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## A COMPARATIVE STUDY OF UNTOUCHABILITY AND AFFIRMATIVE ACTION IN INDIA AND THE USA

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### ABSTRACT

*The paper focuses on the history of untouchability in India and the United States, further it deals with the preventive untouchability measures and laws, and traces the chain of events that lead to their development. Despite the prevalence of such legislation and constitutional protection, reasons will be discussed as to its existence even at the present. The Dalits and other lowest castes have been stigmatized by the caste system, and they live in constant fear of dying in both countries. This paper compares the caste system's historical background and current situation in India of that of Dalits and Black's situation in the USA. Due to institutional parallels and the fact that these groups serve as the social underpinning for the affirmative action programme in both India and the United States, the caste and racial issues in those countries are compared. It is a universal phenomenon for certain groups of people, such as Scheduled Castes, Scheduled Tribes, original inhabitants, and women, in particular, to be exploited and oppressed. Even today, the political philosophy of affirmative action is still largely misunderstood and highly contested around the globe. Proponents of the policy themselves continue to hold contrasting views on how to best put it into practice. In this paper, the comparison of affirmative action in India and the United States will be examined by drawing similarities, and the Affirmative Action*

*practices of India and the USA will also be contrasted. The goal of the study is to evaluate the two systems, compare them critically, and make some suggestions about better measures for abolishing untouchability and strengthening affirmative action practices. But at the same time crafting out certain restrictive measures so that in the way of protecting the rights of one the rights of others don't get curtailed.*

**Keywords:** Discrimination, Caste system, Untouchability, Affirmative action, Comparison.

### I. INTRODUCTION

*"Indifferentism is the worst kind of disease that can affect people".*

– Dr. B.R. Ambedkar

People are treated differently based on various factors, but when they face discrimination based on the same, it results in a violation of their basic human rights. This violation usually happens by way of caste in Indian and American society. For many people who consider the caste system to be one of the highest ideologies to describe how one should live, it is not just a system but also a way of life for them, especially in India. In India, the caste system has always taken precedence over social customs. A person's caste in ancient India was a description of his virtue, fortitude, aptitude, and background. Therefore, based on caste the society was divided into an upper and lower caste, where the lower caste was considered to be untouchables. Under untouchability, certain social limitations were imposed on people due to birth into a particular caste and they were also considered impure. Though the practice of untouchability was ruled to be unconstitutional in 1950, it persists in Indian society. Positive discrimination, which aims to compensate for minorities' lack of advancement opportunities due to historical and current prejudice, is a system of advantageous treatment for women in the



United States,<sup>6</sup> , nonetheless, it is implemented in India to fulfil the requirements of the populace who are less fortunate and to end the country's history of prejudice against "untouchables."<sup>7</sup>

## II. CONCEPTUAL FRAMEWORK

India and United Nations, both have influenced the creation of affirmative action policies in each other. Regarding black and untouchable experiences, a special focus will be placed on American and Indian affirmative action programs. The discussion will revolve around their respective incorporation of these measures in their unique systems and the different forms of discrimination. Indian influences and perceptions of the American affirmative action program and its history of civil rights will receive the majority of attention. Also, the similarities in the histories of discrimination experienced by black people in the United States and people who are regarded as untouchables in India will be looked into. The comparison of the affirmative action systems in the two countries being different yet similar will be traced, formally.

## III. HISTORICAL BACKGROUND

Untouchables, formerly known as Shudras, are placed at the bottom of the Hindu caste system's social ladder.<sup>8</sup> Castes, or "jatis," are subcategories that exist in each class.<sup>9</sup> Some of them were also known as Dalits, and they were always viewed as destitute and miserable people.<sup>10</sup> Mahatma Gandhi named them Harijans which means children of God.

The caste system was not explicitly defined during British administration in India, but the British government did enact it as law. The caste system became a strict division of society after the British withdrew from India. Due to the untouchability practice, Dalits were denied

access to water, prompting a protest in 1927. In 1914, Due to Panchami's caste, she was denied enrolment to the village school as she was Dalit. The villagers set fire to the school. Ayyankali, a Dalit social activist fought for their rights. The children were given access and admission to the school after a protracted one-year battle.<sup>11</sup> Dr. Ambedkar also wished to protect the legal rights that had been established. Mahad Town passed a resolution in 1926 asking that everyone have access to the water in the Chowder water tank, but caste prejudice made this impossible. Therefore, on March 20, 1927, Dr. Ambedkar launched the Mahad Satyagraha, and, as a symbolic act, he drank water from the tank, drawing the wrath of the villagers to him and his supporters. By enforcing Article 17 of the Indian Constitution in response to such incidents, the constituent assembly was able to end untouchability.<sup>12</sup>

Even then, the practice of "untouchability" is still prevalent.<sup>13</sup> The majority of Dalits continue to live in poverty and are discriminated against based on their appearance when eating, entering places of worship, and even entering the homes of upper-caste Hindus. Despite reservations granted by the constitution to promote equal opportunity, members of the Scheduled Castes and Scheduled Tribes have formed a political identity throughout the decades since India gained independence. Dalits have turned to other religions to improve their educational opportunities and obtain stable employment which is the result of the rise in Hindutva.

Black people have similarly faced biasness throughout the historical traces of the United States. Slavery has a long history in America, much like untouchability did in India.<sup>14</sup> After the Civil War, Jim Crow laws and other forms of discrimination against blacks persisted for a considerable amount of time. Black Codes

<sup>6</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §S 16-22, 1523 (1988).

<sup>7</sup> MARC GALANTER, COMPETING EQUALITIES 562, (1984).

<sup>8</sup> Dandekar, Dharma, The First End Of Man, in SOURCES OF INDIAN TRADITION 224 (William T. de Bary, 1958).

<sup>9</sup> CHANDOLA, *supra* note 6.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> The scourge of untouchability continues, The Tribune, 2017.

<sup>12</sup> INDIA CONST. art. 17.

<sup>13</sup> UKEssays, [https://www.ukessays.com/essays/sociology/the-social-practiceof-untouchability-sociology\\_essay.php?vref=1](https://www.ukessays.com/essays/sociology/the-social-practiceof-untouchability-sociology_essay.php?vref=1) (last visited Jan. 13, 2023)

<sup>14</sup> GEOFFREY STONE ET. AL., CONSTITUTIONAL LAW 435-37 (1986).



prohibited black people from working in jobs other than manual labour.<sup>15</sup> Blacks were forced to reside in isolated communities and had limited or none access to community spaces as a result of Jim Crow regulations.<sup>16</sup>

Similar to enslavement, the Jim Crow laws were based on the notion that white people were inherently superior to black people. In *Plessy v. Ferguson*, a precedent for court endorsement of Jim Crow legislation was established<sup>17</sup>, in which the US Supreme Court ruled that it was not unconstitutional to separate amenities between blacks and whites under the Thirteenth or Fourteenth Amendments. The Court stated that all races were treated equally because blacks and whites have always been accommodated in separate facilities.<sup>18</sup> The Court viewed facilities that are segregated appropriately.<sup>19</sup>

In truth, black people didn't have access to as many public amenities as untouchables did. Black people were discriminated against by the Jim Crow laws in the same way as untouchables were discriminated against by the caste system.<sup>20</sup> Despite having different cultural experiences, black people and untouchables both experienced oppression and slavery.<sup>21</sup> The conditions of the untouchables in India and that of the Negroes in America are pretty much similar. Following the arrival of the first Africans in the Colony of Virginia in 1619, the colony tried to clarify the distinctions between those who could be subjected to life and those who could not, leading to the emergence of the American caste system. With time, colonial legislation gave English and Irish indentured employees more rights than the Africans who laboured alongside them, and the Europeans melded into a new identity of being labelled as white. As a result, both India and the United States

experienced the humiliation associated with caste-based discrimination and violent behaviour.

#### IV. CONTEMPORARY DEVELOPMENTS

Despite being constitutionally outlawed, untouchability still exists in people's thinking, which is why Dalits experience the worst societal trauma and are the targets of victimization everywhere. The Dalits are not only being targeted inside the community but also as a target for criminal activity. According to the 2019 report of the NCRB<sup>22</sup>, UP had reported approximately 11,829 cases of crime against Dalits, which is followed by Rajasthan with 6,794 cases, and Bihar with 6,544 cases. It has also been found that Dalit women are being used as revenge objects in instances of communal wars.<sup>23</sup> In 2016, as per Equality Lab Reports<sup>24</sup>, 25% of Dalits who interacted with other students had definitely faced an assault of some kind, and one out of three Dalit students surely had faced discrimination during their education. Two out of three Dalits have faced discrimination at their workplace and almost 60% of Dalits faced caste-based derogatory jokes or comments at some point in time or the other. Recently, race has also come up as a ground for affirmative action which is still in dispute and the supreme court is peculiarly looking into the matter in the cases of *Students for Fair Admissions v. President and Fellows of Harvard College*<sup>25</sup> and *Students for Fair Admissions v. University of North Carolina*<sup>26</sup>. The court's decision on university admissions could set broad principles that would affect uses of race as a factor for affirmative action or protected discrimination in higher education in the United States.

#### V. CONSTITUTIONAL SAFEGUARDS

<sup>15</sup> STONE, *supra* note 15, at 445

<sup>16</sup> WOODWARD, *supra* note 16, at 7.

<sup>17</sup> *Plessy v. Ferguson*, (1896) 163 U.S. 537.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> WOODWARD, *supra* note 16, at 144-47.

<sup>20</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, 668 (1962); Gerald D. Berreman, *Caste in India and the United States*, in *CASTE AND OTHER INEQUITIES* 1-13 (1979).

<sup>21</sup> *Plessy v. Ferguson*, (1896) 163 U.S. 537.

<sup>22</sup> NATIONAL CRIME RECORDS BUREAU, 2019, <https://www.news18.com/news/india/on-an-average-india-reported-10-cases-of-rape-of-dalit-women-daily-in-2019-ncrb-data-shows-2930179.html> (last visited Oct. 6, 2022).

<sup>23</sup> THE GUARDIAN, <https://www.theguardian.com/world/2020/sep/16/dalits-bear-brunt-of-indias-endemic-sexual-violence-crisis> (last visited Nov. 14, 2022).

<sup>24</sup> EQUALITY LABS, <https://www.equalitylabs.org/caste-in-the-united-states> (last visited Jan. 11, 2023).

<sup>25</sup> *Students for Fair Admissions v. President and Fellows of Harvard College* (Docket No. 20-1199)

<sup>26</sup> *Admissions v. University of North Carolina* (Docket No. 21-707)



The 1947 Indian constitution provided many protections for the lowest caste, also referred as the "Scheduled Castes" under the constitution, primarily through affirmative action.<sup>27</sup> Contrary to the U.S. Constitution, the Indian Constitution explicitly permits affirmative action, sometimes known as "compensatory discrimination".<sup>28</sup> No controversy, therefore, exists over the constitutional validity of affirmative action in India. The Indian Constitution also expressly allows "reservations" or quotas. In the United States, in contrast, the Fourteenth Amendment has been interpreted to permit affirmative action. Furthermore, the constitutional validity of quotas in the United States remains unclear.<sup>29</sup> Similar to how affirmative action systems in the United States include minorities like Hispanics and Native Americans, the Indian Constitution also includes additional groups like the "Scheduled Tribes" (ST) and "Other Backward Classes" (OBC). Scheduled Castes (SC), Scheduled Tribes, and Other Backward Classes collectively are referred to as "backward classes"<sup>30</sup>

Affirmative action policies in the United States,<sup>31</sup> are very similar to the safeguards found in the Fundamental Rights portion of the Indian Constitution. <sup>32</sup>According to Article 14 of the Indian Constitution, equality promotes the idea that people in similar situations should be treated equally.<sup>33</sup> Article 16(4), in addition to allowing the creation of quotas, gives the state the right to establish preferences for the promotion of untouchables in government employment. Quotas in educational and other state-run institutions were also a matter of controversy until the passage of Article 15(4). The creation of Article 15(4) was prompted by the decision in the State of Madras v.

Champakam Dorairajan<sup>34</sup>. As caste-based special quotas were kept in place, the court ruled that they violated the ban on caste discrimination. Immediately thereafter, Article 15(4) has been adopted, thereby nullifying Dorairajan Quotas. However, under both Article 335 and the reasonable categorization criteria of Article 14, Quotas must still be within reasonable bounds. This, however, does not imply that the state has unrestricted authority to designate groups in favour of the untouchables; rather, it is constrained by Article 335, which obstructs "the maintenance of administrative efficiency." Thus, it is necessary to strike a balance between positions obtained through purely competitive means and reservations created for specific groups. Merit must also be taken into account. Substantive equality in the Indian Constitution functions within the general parameters of formal equality.

In the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment was created to secure and uphold rights provided to freed black slaves.<sup>35</sup> The states, however, are under no legal obligation to do that.<sup>36</sup> The landmark decision of *Brown v. Board of Education of Topeka*<sup>37</sup> was a precursor for the development of affirmative action programs in the United States.

Separate but equitable was simply flawed, according to the court. The *Brown* decision cleared the way for subsequent Supreme Court decisions that found segregation to be a constitutional violation of the Fourteenth Amendment. One key development was the enactment of the Civil Rights Act of 1964. Title VII, which has been implemented to combat racial as well as other forms of prejudice in a variety of work contexts, especially private employment, was a crucial component of this Act.<sup>38</sup>

<sup>27</sup> Parmanand Singh, *EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA*, 20-21 (1982).

<sup>28</sup> Stephen L. Wasby, "Compensatory Discrimination" and American "Affirmative Action": Some Parallels - A Review of Galanter's *Competing Equalities*, 8 *LAW & POLY* 379, 380 (1986).

<sup>29</sup> An Indian Decision and the Bakke Case, 25 *AM. J. COMP. L.* 611; GALANTER, *supra* note 2, at 147; SINGH, *supra* note 27, at 111.

<sup>30</sup> GALANTER, *supra* note 2, at 3.

<sup>31</sup> Marc Galanter Symposium articles in 8 *LAW & POLY* 323-87.

<sup>32</sup> INDIA CONST. art. 12, § 35.

<sup>33</sup> BASU, *supra* note 38, at 25 (*Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 41).

<sup>34</sup> *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226.

<sup>35</sup> *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

<sup>36</sup> RIBE, *supra* note 1, at 1525. *Plessy v. Ferguson*, 163 U.S. 537, 559.

<sup>37</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>38</sup> MARK ROTHSTEIN ET. AL., *EMPLOYMENT LAW TEXTBOOK* 198-200 (1987).



Affirmative action critics assert that the interpretation of Title VII has led to "negative discriminatory practices" against the white majority by unfairly allowing benevolent preferences towards minorities.<sup>39</sup> Still, it led to the establishment of affirmative action. But it faced its first serious challenge in *Regents of the University of California v. Bakke*, the Court, which ruled that racial quotas were illegal under Title VI. In addition, it maintained that race might be taken into account when deciding who gets into a school in order to create a varied student body. However, the verdict did not resolve the constitutional debate surrounding affirmative action. Although the Court declared quotas to be unlawful, this conclusion has been somewhat challenged by post-Bakke cases. The goal of "temporary quotas," or similar strategies, is to increase the proportion of minorities in the workforce. Both rulings addressed "reverse discrimination," in which Thomas supported the usage of quotas, whereas Bakke invalidated it. Bakke did not, however, exclude the use of amiable inclinations because it allowed for the consideration of race in the admissions procedure. In his civil rights movements, Dr. Martin Luther King, Jr., freely acknowledged using Gandhi's technique of civil disobedience. The pioneers of CORE - Congress of Racial Equality in the United States as well as the black rights struggle were greatly influenced by Gandhi's ideas. Thus, In light of this, it can be claimed that both Indian and American law have attempted to enshrine substantive equality inside a paradigm of fairness.<sup>40</sup>

## VI. JUDICIAL PERSPECTIVE

In the case of India, the law need not apply identically to every person. The state may create "reasonable classifications" to cure the early defects of history and untouchability. In the case *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*, the Indian Supreme Court ruled that a reservation premised on a

proportion for the Scheduled Castes and Tribes that wasn't much more than half was a justifiable categorization.<sup>41</sup>

Nevertheless, the Court ruled that illogical and capricious distinctions were unlawful. *State of Kerala v. N.M. Thomas*, another significant ruling, confirmed the gov't's power to grant special hiring privileges to members of the Scheduled Castes and Scheduled Tribes.

In the case of the United States, *Wards Cove Packing Company v. Antonio*<sup>42</sup>, according to the courts, in order to establish race prejudice, the complainant must be capable of recognizing the allegedly biased activity and demonstrate that the accused's non-discriminatory justifications are mere cover for the claimed unequal treatment. The passage of the Civil Rights Act of 1991 has effectively overturned *Wards Cove*.<sup>43</sup> On the point of caste legislation, Justice Marshall's contributed significantly as in the case of *Kadrmas v. Dickinson Public Schools*<sup>44</sup> he stated that "the Fourteenth Amendment intended to abolish caste legislation" which therefore gave clarity on the point reason for the enforcement of the Fourteenth amendment.

## VII. ANALYSIS

The Indian constitution therefore confronts a significant test in determining if its safeguards for the lowest caste will hold up in the light of widespread unrest about positive discrimination. The affirmative action policies in the US and India are indeed homegrown initiatives.<sup>45</sup> however, all these nations' positive action systems were influenced by one another as they developed. Its text of both the Equal Protection Clause of the Fourteenth Amendment was incorporated into Article 14, which has the greatest important American effect on Indian positive discrimination. Like its American equivalent, the Indian Equal

<sup>39</sup> Francis T. Coleman, *New Rules For Civil Rights*, A.B.A. J., 78-80 (1989).

<sup>40</sup> Richard L. Alfred & Thomas A. Knowlton, *Civil Rights Act will Encourage Federal Claims; the Civil Rights Act of 1991*, Mass. Law. WKLY.,5 (1991).

<sup>41</sup> *Akhil Bharatiya Soshit Karmachari Sangh v. Union of India*, A.I.R 1981 S.C. 298.

<sup>42</sup> *Wards Cove Packing Company v. Antonio*, (1989) 490 U.S. 642.

<sup>43</sup> *Griggs v. Duke Power Co.*, (1971) 401 U.S. 424.

<sup>44</sup> *Kadrmas v. Dickinson Public Schools*, (1988) 487 U.S. 450 (*Plyler v. Doe*, (1982) 457 U.S. 202).

<sup>45</sup> GADBOIS, *supra* note 26, at 344.



Protection Clause exclusively applies to governmental action. The "rational basis test," which is applied in separate but equal reasoning underneath the Fourteenth Amendment, has been utilized in Article 14 examination. There is limited evidence whether India's positive discrimination doctrine had any sort of impact on American policy. The word "caste" was first used in the United States due to effects from India. Segregation laws have indeed been referred to as "caste legislation." In addition to having an universally accepted definition, "caste" could also have a very clear meaning that exclusively applies to Hindus. As a result, both Black people and lower castes face prejudice.

### VIII. FINDINGS AND EVALUATION

As is evident from the success of the Civil Rights Movement, which resulted in the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 in the United States, there is a close connection between the discriminatory practices in India and the United States. Both countries also inspired one another to combat such issues by enacting legislation. It is improbable that the Civil Rights Acts and, by extension, affirmative action would have been created if King's movement and CORE had not used Gandhian methods. As a result, the Civil Liberties struggle was the origin of positive discrimination. A significant link connecting Gandhi's influence on the Civil Rights Movement and the ultimate creation of positive discrimination laws in the United States is underlined by the succession of events that have just been detailed. As a consequence, it can be said that both India and the United States have such a strong bond that has been evident through their long experience and that both remain to exert an influence over one another.

### IX. CONCLUSION

The caste system has never been advantageous to anyone, particularly the lowest caste members, who are more at risk in India and the United States than in any other

country. Therefore, Affirmative action programs have been implemented in both India and the United States, despite claims that they have exacerbated racial or caste relations in one country or the other. This shows that both nations are committed to combating discrimination. The results of the aforementioned study and research show that despite the "practice of untouchability" being outlawed by the Indian Constitution and the American Constitution by way of various enactments, societal norms and people's constrictive viewpoints toward the weaker segments of society remain unchanged and they are still subject to various forms of discrimination.

### X. RECOMMENDATIONS

It hasn't made much of a difference in recent years to only execute and change constitutional provisions or enforce laws protecting untouchables, underprivileged classes, black people, or other marginalized groups. India should celebrate any incident that made us think about our responsibility to advance human equality in light of the Constitution's protection of all its ideals. To clarify affirmative action and anti-untouchability regulations, separate legislation could be passed in both India and the United States. Also, apart from legal safeguards, social safeguards should be extended to such groups, but such advantages should be reasonably granted otherwise it will be discriminatory to others.

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