

MARGINALISATION AND RESERVATION IN INDIA: AN ANALYSIS IN THE LIGHT OF RAWLSIAN THEORIES OF JUSTICE AND EQUALITY

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In this article the author applies the Rawlsian principles of justice, which lay down a theory of fair equality of opportunity, to examine the Indian reservation policy. Both, in principle, seek to mitigate the arbitrariness of birth and provide individuals with an 'equal start' in life. Although reservations seem justified from a theoretical angle, the historical politicisation of caste has led to the distortion of the policy from being one that seeks to promote equality to a policy that preserves social inequalities and hierarchies. This has been one of the major causes that have prevented the envisioned objectives of the reservation policy from being realised. The problem may, however, be overcome by replacing the purely caste based criterion with one that takes into account economic backwardness as well and by expanding the scope of affirmative action beyond reservation.

Introduction

The debate on the Indian reservation policy has taken an interesting twist with Dalit organisations threatening violence unless their demands for reservation in the private sector are met.¹ While the private sector remains cautious, the demand is vehemently supported by the Congress which has even proposed a comprehensive Reservation Act that would include such reservation.² The reinforced revival of the reservation debate has prompted the writer to examine a more fundamental issue- the theoretical foundation of the concept of reservation.

John Rawls, in *A Theory of Justice*, while elaborating on the liberal notions of justice, equality and fair opportunity has proposed two principles of justice. His first principle endows upon all persons certain inalienable 'basic liberties' that are to be compatible with the similar liberties of others. Through his second principle, he recognises the existence of inequities and allows them as long as they operate to everyone's advantage. Rawlsian theories of equality and justice have been widely applied to justify various forms of affirmative action- from preferential treatment of minorities in American Universities³ to equitable allocation of Medical resources.⁴ The writer shall apply these principles to examine the concept of reservation⁵ in India. At first glance, it might seem that the Rawlsian theories are inappropriate tools

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¹ Pioneer News Service, *Dalits Demand Reservations in the Private Sector; Threaten Violence*, DAILY PIONEER, <<http://www.dailypioneer.com/archives/secon33.asp?cat=\nt4&ed=Naton&tl=Jan2301>> (visited on 12.01.2004).

² The Congress has demanded that in the light of the privatization of Public Sector Enterprises, the reservations for the depressed classes must be kept intact. The party has suggested providing fiscal incentive-based regime for private sector employers to encourage them to recruit from lower castes. For e.g. Government contracts must be given to cooperatives, firms and companies whose composition reflected at least 50 per cent component of disadvantaged category. See P. Sood, *Cong for quota in the Private Sector*, THE TRIBUNE, July 9, 2003. The Congress' stand on reservation has been concretised by the Common Minimum Programme, <http://www.ibef.org/Attachment/Com_Min_Prog.pdf>, (visited on 16.07.2004).

³ R. Fullinwider, *Affirmative Action*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <<http://plato.stanford.edu/archives/spr2002/entries/affirmative-action/>> (visited on 12.01.2004).

⁴ *Justice and the Allocation of Health Resources*, <<http://www.health.wits.ac.za/bioethics/resource.htm>> (visited on 31.07.2004).

to judge to reservations in India as Rawls concentrates on economic classes and is largely concerned with distribution of income and wealth, while reservations in the Indian context aim at improving social and educational conditions of the backward classes.⁶ However, Rawls himself believes that the distribution of economic assets is influenced by the social standing of a person.⁷ In fact, while discussing inequality Rawls discusses the unjust and ascriptive nature of aristocratic and caste societies.⁸

Rawls' disbelief in the absolutist notion of equality is what makes him particularly relevant for the present analysis. While looking at role of justice he concedes that a certain amount of injustice is tolerable if used to avoid a greater injustice.⁹ The writer feels that Rawls' very basis for propounding a theory of justice lies in his conviction that despite disagreements among humans on the very notion of justice, they recognise the need, and further, are prepared to accept a common set of governing principles for distributive justice.¹⁰ Rawls becomes relevant to the Indian context because although he proposes a shift from formal equality to a fair equality of opportunity, he theorises within the liberal democratic paradigm and does not ignore the necessity of individual rights

Through this piece, the writer shall analyse whether the concept of reservation is justified at a theoretical level. If the concept itself is faulty, then we need to discard the system of reservation as a whole and find a more effective method of promoting equality. In the first part the writer shall present a critical overview of the Rawlsian notions of justice and equality. In the second part the writer shall apply these theories to examine the concept of reservation in India. In the third part the writer will show why, despite the theoretical soundness, the reservation policy has not been a successful form of affirmative action in India.

I. The Theoretical Formulation

Rawls begins his theorisation with the aim of providing an alternative to the classical Utilitarian model of 'greatest good for the greatest number.'¹¹ He debunks the idea that justice is attained if the social order arranges the major institutions to achieve the greatest net balance of satisfaction arrived at by a sum of the satisfactions of all the individuals belonging to it. Indeed, his fundamental opposition to the Utilitarian

⁶ The 'concept' of reservation is the idea of keeping aside certain positions in various institutions for the socially and educationally backward classes. This must be distinguished from the 'policy' of reservation which is essentially the manner in which the Government gives effect to the concept.

⁷ Backwards classes in the Indian context includes Scheduled Castes, Scheduled Tribes and Other Backwards Classes (OBCs). The Supreme Court has held that in order to classify a class as backward what must be looked at is its social backwardness. It has categorically rejected the application of an economic criterion to determine backwardness. Although not required by law, caste is the most important determinant of backwardness today. See *Indro Sawhney v. Union of India*, 1992 Supp (3) SCC 217 and *P. Rajendran v. State of Madras*, AIR 1968 SC 1012.

⁸ "...the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies. The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets." J. RAWLS, A THEORY OF JUSTICE 72 (1973).

⁹ *Ibid*, at 102.

¹⁰ RAWLS, *supra* note 7, at 4.

¹¹ "...they understand the need for, and are prepared to affirm a characteristic set of principles for assigning basic rights and duties for determining what they take to be the proper distribution of the benefits and burdens of social cooperation." RAWLS, *supra* note 7, at 5.

¹² RAWLS, *supra* note 7, at 22.

model was that while giving primacy to greater societal good it fails to recognise the needs of individuals and distinctions between persons or groups of persons. Under this model it is perfectly fine if the liberties of some are confiscated in order to increase the overall benefit to society. The actual distribution of rights and obligations among different individuals is immaterial. Rawls, on the other hand, believes in the plurality and distinctness of a person. A just society will not subject the rights of an individual to the 'calculus of social interests.'¹² Thus he argues that - *"Each person possesses an inviolability founded on justice that even the welfare of society cannot over-ride. For this reason justice denies that the loss of freedom of some is made right by greater good shared by others."*¹³

Although Rawls is critical of Utilitarian notions of justice, he accepts the Pareto model of optimality at a general level. According to the Pareto model, a concept usually used in economics, a distribution of resources is efficient if no possible redistribution can make one person better off without making another person worse off.¹⁴ There can be a number of efficient distribution configurations ranging from rights being equally divided, to all rights being vested in a single person. The Pareto model, which considers only the sum total of benefits and ignores individual interests, is similar to the Utilitarian philosophy and hence not completely acceptable to Rawls. He builds upon the shortcomings of the Pareto model by going beyond the mere notion of efficiency and develops principles that will help determine which of these optimal distributions are truly just.¹⁵

Rawls, through his first principle, propounds is that *"each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for another."*¹⁶ Basic liberties include political liberties (right to vote and to be eligible for public office), freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person along with the right to hold property, and the freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.¹⁷ As any other liberal democrat, Rawls gives primacy to civil and political rights and places them in the non-negotiable category. On the other hand, social and economic rights (dealt with in his second principle) are negotiable and all individuals need not be entitled to absolute equality with respect to these rights.¹⁸

According to his second principle *"social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all."*¹⁹ This principle of justice is the prologue to another important Rawlsian notion- fair equality of opportunity. It is not

¹² Rawls, while giving primacy to individual interest over general societal welfare, borrows from the Kantian logic of treating every person as an end and not merely as means, and seeks to develop principles of justice that embody this idea. RAWLS, *supra* note 7, at 179.

¹³ RAWLS, *supra* note 7, at 3.

¹⁴ RAWLS, *supra* note 7, at 67.

¹⁵ *"...the principle of efficiency cannot serve alone as a conception of justice. Therefore it must be supplemented in some way."* RAWLS, *supra* note 7, at 69.

¹⁶ RAWLS, *supra* note 7, at 60.

¹⁷ RAWLS, *supra* note 7, at 61.

¹⁸ But the Rawlsian idea of basic liberties has been criticized because his solutions to social inequity work on the assumptions of liberal democracy that all citizens have equal political rights by virtue of being citizens. Political theorists like Carole Pateman argue that although liberal democratic theorists assume that liberal democracy provides an impartial procedure that protects all interests, practically minorities may be denied not just social and political rights but also all the political rights of a citizen. Social welfare is possible only by moving out of the liberal democratic paradigm. See C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* (1979).

¹⁹ RAWLS, *supra* note 7, at 60.

sufficient that positions are left open to all; they must be arranged in such a manner that all are afforded an equal opportunity to attain them. The quest for attaining a just and equal society has thrown up varied interpretations of the idea of equality of opportunity. Rawls' idea of fair equality of opportunity falls somewhere in between the two extremes of formal legal equality of opportunity and equality of result. Although he proposes to move from formal equality to a more substantive form of equality, he accepts the inevitability of inequality in certain situations²⁰ and stops short of proposing absolute equality. All the theories essentially aim creating a level playing field; but every theory's idea of 'level playing field' is drastically different.

Formal democratic equality, based on standard meritocracy, can be attained by laying down certain qualifications and procedures for the appointment or election of persons to institutional posts.²¹ Under such a system all those with a similar level of skill and abilities, and those who have a similar willingness to use them must have a similar chance of success. A candidate cannot be excluded on grounds that are irrelevant to his capacity of doing work.²² The problem, however, with the notion of formal equality of opportunity is that it makes a controversial assumption that every individual has an 'equal start' in life and thus, has an equal opportunity of attaining the skills and abilities necessary to attain the post.²³

On the other hand, equality of result is completely opposed to the idea of meritocracy which it considers as antagonistic to the idea of equality of result. It refuses to accept that providing an equality of opportunity can achieve an equality of result. Thus, providing an equal opportunity is not sufficient. The end result in terms of income, education, status and power must be equal.²⁴ Commenting on a study carried out by James Coleman of Hopkins University to find the relation between differences in resources available to white and black children to the disparity in their achievement. Coleman pointed out that despite comparability of black and white schools in terms of resources, there was a significant achievement gap between the achievements of black and white children.²⁵ This shifted the focus to achieving equal outputs by continuously readjusting distributive shares to correct the persisting differences of talents and abilities.²⁶

Rawls, while acknowledging the need for an equality of result does not neglect the role of talents and abilities in attaining positions. He presents an idea of fair equality of opportunity that takes into account the initial social and cultural handicaps of an individual. Rawls grounds his theory in the fact that the arbitrariness of birth and the problem of natural lottery take away the chance of individuals to have an

²⁰ He justifies certain forms of inequality on the basis of the 'Difference Principle' which has been explained ahead.

²¹ Formal equality is closely associated with the development of the competitive market economies. In such an economic set up applicants are judged on their merits, and the most qualified according to criteria that are relevant to job performance are offered positions. This system of appointment ensures that each post is occupied by an efficient worker and hence profit is maximised. See R. Arneson, *Equality of Opportunity* in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY <<http://plato.stanford.edu/entries/equal-opportunity/>> (visited on 12.01.2004).

²² N. MacCormick, *Justice According to Rawls*, 89 LQR. 406 (1973).

²³ The proponents of fair equality, including Rawls, oppose formal equality on this very assumption that all persons are all endowed with the same initial resources.

²⁴ S. Yu, *On Meritocracy and Equality*, Daniel Bell, <http://ocw.mit.edu/NR/rdonlyres/Urban-Studies-and-Planning/11-020Fall2003/866B9791-5848-4329-A269-876A33F73672/0/bell_paper.pdf> (visited on 16.07.2004).

²⁵ Daniel Bell argues that equality of result is not an effective solution because social inequality is inevitable. He gives the practical example of the former Soviet that discarded the idea of equality of result because a system of differential results served as an incentive and was more efficient. *Id.*

²⁶ M. J. SANDLER, *LIBERALISM AND THE LIMITS OF JUSTICE* 69 (1998).

'equal start' in life.²⁷ Birth into a particular social and cultural stratum will determine the talents and skills developed by the person and finally the opportunities he will have access to. In a formal system of equality, those with substantial initial social and educational endowments will end up with a substantial share of the available rewards, while those with meagre initial endowments will continue to receive only meagre returns. Thus, the formal or legal idea of equality merely reproduces the patterns of initial distribution of resources, and there is no justification for allowing opportunities to be based on this arbitrary process.

The liberal principle of equality which Rawls propounds addresses the root of the problem and clearly recognises that the initial distribution of resources dangles on the natural and social contingencies. Its primary goal is to negate the social and cultural disadvantages that a person is under by virtue of being born into a particular social stratum and provide all with an 'equal start' so that a person's social standing is not a hindrance in reaching the open posts and positions.²⁸ If two individuals are equally ambitious to attain a certain goal, then fair equality tries to ensure that the fact that one is born to uneducated parents or belongs to a socially disfavoured group does not interfere in their path to achieve the goal.²⁹ Hence fair equality of opportunity is the basis for giving preferential treatment to disadvantaged classes.³⁰

II. The Politics of Reservation

The demand for reservation first emerged in South India in the form of a protest against the monopoly of Brahmins in the government services (including the administrative offices under the princely states.) The lower castes were marginalised not only due to their educational backwardness but also due to their low social status which was based on the notions of ritual purity and impurity.³¹ The rigid and immobile caste structure ensured that the social and educational backwardness was passed on to future generations.

Preference was given to Brahmins, not so much as for their claim of divine superiority, as much as for the

²⁷ RAWLS, *supra* note 7, at 7.

²⁸ BELL, *supra* note 25, at 68.

²⁹ Although fair equality, seems just as a theory, it has been accused of allowing the State to invade into private lives because enforcement of any form of fair equality of opportunity requires interference by the Government. For a more detailed discussion on the same. See J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

Another problem from the point of view of implementation is distinguishing between unchosen circumstances and choices for which the individual is responsible. For e.g. a student may be born into a socially and educationally forward family but has bettered his chances of college admission by his own perseverance in school. How does one distinguish between the edge he has over others by virtue of birth and by virtue of his own work? For greater discussion on the same and for views on how to draw the line between unchosen circumstances and circumstances that are a result of individual choice. See R. DWORKIN, THE THEORY AND PRACTICE OF EQUALITY (2000).

³⁰ The critics of preferential treatment have opposed the system on the grounds that it is nothing more than reverse discrimination which goes against public equality by perpetrating the same injustice that it is trying to mitigate. See L. Newton, *Reverse Discrimination as Unjustified*, 83 ETHICS 310 (1973).

The writer feels that these critics fail to realise the difference between unfair discrimination and fair discrimination. While the former gives a class of people an undue advantage over the rest, the latter brings the disadvantaged class of people onto the same competitive plane as the rest.

³¹ The Indian Hindu society was characterised by a graded inequality based on ritual purity with the Brahmins occupying the topmost hierarchical level. This was originally based on nature of work performed by each caste. However, even after the caste based division of labour began to dissolve, the tags of ritual purity and impurity remained attached to the castes. These tags define and regulate various aspects of social life. For e.g. certain castes are prevented from entering temples due to their impure status.

high rate of literacy among them.³² The British administration also preferred hiring Brahmins as candidates with the necessary educational qualifications were to be found more easily among the Brahmins than among other castes.³³ Thus, the Brahmins armed with the education, skills and other assets they had accumulated over the centuries carved out a large chunk of the government jobs for their exclusive consumption.

As a person's caste was decided by birth, his initial endowment of resources was simply arbitrary. As a result his chances of attaining formal education, skills and qualifications that are needed for the various posts largely depended on the family he was born into. It is this natural lottery that the Rawlsian theory of equality and justice tries to mitigate.

In India, preferential treatment takes the form of compensatory discrimination, i.e. those who are in a socially and educationally disadvantageous position due to past discrimination are given certain benefits to compensate for that discrimination in order that they may move towards a level playing field. The effect of this arbitrary process that afflicts the marginalised sections is sought to be softened by reserving seats in various institutions for the socially and educationally backward classes. The process first began in 1920 with the reservation of 28 of the 65 non-Muslim seats for non-Brahmins in the Madras legislature.³⁴ The non-Brahmin movement, under the auspices of the Justice Party managed to extract reservations in government jobs for non-Brahmins. The First Communal Award of 1921 extended the reservation, which till then was restricted to the revenue department, to all the government departments.³⁵ However, efforts to have an All-India policy of reservation were not successful in the pre-independence era. It was only with the framing of the Constitution that such a policy was made possible.³⁶

Indeed, Rawls' idea of equality is no different from the equality of opportunity that the constitutional framers believed in.³⁷ Hence, what the concept of reservation does is it recognises the initial social and educational handicaps that affect a certain category of persons and which causes them to occupy a disadvantageous position in society, and moves away from the standard procedure of meritocratic selection as demanded by formal equality in order to ensure fair equality.

³² P. Chopra, *The Reservation Policy: An Overview* in V.A. PAI PANANDIKER, Ed. THE POLITICS OF BACKWARDNESS 13 (1997).

³³ *Ibid*, at 14. Statistics are a glaring example of such favouritism. In the first decade of the 20th century Tamil Brahmins comprised only 3% of the population of the State of Mysore yet occupied over 80% of the posts in the State. *See* B. Das, *Moments in a History of Reservations*, 35 (44) EPW 3831 (2000).

³⁴ S. Prakash, *Reservation Policy for Other Backward Classes: Problems and Perspectives* in V.A. PAI PANANDIKER, Ed. THE POLITICS OF BACKWARDNESS, 13 (1997).

³⁵ *Ibid*, at 41.

³⁶ Article 330 and 332 place an obligation on the State to reserve seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha and the Legislative Assemblies. Article 15 (4), 16 (4) and 16 (4A) expressly permit the State to afford preferential treatment to members of Scheduled Castes and Scheduled Tribes. Thus, the Constitution allows for three kinds of preferential treatments- preferential electoral representation, preferential employment and preferential treatment with respect to education and welfare.

³⁷ The Constituent Assembly Debates clearly show that by providing reservations the framers intended to embody the idea of fair equality of opportunity into the Constitution:

"...equal merit pre-supposes equal opportunity, and I think it goes without saying that the toiling masses are denied all those opportunities which a few literate people, living in big cities enjoy. To ask the people from the villages to compete with those city people is asking a man on a bicycle to compete with another on a motorcycle, which itself is absurd." CONSTITUENT ASSEMBLY DEBATES, Vol III, 616 (1950).

As mentioned earlier, at the other end of the spectrum of equality is the notion of equality of result, an idea that tries to achieve absolute equality. However, Rawls stops short of proposing a complete eradication of all inequalities. In furtherance of fair equality of opportunity, he develops the idea of a 'Difference Principle' which does not seek to completely eliminate inequalities but only rearranges them in a manner that they benefit the least advantaged classes.³⁸ The Difference Principle, which attacks the arbitrary endowment of initial benefits, is grounded in the assumption that a person is not the sole proprietor of the natural advantages that he is vested with. He is merely the guardian of these abilities and capacities that happen to reside in him and hence has no exclusive right over them.³⁹ Rawls regards these endowments not as individual, but common societal assets.⁴⁰ Since the natural distribution is simply arbitrary, in a just and fair society men agree to share each others fate.⁴¹

The Difference Principle can be used to justify the concept reservation in two ways. Firstly, it shows that in the absence of reservations the requirements of justice and fairness will not be met. Inequalities favouring the higher sections are permissible if they work to benefit the marginalised sections in such a way that a fall in the expectations of the better offs would lead to similar decrease in the expectations of the least advantaged.⁴² Although the relative inequality between the higher and lower classes might continue to exist, this inequality is allowed to continue if the lower classes are better off in absolute terms than they would be if the existing inequality was removed. An oversimplified example is the working of an office. Appointing a general manager with a higher share of the earnings than the rest of the employees working under him is justified even when all put in the same amounts of efforts, if and only if, by giving an equal power and equal share to all the employees the share of each employee is lower in comparison to the former unequal situation.

However, in Indian society the higher education and socialisation of certain classes does not in anyway work to the benefit of the least advantaged classes. The rewards of society that the lower classes receive

³⁸ "But it does not follow that one should not eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system that no one gains or loses from this arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return." RAWLS, *supra* note 7, at 102.

³⁹ "No one deserves his greater natural capacity nor merits a more favourable starting place in society." RAWLS, *supra* note 7, at 102. Nozick objects to the Difference Principle and argues that even if individuals do not deserve the assets they are naturally endowed with it does not automatically follow that society as a whole deserves or possesses them. To consider them as community assets is as arbitrary as allowing an individual to exercise exclusive ownership over them. Nozick believes that they should be considered as free floating 'nobody's' assets. He propounds an 'Entitlement Theory' where he holds that although an individual may not deserve the initial endowment he is still entitled to take advantage of it. For a more detailed discussion See SANDLER, *supra* note 26.

⁴⁰ The Rawlsian welfarist idea within the liberal democracy has been accused not being able to clarify whether individual rights supersede community rights or vice-versa. "...while Rawls begins his theory with a Kantian, individualistic premise...his social contract turns away from this orientation towards egalitarianism and public choice...Nor does the Rawlsian believe that the overreaching of self-interested governmental agents is so great a problem as to disable proper public projects." See B. Kulkin, *Evolution, Politics and Law*, 39 VALP. UNIV. L. REV. 1131 (2004).

⁴¹ RAWLS, *supra* note 7, at 102. Dworkin rejects the idea of equality of resources and suggests an alternative system where the distribution of resources is equal when no one envies the resources others have. See R. DWORKIN, *DO LIBERTY AND EQUALITY CONFLICT?* 45 (1996).

⁴² This idea of inequality assumes a kind of trickle down effect where the benefits received by the higher sections are passed down to the lower sections.

are not increased as a result of this inequality. The inequality would be justified if there was some kind of trickle down effect in terms of economic, educational or social standing. However, the inequality gives the upper classes almost exclusive access to positions and offices which results in continued marginalisation.

Secondly, reservations arrange the inequalities in a way that benefits the least advantaged. The lower classes that have been marginalised due to historical discrimination are given a preferential treatment in order to create a level playing field. Although reservation doesn't remove the actual inequalities, it rearranges them to afford a fair equality of opportunity to the lower sections.

Another fundamental element of Rawlsian theory is the 'Veil of Ignorance', which can be used to verify whether a society is just or not. While making a decision regarding the principles of justice the parties must be behind a Veil of Ignorance. They are unaware of facts like their position or status in society, or what talents and abilities will be endowed upon them. The idea behind this principle is that since a person is ignorant of whether he belongs to the aristocracy or commonality, there is no chance for him to choose a notion of justice that will work to his specific advantage and hence, the idea of justice chosen in such a situation is truly fair and just for the entire society.⁴³

Hence, the question that arises is whether a system of reservation will be selected by a person behind this imaginary Veil. If he selects a society without reservation, as a high caste he has no special benefits. But as a low caste he will be at a great disadvantage. On the other hand, in a society providing reservation, as a high caste he does not suffer any substantial loss, but as a low caste he stands to benefit a great deal as compared to without reservation. Through this particular hypothesis, it seems certain that the person behind the Veil will select a social system that allows for reservation.⁴⁴ This question can be posed from another angle - will a person be more likely to prefer birth as a Brahmin than a Dalit in a society with reservations or without reservation? His preference for a higher caste would be higher in a society without reservation because as a Dalit he would be under severe handicaps in such a system.

Theoretically analysing the concept of reservation from the Rawlsian perspective it seems to be on a firm ground and its working in Indian society would ensure fairness, equality and justice to the marginalised sections. But in spite of conceptual soundness, why has the Indian reservation policy not been able to achieve the level equality that the framers of the Constitution thought would achieve in 10 years?⁴⁵ The writer finds that one of the primary reasons for the reservation policy being distorted from being a policy

⁴³ RAWLS, *supra* note 7, at 137.

⁴⁴ The 'Veil of Ignorance' has been criticised on the grounds that it is an impossible abstraction. It is not possible for any person to extract himself out of his own social, geographical and historical context which necessarily brings an irremediable bias into all his views on justice and rights. "It is a theoretical attempt to isolate that which cannot be isolated." See MACCORNUCK, *supra* note 22.

⁴⁵ It is quite clear from the debates in the Constituent Assembly that the framers of the Constitution envisioned that the policy of reservation would be nothing more than a transitional policy: "...before ten years have expired from the commencement of the Constitution...there will be not merely no backward classes, socially and educationally backward classes left, but that all classes will come up to a decent normal human level, and also that we shall do away with this stigma of any caste being scheduled." CONSTITUENT ASSEMBLY DEBATES, Vol III 647(1950). According to Article 334, reservation for Scheduled Castes and Scheduled Tribes was to cease 10 years after the coming into force of the Constitution. However, by way of amendments, this figure has been conveniently increased, the last change being in 1989 by the Sixty-Second Amendment. Rajiv Dhavan is of the opinion that preferential treatment was not intended to be a transitional policy. See R. Dhavan, *The Supreme Court as the Problem Solver: The Mandal Controversy* in V.A. PAI PANANDIKER, Ed., *THE POLITICS OF BACKWARDNESS* 273 (1997).

that seeks to promote equality to a policy that preserves social inequalities and hierarchies is the politicisation of caste.⁴⁶

III. Contextualising the Reservation Policy

The fundamental rule in politics for organising and mobilising support among masses is to make full use of the institutions and organisations where the masses are to be found. As Rajni Kothari puts it "*Politics is a competitive enterprise, its purpose is the acquisition of power for the realisation of certain goals, and its process is one of identifying and manipulating existing and emerging allegiances in order to mobilise and consolidate positions.*"⁴⁷ The caste system has clear-cut hierarchies and divisions, giving the political parties ready-made target groups. Therefore, it is not surprising that politicians have found it convenient to organise politics on the basis of the caste structure rather than work to eliminate it. The writer shall briefly examine the development of the relationship between politics and caste which has thrown to the wind the original principles of justice, fairness and equality on which the concept of reservation was based.

Ram Manohar Lohia was one of the first political leaders in independent India to entwine caste into political campaigns in a big way. He took advantage of the grossly unfair land tenure system of Bihar which was the source of generations of exploitation of the landless peasantry.⁴⁸ Lohia's campaign paid off as he made big gains in the State level elections in Bihar in the 1960's.⁴⁹ The situation in South India was no different. Parties like the DMK in Tamil Nadu came to power with the pledge to destroy caste, but ended up strengthening the system with their politics based on *jati* and *varna*.⁵⁰

One of the most significant ways in which the political parties have corrupted the policy of reservation is by freely increasing the quantum of reservations by extending it to more castes because more reservation simply means more votes. Creation of numerous categories like Other Backward Classes, Most Backward Classes, Intermediate Backward Classes, Depressed Backward Classes, not only increased the number of reserved seats, but further fragmented society.⁵¹

The parties in power used Article 338 of the Constitution to set up National Backward Classes Commissions which gave some legitimacy to their actions of increasing the quantum of reservation. The Kaka Kalelkar Commission, constituted in 1953, listed 52% of the country's population as deserving of

⁴⁶ Other reasons include failure to address problems like that of the creamy layer (socially and educationally forward members of the Scheduled Castes and Scheduled Tribes) taking advantage of the reservation policy while the real marginalised persons remain on the margins of society; inclusion of communities that are not really backward into the list of backward communities.

⁴⁷ R. KOTHARI, CASTE IN INDIAN POLITICS 4 (1995).

⁴⁸ Lohia mobilised support of a significantly large section of the population by grouping all the landless peasant castes under the banner of "Backward Castes" and carved out a huge vote bank in rural Bihar for his Socialist Party. See CHOPRA, *supra* note 32, at 17.

⁴⁹ *Id.*

⁵⁰ In the 1967 elections the DMK's electoral campaign harped on destroying cast. However, after coming to power it extensively used the *jati* and *varna* classifications in its welfare programmes. See S. BAYIN, CASTE, SOCIETY AND POLITICS IN INDIA 292 (1999).

⁵¹ B. Dogra, *The Most Backward Classes*, 39(33) MAINSTREAM 25 (2001).

the State's protection on grounds of their low caste or tribal origins.⁵² It sent tremors through the country by recommending 70% reservations in medical and technical colleges and up to 50% reservations in government services.⁵³ The Report was rejected by the central government which deprecated the use of caste as a category to determine backwardness.⁵⁴

The Second Commission, under the Chairmanship of B.P. Mandal⁵⁵ also recommended an increase in the public sector reservations. The Report listed 3743 OBCs, which was 54.4% of the country's population⁵⁶ and recommended 27% quotas for Other Backward Classes, plus an additional 22.5% for Scheduled Castes and Scheduled Tribes.⁵⁷ The Report was branded as unconstitutional, unequal, biased and anti-meritorian, among other things. Rather than a quest for social justice the Commission was a means to garner a larger vote bank for the Janata party. For most, the Mandal controversy was fuelled by the Congress with the sole aim of toppling the Janata government. Whatever the arguments and justifications, the fact remains that the entire Mandal exercise was nothing more than an excellent example of caste politics.

Conclusion

The writer feels that there is a major discord between the concept of reservation based on the principles of justice and fair equality, and the policy of reservation as developed by Indian politics. The concept of reservation, as the writer sees it from the Rawlsian perspective, aims at reducing the historical social inequalities and tries to give every person the same 'equal start' in life. On the other hand, the Indian policy of reservation aims at preserving the inequalities and caste based social hierarchies to ensure that politicians have clear cut vote banks.

Although it may be argued that since caste is a social reality in India, there is nothing wrong in mobilizing the masses on caste lines for political purposes and the controversy of caste politics is only a knee-jerk reaction of the middle class to the rise of politicians like Laloo Prasad Yadav and Mayawati; what needs

⁵² The 1951 census, on the other hand, included about 50 million Scheduled Castes and 25 million tribals, which was only about 20 percent of the nation's population. *Ibid*, at 279.

⁵³ S. MAHESHWARI, *THE MANDAL COMMISSION AND MANDALISATION: A CRITIQUE* 116 (1991).

⁵⁴ The government stated that caste was "...the greatest hindrance in the way of our progress toward an egalitarian society...recognition of specified castes as backward may serve to maintain and perpetuate the existing distinctions on the basis of caste". See S. Murlidharan, *The Politics of Reservation*, 16(24) *FRONTLINE* 34 (1999).

⁵⁵ Mandal was accused of being biased towards the lower classes as he was a staunch follower of Ram Manohar Lohia and a member of the Socialist Party. Even his speeches in Parliament indicate his favouritism: "*The backward classes are un-represented in services, giving them such reservation is the liability of the State. The makers of the Constitution had made this provision as till they were represented in services they would be no full development in the country. It is for this reason that provision was made for reservation under 16(4). Dr. Ram Manohar Lohia had said that in India there should be at least 60 percent reservations for Shudras and backward classes. It is the obligation of the home ministry look after the welfare of the backward classes.*" – Speech in Parliament on 25th April, 1978. See DHAWAN, *supra* note 45, at 30.

⁵⁶ This was despite the fact that the Commission itself admitted that its methodology was not comprehensive enough.

⁵⁷ Report of the Second Backward Classes Commission, Para 12.5, cited from S.S. AHLUWALIA, *MANDAL REPORT X-RAYED* 99 (1990). The Report was branded as unconstitutional, unequal, biased and anti-meritorian, among other things. Rather than a quest for social justice the Commission was a means to garner a larger vote bank for the Janata party. The Mandal controversy at times was also fuelled by the Congress with the sole aim of toppling the Janata government. Whatever the arguments and justifications, the fact remains that the entire Mandal exercise was nothing more than an excellent example of caste politics.

to be seen is where the backward classes stand in the midst of these caste politics. Have they really benefited from the entire process? Although the most populous state in the country has had a Dalit Chief Minister in the form of Mayawati, this is only a vicarious form of empowerment. Over one million Dalits are still forced to work as manual scavengers (*Bhangis* in Gujarat and *Sikaharis* in Tamil Nadu) who clear human faeces and animal carcasses and are segregated from the rest of society.⁵⁸ Although the Bonded Labour System (Abolition Act), 1976 prevents all forms of bonded labour, over 40 million Dalits still survive as bonded labourers.⁵⁹ Despite the reservation for backward classes in the field of education, the drop-out rate for Dalits at the primary level is 49.35% and a shocking 77.65% at the secondary level.⁶⁰ These statistics clearly reveal the failure of the reservation policy.

The next logical question is how can the discord between the concept of affirmative action as justified by the theories of equality and justice and the Indian reservation policy be resolved? The writer suggests two alternatives. The first is replacement of the purely caste based reservation criteria with one that takes into account economic backwardness as well. Although the Supreme Court has rejected the use of an economic criterion in determining backwardness,⁶¹ the final manifestation of social backwardness is poverty. Using caste as the sole determinant will only result in the elites among the backward castes taking advantage of the reservation. The second suggestion, which may be used in conjunction with reservation, is to expand and emphasise other forms of affirmative action like free medical aid, scholarships for education, housing and self employment schemes. This will help eliminate poverty which is one of the immediate effects of backwardness.

Although the Constitution envisaged a time-bound reservation policy,⁶² in the light of the Rawlsian theories of justice and equity, the writer feels that instead of hypocritically extending the time-limit every ten years reservations and other forms of affirmative action should continue as long as social inequality exists. But will inequality be eliminated? That is a difficult question to answer.

⁵⁸ S. Narula & M. Macwan, *Untouchability: The Economic Exclusion of the Dalits in India* (presented at the Seminar on the Economics of Racism, Geneva January, 2004, on file with the NLSIU Library).

⁵⁹ *Id.*

⁶⁰ Narula & Macwan, *supra* note 58

⁶¹ *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

⁶² CONSTITUTION OF INDIA, Article 334.