisiting the notion of merit, the Department for Education and Skills in London, in its report on *Widening Access in Higher Education* in January 2003, also emphasized the need for “raising the academic attainment of underserved student population”, “increasing the aspiration of students from these groups” and “influencing and broadening university admissions to include an expanded notion of merit” (Douglass, 2005: 108).

We should not forget that the continuance of affirmative action in higher education in the USA is not only in the interest of the students and faculty but also in the wider interests of business and society. That is why it has the tacit approval of the political elite in the government and judiciary. It amounts to silent remixing of the mixed economy (Gupta, 2000). Not only academia but also the political elite in the USA understand very well that without affirmative action in higher education, the country cannot compete in an increasingly globalized and multicultural world dominated by non-whites. The US leadership has to deal not only with the minorities and ethnic groups within the country but also across its borders. They cannot win the trust and legitimacy of non-whites if whites monopolize the highest and most crucial positions in the USA and abroad (Weisskopf, 2004).

In Sharp Contrast With India

Affirmative action in higher education in the USA is in sharp contrast with that of India. Reservation in educational institutions and jobs has been the basis of social order in India for a long time. The Indian leadership still sees “merit” in the quota system and wants not only to retain it but also extend it to private higher education and enlarge the percentage up to 49.5% in all central universities and professional schools. The Scheduled Castes, Scheduled Tribes and Other Backward Classes (SCs, STs and OBCs) together comprise roughly 70% of the Indian population. For this reason, no major political party or their student wing is openly opposing the UPA government’s recent move and the 93rd constitutional amendment. No political party can afford to lose the vote bank. Surprisingly, such drastic steps have been taken without consulting the academia or the affected parties. Nor is there any evidence of systematic research to support such politically charged measures (Mohan, 2006).

Even the Mandal Commission Report, which formed the premise for the sudden explosion of quotas, has not been read carefully. The commission was instituted in 1978 by Morarji Desai, then Prime Minister of India, to consider affirmative action policies for

the backward classes and disadvantaged castes in India. Under the chairmanship of B. P. Mandal, it became popularly known as the Mandal Commission. It used eleven indicators to ascertain economic and social backwardness and came to the conclusion that about 52% of the total population of India, belonging to 3,743 different castes and communities, was backward. Therefore, in its report submitted in 1980, it recommended 27% reservation for the OBCs in all government jobs and higher education institutions (except in those states where a higher percentage of reservation already prevailed) in addition to the prevailing 22.5% reservation for the SCs and STs, bringing the total to 49.5% (Sivaramayya, 1996).

Unlike the USA, where we do not find any provision for affirmative action in the constitution, in India, we find that the constitution that came into force in 1950, itself stipulates up to 15% reservation for the SCs and 7.5% reservation for the STs. In 1951, the First Amendment Act made certain changes in the Article 15(4) of the Indian Constitution, guaranteeing the Right to Equality to all its citizens. This amendment empowered the state to make any special provision for the advancement of any socially and educationally backward class, SCs or STs in India. It paved the way for the establishment of the first Backward Class Commission under the chairmanship of Kaka Kalekar.

The Kalekar Commission submitted its first report as late as 1955, but it did not carry much weight. On the other hand, in a historic judgment in 1963, the Supreme Court of India ruled that under no circumstances the quantum of reservation could exceed a 50% limit. This ruling formed the basic premise for fixing a 27% reservation for the OBCs. Though the Mandal Commission submitted its report in 1980, no action was taken on it until August 1990. When V P Singh, then Prime Minister of India, showed interest in its implementation, there was great uproar and protests by the students. One student from the University of Delhi, Rajeev Goswami, even died due to self-immolation, followed by a few others in a row, creating a very charged atmosphere all over the country. Though it formally affected only about one percent of population, it carried much larger impact.

On November 16, 1992, a writ petition was filed against the reservation policy. In *Indira Sawhney vs. Union of India*, the Supreme Court of India upheld a 27% reservation for the OBCs, but subject to the exclusion of the “creamy layer” or “socially advanced persons/sections of the OBCs”. Included in the “creamy layer” were the children belonging to Class I and Defense Officers and children whose parents had an income above Rupees 100,000 per annum. This limit was further revised in 2004 and extended to Rupees 250,000. The government tried to extend the reservation policy to the private sector but in vain. On August 12, 2005, in *P.A. Inamdar vs. State of Maharashtra*, the Supreme Court of India ruled that the State cannot impose its caste based reservation policy on minority and non-minority unaided private colleges, including professional colleges. This led to the recent controversy between the executive and the judiciary branches of the government.

On December 21, 2005, the UPA Government succeeded in passing the 104th Amendment Bill (93rd Amendment Act), rolling back the Supreme Court judgment against caste-based admissions in private un-aided higher educational and professional institutions. A new clause, 15(5), was inserted into Article 15 of the Indian Constitution that guarantees the “right to equality” and “equal protection before law” to all citizens without discrimination. The new clause allows the government to reserve seats for the SCs, STs and OBCs in private unaided educational institutions except in the minority

institutions. It also forms the legal basis for extending reservations for the SCs, STs and OBCs in all central and prestigious professional colleges up to 49.5%.

This venture is also called “Mandal II” in the media. There is lot of protest against this move in “cyberia.” For instance, Rina Dhaka, a designer, expressed the widespread dissatisfaction with this proposal:

We all know the decision is a political gimmick to please the backward castes and win polls. Politics should not come into creativity. This is a shameful decision. It would only reduce competence. (*The Hindustan Times*, April 10, 2006: 2)

To many others, the decision is uncalled for. Nobody ever demanded the fee cut in the case of IIMs in 2003. Nor did any group ask for an extension of reservations in private higher education or in the Central Universities, IITs, IIMs and NIFT. These policies are the brainchild of the HRD ministers themselves. The corporate sector in India is very much against the move of making quotas mandatory in private higher education institutions in the name of social responsibility. Reservation can be seen only as a temporary relief or help rather than a “fundamental right” (Srikant, 2006). It is quite strange that whereas the government has been relinquishing its control over the Indian economy ever since July 1991, when the New Economic Policy came into force, it is tightening its control over higher education in general and the private professional colleges in particular.

When Rajiv Gandhi carved out the Human Resource Ministry, a jumbo administrative unit designed to look after education and welfare in a holistic manner, he could hardly have imagined that it would become a launching pad for contentious politicking. Both Murli Manohar Joshi under the National Democratic Alliance and Arjun Singh under the United Progressive Alliance have exercised unusual patronage powers as HRD Ministers. Both ministers have shown a high sense of political ambition and an interventionist mindset, resulting in probing into the high-flying elitist institutions such as the IITs and IIMs. It appears that they only looked for opportunities to bring these institutions to task for showing scant respect for the political authorities in the name of ‘autonomy’ and ‘professionalism’ (*The Hindustan Times*, New Delhi, April 9, 2006:6).

Indeed, emotions and patronage are the hallmark of Indian politics, so it is no wonder that caste still plays an important role in Indian politics and society. Instead of playing the role of “levelers” like the US universities, institutions of higher education in India, including the private un-aided and minorities, have become the very battlefields of caste politics, whether they like it or not. Whereas the court judgments in the two US cases involving the University of Michigan have been “race-exclusive”, the court decisions in the case of India have been “caste-enforcing”. Whereas in the USA, quotas and reservations are banned as discriminatory and anachronistic, in the case of India, the government itself has made a move to write these policies into the constitution by inserting 15(5) through the 93rd amendment. Only the minority institutions are exempted, and that too because they are already free to admit up to 50% of students from their own communities based upon caste, language or religion.

Despite the recent court verdicts, a lot of confusion prevails over the reservation policy as affirmative action in India. Of late, we find the Supreme Court of India playing a proactive role in matters pertaining to education, including higher education. Unlike the USA, where court interventions in policy matters on higher education in general, and

private higher education in particular, have been rare (Ross, 1995), in India we find every sundry matter coming before the apex court for a hearing—whether it is the issue of fee cuts, reservation of seats, choice of courses at “plus two” stage, a common entrance exam, leaks in question papers, bungling in admissions, the right of minorities to establish an educational institution of their choice or any other administrative matter (Gupta, 2004).

These are not simple open-and-shut cases as perceived by the HRD Ministry or the judiciary. There are deeper issues involved, such as ‘access versus equity’, ‘autonomy versus accountability’, ‘elitism versus massification’, ‘socialistic provisions enshrined in the constitution versus liberal economy’ and ‘legalization versus judicialization’. The issue before the Supreme Court is not just to find out the legality of an executive order or legislation, but also to find out its appropriateness in a given circumstance. Whereas in the USA, judicial interventions in higher education remain an exception, they have become the rule in the Indian scenario. In the USA, initiating a judicial process is a deliberately chosen alternative to more explicit, partisan, electoral politics and interest group lobbying, while in India, judges have no choice but to intervene when the other two governmental organs fail to perform or under-perform (Gupta, 2005).

We must admit that the Indian system is very weak as far as implementation of government programs and policies is concerned. Still, the vast majority depend upon the state. In the USA, we find public resentment against a free lunch. But in India, those who can very well afford education or health care still depend on government largess. Whereas we find the public trust growing in the private provision, in India, people still lack trust in the competence, quality and honesty of the private sector. Thus there is a lot of pressure on public higher education from both the affluent and underprivileged sections of society. It is not only a question of affordability but also a question of credibility. It is feared that if the aspirants from the upper middle and affluent class are not absorbed due to heavy reservations in favour of the SCs, STs and OBCs by the public higher education institutions, these students might leave the country in quest for higher education and professional training abroad, resulting into huge losses in terms of human capital and brain drain.

However, the HRD Ministry prefers to call it “brain gain”. We still find stark anomalies in the education sector in India in terms of policy prescriptions and actual achievements, on the one hand, and the demand and supply, on the other. The telecom sector in India also suffered from similar ailments but with the induction of the private sector and a free hand, it is doing fairly well now. Instead of providing valuable direction to the higher education sector to enable it to meet the challenges posed by internationalization, vocationalization and privatization, the HRD Ministers have been obsessed with party politics and their Ministry is bent on strengthening its stronghold—despite the fact that education now falls under the category of Concurrent List, implying that both the central and state governments can pass legislation pertaining to higher education (Kapur and Khilnani, 2006).

The policy of reservations in higher education in India cannot be seen in isolation. Rather, it has to be seen in the context of the overall socio-cultural, historical and political background. The caste system in India is estimated to be 2500 years old. Since 90% of the populace still does not pay any income tax, caste remains a criterion for ascertaining the socio-economic status of an individual. In earlier times, caste and class corresponded, though caste has gradually degenerated into the *jati* system (Srinivas,

1996). Today it is difficult to isolate the “creamy layer” from the really poor and needy in the absence of authentic records. Therefore, we still find the perpetuation of caste-based reservation systems in government jobs and education in India. Even the liberalization and globalization of the economy have not reversed this, nor has it bridged the socio-cultural, economic, and regional and gender-based disparities (Deshpande, 2005: 19).

Whereas affirmative action in higher education in the USA has been primarily voluntary, it has been mandatory in India (Deshpande, 2005: 19). Surprisingly, despite the differences in form and substance, the opposition to affirmative action in higher education in the USA and India has been quite common. In both countries, the non-beneficiaries have opposed it in the name of inequalitarian, overuse or misuse of the public provisions and services. For instance, despite reservations for the SCs and STs in the electoral constituencies and *gram panchayats*, power has not shifted from the upper castes and affluent sections of society to lower castes or lower strata in India. Similarly in the US, neither the welfare state nor affirmative action could transform the country into a more egalitarian or just society. Rather, we find the people becoming more calculating, materialistic and individualistic in both these countries (Yang, D’Souza, Bapat and Colarelli, 2006).

Costs and Benefits of Affirmative Action

Affirmative action, in most countries, has been intended as a corrective for the historic, social and political injustices against certain groups due to prejudice on the basis of race, caste, ethnicity, region or gender. It is justified and in some cases also legitimized through constitutional provisions in the name of equity. It is based either on the logic of compensation for discrimination in the past or redistribution from the affluent to not-so-affluent sections of society. Today the recourse to affirmative action in higher education is supposed to achieve diversity on campus. Diversity in the era of globalization and hyper-mobility is considered a value in itself as it can pave the way for a more integrated society (Weisskopf, 2004).

Those who are opposed to affirmative action in higher education cite the examples of mismatch between the students and their chosen career paths. For instance, even the students from the reserved category in India are opposing the move by the UPA government to extend reservation. Very few of them actually complete their professional training in time or with respectable grades. Instead of ameliorating the differences based on caste, class, creed or gender, affirmative action policies based on reservation and quota actually exacerbate them. The non-beneficiaries have a general tendency to devalue the accomplishments of the students and faculty belonging to the reserved category. Instead of harmony, affirmative action in higher education usually leads to a feeling of resentment about unfairness in admission procedures by the non-beneficiaries. In fact, it takes a rigid view of “merit” and gives very little weight to the potential of prospective candidates belonging to the lower strata (Weisskopf, 2005).

To Weisskopf, the costs arising from racial and ethnic divisions are more profound in the case of India than in the USA. To him, the cost arising from the failure to select the most qualified applicants are more significant in the case of India, though the benefits accruing from more diversity are better realized in the USA. While some systematic research has been done on the benefits of affirmative action in higher education in the USA, not much empirical research has been carried out on the outcome of reservation and quota policies in higher education in India. Though only a tiny percentage of the

populace is affected (only 9% of the youth in the age group of 17-23 has access to higher education in India), there has been a lot of protest and resentment over the extension of reservations in higher education on the basis of caste or tribe rather than income or wealth. These policies have also been criticized for their ineffectiveness, in part due to the difficulties of classification:

The goal of reservation in India has been to bring about an improvement in the welfare of those who, historically, have been economically and socially depressed. But in arriving at this judgment about who should be eligible for reservation, the criterion has been a person's caste rather than his or her income or wealth. Consequently, groups belonging to what Article 115 of the Indian Constitution calls "socially and educationally backward classes" have benefited from reservation even though, in practice, many of these groups could not be regarded as "backward". This has meant that many of the benefits of reservation have been captured by well-off groups from the depressed classes (for example, *chamars* from the SCs) while poorer groups from the depressed (for example *bhangis* from the SCs) have failed to benefit. (*New Economist*, December 19, 2005)

Moreover, we should not forget that despite the government policy of positive discrimination in public education in general, and higher education in particular, very few students actually make it to the top institutions. According to one report, the dropout rate amongst the backward class, including the SCs and STs, up to middle school (Classes I-VIII) was 15%, and at the secondary level (Class VIII-X) was 40%. At the technical education level (carpentry, plumbing, electrical appliance, etc.), 81% of the seats under the reserved category remained vacant and at the higher technical level, 97% of the reserved seats remained unoccupied (*The Hindustan Times*, New Delhi, April 21, 2006:19). Very few know that the seats reserved at central universities sometimes remain vacant not because higher education is not affordable, but because most students belonging to the reserved category find it difficult, abstract, monotonous or futile in terms of job-preparedness.

Alternatives to Affirmative Action

The questions arise: are there better options than reservations or quotas in higher education? Don't these measures encourage the beneficiaries of affirmative action to designate themselves as members belonging to preferred groups? Don't these measures make those sections of society that historically have been discriminated against feel that they have been elevated due to preferential treatment or positive discrimination on the basis of group allegiance rather than individual merit? Won't the poor white or upper caste people suffer due to reverse discrimination in favour of affluent blacks in the USA or well-to-do lower castes in India? Won't they make the beneficiaries of the affirmative action lethargic or complacent? If the students coming from a backward class were to know in advance that they would be accepted by higher education institutions under the reserved category or preferential treatment, would they still strive hard to perform their best? Won't it aggravate further animosity if, despite reservation and preferential treatment, such students find students from the general category outperforming them? (Knight and Hebl, 2005: 547-568).

Affirmative action in the name of race, caste or minority can have deeper psychological scars on the groups, according to who receives preferential treatment and who does not. Moreover, affirmative action in the name of diversity, has an ameliorating effect on both groups, preferred as well as non-preferred. Like mercy, it is “doubly blessed”. It leads to less passion and resentment. It gives due weight to students’ potential capabilities along with their realized capabilities reflected in high grades and scores on the basis of final examinations or common entrance tests. Under the new measures, once admitted, the costs of poor performance are borne to a greater extent by the beneficiaries of affirmative action themselves and to a lesser extent by others. By promoting diversity on the campus, affirmative action can help in diluting the ill effects of race or caste on society in the long run (Sowell, 2004).

Enhancing access, equity and diversity in higher education does not mean that all must be treated as equal or exactly the same. Nor does it imply equal or proportional representation in all areas of higher education and institutional operations. It simply implies being systematically fair. Consideration for all on an equal footing requires that inequities, when they occur, should be justified by overall benefit and gains to all concerned and that they should be in the public interest. Some alternatives to affirmative action should also be devised to strike a balance between equity and equality, on the one hand, and individual gain and public accountability, on the other. Greater accuracy, creativity and autonomy in the appraisal of the qualifications of prospective students are required to serve the individual, institutional, national and international interests.

It is imperative that universities and policy-makers focus on the criteria to be used for affirmative action. They should ponder the issues, such as: Should affirmative action be used for the purposes of equity and justice or diversity and redistribution? Should it be used uniformly or differently for different groups and sub-groups? Should tests be used to stop misuse, overuse or inegalitarian use of affirmative action? Should it be limited to access to higher education through positive discrimination, or should it also be supplemented with necessary financial support in the case of the needy? What should be the extent of affirmative action in each course or institution? What should be the duration of affirmative action? How should we find out the potential for higher education from amongst the lower strata of society? How can we avoid subjectivity and a biased attitude on the part of the recruiting authorities and faculty? How can we secure the support of the non-beneficiaries for affirmative action policies and practices? How do we quantify or record the benefits accruing from such policies? All such questions await honest answers and evidence based on research.

Some of the alternatives to affirmative action that have been suggested are employing a lottery system, using family income, education and social capital as criteria, ranking of the school last attended, ascertaining opportunity costs based on neighbourhood, convincing the non-beneficiaries to believe in the fairness of the system, guaranteeing X% of seats to students from local schools (for instance, the mandated 20% in Florida, 10% in Texas, and 4% in California), allowing for low performance due to circumstances but not due to the lack of individual capabilities, motivation or determination, using modern psychological methods for ascertaining future potential even in the case of low-credentialed applicants, allotting bonus points for various factors that have resulted in the loss of opportunity or poor performance, awarding bonus points for excellence in sports, co-curricular activities and community leadership or in compensation for physical or mental challenges, etc.

Whereas the debate on the merits and demerits of affirmative action continues unabated, no one can deny the reality that affirmative action will continue in one form or other as long as inequities prevail in society. In fact, there cannot be any single, complete or permanent solution to inequities (Crosby, 2004). Changes in demographics, hyper-mobility increases in non-traditional or working students, the need for lifelong learning, capabilities for online and distributed learning, the entrance of private and corporate worlds into the higher education sector, a shift from supply-driven education to demand-driven higher education policy with more focus on competencies and output than on inputs, along with other similar trends, all call for new and innovative measures to enhance equity and access in higher education other than affirmative action and court interventions. But one thing is certain—a good policy for positive discrimination has to be time-bound. Quite ironically, its continuance only implies its failure (Weisskopf, 2006:20).

Social scientists can play an increasingly vital role in facilitating the change from reliance on affirmative action policies to alternatives aiming to address institutional, national and international interests in the wider sense. Promotion of diversity on campus on race-exclusive or caste-neutral terms can ameliorate the strong polarization of views and emotions in favour of affirmative action or against it (Lewis, 2003). Social scientists can also help in expanding an understanding of how the 21st century students come to aspire for higher education and professional training, what their expectations are, how inter-group contacts enrich their lives, how the networks developed affect their future lives, as well as the benefits, socio-economic and political costs of affirmative action.

This is a complex issue and needs careful handling, in part because it is a "zero-sum game" in which improvement in the well-being of one group comes only at the cost of another group. There are always losers and winners and in a democracy, the losers never take a back seat but actively protest and even involve the courts at the earliest opportunity. Quite paradoxically, affirmative action can harm the interests of the very disadvantaged people it is intended to protect by branding them as "inferior" or "incompetent" or both. In the long run, it may prove to be "doubly cursed" or "fulfilling negative prophecies" (Crosby and Clayton, 1990). It may even lead to further polarization or stigmatization in some cases, despite the best intentions to the contrary (Ross, 1995).

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