

Discrimination and Justice: Beyond Affirmative Action

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The theme of this essay is that affirmative action is necessary but cannot be sufficient to resolve problems of discrimination and injustice in society. It begins with the origins of discrimination in historical perspective, and explains how discrimination leads to exclusion, to show that embedded injustice is an outcome of the process. The conception of justice evolved over a long period of time that spanned centuries if not millennia. Yet, it is clear that the quest for social justice, driven by political democracy mostly through affirmative action, essentially surfaced during the second half of the 20th century. This leads into a discussion on the logic, the necessity and the limitations of affirmative action to highlight what else is needed. And a dose of reality is imparted to the story with a tale of three countries, even if the focus is on India. In conclusion, the paper draws some lessons from experience to contemplate the future.

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The object of this essay is to analyse discrimination and justice, in terms of theory and experience, to suggest that affirmative action is necessary but cannot be sufficient in the quest for social justice. The structure of the discussion is as follows. Section 1 considers the origins of discrimination in historical perspective. Section 2 examines how discrimination leads to exclusion, and embedded injustice is an outcome of the process. Section 3 discusses the conception of justice as it has evolved, beginning in ancient India through enlightenment thinkers in Europe, to modern political thought in the contemporary world. Section 4 argues that the quest for social justice, which gathered momentum during the second half of the 20th century, is a relatively recent phenomenon even if discrimination and injustice have a long history. Section 5 analyses the logic, the necessity and the limitations of affirmative action to highlight what else is needed. Section 6 endeavours to impart a dose of reality to the story through a tale of three countries – India, United States (us), and South Africa – even if the focus is on India. Section 7, in conclusion, draws some lessons from experience to contemplate the future.

1 Origins of Discrimination

Let me begin with the origins of discrimination. Societies are characterised by inequalities as a rule. Indeed, social stratification in one form or another is as old as humankind. It would be reasonable to ask a simple question. Was there discrimination at the very start of human social existence? If not, how did it begin? It is plausible to suggest, though impossible to prove, that the origins can be traced to the division of labour: in the household, in the community, in the world of work. It may also have been the outcome of conflict whenever victors subjected the vanquished to subordinate roles and, then, discrimination. The classic example, perhaps, is the discrimination against women embedded in the division of labour in a household. Such gender bias has a wide range of manifestations, particularly in our society where women have no access to potters' wheels or farmers' ploughs, even if, ironically enough, this practice is juxtaposed with the worship of goddesses. People captured in battle, then enslaved, are another example. In sum, the division of labour and the outcomes of conflict shaped relationships given historical contexts or conditions.

The divisions or thresholds that constituted the origins of discrimination were not defined once and for all. There was evolution and there was mutation. The forms of discrimination changed over time and differed across societies. Yet, the essential attributes of discrimination, whether contours or consequences, are similar in their manifestations of inequality and injustice in

societies. It would seem that the divides between the privileged and the underprivileged, the exploiters and the exploited, the victors and the vanquished, or the fundamental divide between inclusion and exclusion, are two sides of the same coin. One cannot exist without the other. In fact, in any society, the inclusion of some necessitates the exclusion of others, if only as a point of reference. The lines that divide people differ across societies and change over time. But if such lines did not exist they would be invented so that they could be drawn.

2 Discrimination and Exclusion

We can now turn to discrimination and exclusion. The term exclusion has become a part of the lexicon of economists in recent years although it has been in the jargon of sociology and the vocabulary of politics for somewhat longer. The word exclusion has multiple dimensions: social, economic, and political. Exclusion is used not simply to describe a situation but also to focus on a process which excludes individuals or groups from communities, livelihoods, and rights, thus depriving them of freedoms that are constitutive of, and instrumental in development, which is a source of well-being for people, ordinary people. The essential point is that stratification is almost inevitable in economies and societies which systematically integrate some and marginalise others, to distribute benefits of economic growth and social progress in ways that include some and exclude others. There is a strange irony in this process, which is captured almost perfectly in an epithet from Joan Robinson, one of my favourite economists, who taught at Cambridge. She once said, "There is only one thing that is worse than being exploited by capitalists, and that is *not* being exploited by capitalists". Joan Robinson was a profoundly original mind but in this she was not. She probably borrowed from Oscar Wilde who once said, "There is only one thing that is worse than being talked about, and that is *not* being talked about". Much the same can be said about markets in societies.¹

Markets exclude people as consumers or buyers if they do not have any incomes, or sufficient incomes, which can be translated into purchasing power. This exclusion is attributable to their lack of income or *entitlements*. Such people are excluded from the consumption of goods and services which are sold in the market. Markets exclude people as producers or sellers if they have neither *assets* nor *capabilities*.² People experience such exclusion if they do not have assets, physical or financial, which can be used to yield an income in the form of rent, interest, or profits. Even those without assets could enter the market as producers or sellers, using their labour, for a wage if they have some capabilities. Such capabilities are acquired through education, training, or experience.

Markets exclude people both as consumers and producers, or as buyers and sellers, if they do not accept, or do not conform to, the values of a market system. The most obvious example of such exclusion is tribal populations or forest communities in market economies. But such exclusion may take other forms. There may be people who are unable or unwilling to sell their capabilities. For instance, a person may be unable or unwilling to charge fees as an astrologer or a musician because of a belief system that such talents cannot and should not be sold.

There is, of course, an interaction between exclusion from the market in the economic sphere and the non-economic dimensions of exclusion in the social, political, and cultural spheres.³ The social manifestations of exclusion can be powerful, for economic exclusion accentuates social exclusion. Economic exclusion from livelihoods often creates or accentuates a political exclusion from rights. Similarly, cultural exclusion such as that of immigrant groups, minority communities or ethnic groups interacts with economic exclusion from the market. Each dimension reinforces the other to produce a vicious circle of cumulative causation. The outcome is embedded discrimination.

This does not mean that exclusion is always bad and inclusion is always good. Coercive inclusion by markets, whether of child labour, tribal populations, or immigrant workers, can be exploitative. The employment of women as wage labour on terms inferior to those of men provides another example. The basic point is that inclusion which is coercive, or on inferior terms, is not desirable. For similar reasons, exclusion is not always bad. To those who do not accept the values of the market system, any voluntary exclusion from market should be perfectly acceptable.

It is no surprise that there is a cumulative causation associated with exclusion, or inclusion, as a process. For those excluded, there is more and more discrimination, which creates vicious circles over time. For those included, there is more and more privilege, which creates virtuous circles over time. Discrimination, then, is embedded in relationships and processes that reinforce and strengthen it over time, which makes it difficult to curb let alone reverse or eliminate. The divides that nurture stratification and foster discrimination differ across space and change over time. Yet, some are common enough everywhere in the world: race, caste, religion, gender, ethnicity. It is worth noting that discrimination and exclusion are closely interwoven but could be different in their origins. Discrimination can be based on a common identity where the society breaks down the identity into a hierarchy. But exclusion, except for gender exclusion which is natural, is created by society through different identities, whether it is based on race, religion, caste or ethnicity. Once introduced, however, exclusion and discrimination reinforce each other in societies.

3 Conceptions of Justice

The stage is set for us to consider conceptions of justice. It might be appropriate to begin with the classical distinction from jurisprudence in ancient India, which is a premodern conceptualisation of justice: *niti* and *nyaya*. In a literal sense, both stand for justice in classical Sanskrit. *Niti* is about what is right in terms of propriety, conduct, and behaviour. *Nyaya* is about what is just, not as an abstraction but as a realised outcome. This conception has a point of reference in ancient India: *Matsyanyaya*, justice in the world of fish, where, in times of drought, the big fish devour the small fish at will. This happens in two sets of conditions, either bad times such as drought or in chaotic times such as anarchy. The latter represents a situation of *arajya* associated with patent violations of human justice as *nyaya*. In terms of this characterisation of justice, Amartya Sen argues that the people who agitated for the abolition of slavery in the 18th and 19th centuries, sought to eliminate intolerable injustice in the sense

of *nyaya* rather than establish perfect justice in the sense of *niti*.⁴ But I would differ from Sen in this interpretation. The reason is that *nyaya* is defined as justice not in the abstract but in a social context.⁵ *Matsyanyaya*, or slavery, may have been contrary to conception of *nyaya* as caricature or intolerable forms of injustice, but inequalities, or less than just situations, which were accepted as norms in society, may have been consistent with the conception of *nyaya*.

Enlightenment thinkers in Europe in the 18th and 19th centuries were encouraged by the political climate of change and the socio-economic transformation of the times. This led to a different modern conception of justice and there were two basic divergent lines of reasoning about justice in the radical intellectual tradition of that period: the contractarian approaches and the comparative approaches.⁶ The contractarian approaches were initiated by Thomas Hobbes. They were developed further by John Locke, Jean-Jacques Rousseau, and Immanuel Kant. The social contract then was an ideal alternative to the chaos that might otherwise characterise a society. The most powerful and elegant exposition of this approach to justice can be found in the work of John Rawls, a leading political philosopher of our times.⁷ Other contemporary theorists, such as Ronald Dworkin and Robert Nozick, have taken a similar route. In terms of the jargon in the trade, Amartya Sen describes this approach as transcendental institutionalism.⁸ But I think this approach can be explained in a simpler manner. It has two essential foundations: that of a just society as an idea, and that of institutions and rules as arrangements that deliver such a just society. The comparative approaches owe their origins to the work of Adam Smith, Jeremy Bentham, Karl Marx, and John Stuart Mill, all of whom were enlightenment theorists concerned with social realisations resulting from actual institutions and behaviour. In my simplification of theories of justice, there are, once again, two essential ideas in this approach. The first seeks to focus on comparisons of situations as more just or less unjust. The second seeks to focus on realisations in terms of outcomes for people, whether they were just, unjust, more just, or less unjust. This realisation-focus is the real point of departure for a number of contemporary theorists including Sen.

4 Quest for Social Justice

From theories of justice let me move to the quest for social justice. What is social justice? In what sense if any is it different from justice? The answer to this question is neither obvious nor clear. It is possible to speculate. It might refer to the distinction between the comparative and the contractarian approaches, to the distinction between justice that is contextualised in society and justice that is conceptualised in abstract principles of jurisprudence. It might also be that social justice is an ideal construct which creates a society, whose very being as it were, ensures rights and opportunities for all people, irrespective of whether the State steps in to provide these rights and opportunities.

Be that as it may, discrimination in society is an obvious form of social injustice. The cognition of this reality goes back a very long time. However, the realisation that social justice is not an automatic outcome – on the contrary it has to be discovered and established – is a more recent phenomenon. In fact, the quest for

social justice which seeks to reduce, if not eliminate, discrimination is essentially a phenomenon that gathered momentum during the second half of the 20th century. It is motivated by a concern which arises from observed reality that society does not provide rights and opportunities for a significant proportion of people who are subjected to discrimination in one form or another. This concern is attributable not so much to a sense of egalitarianism as it is to perceptions of injustice.

What were the factors underlying the quest for social justice? There were many. But I choose to highlight two that probably shaped and drove this quest: institutions and ideologies.

In institutions, I would focus on the nation state and political democracy. The emergence of the nation state was associated with the emergence of nationalism, which led to a slow but steady erosion of multiple identities that developed into a national identity. The spread of political democracy was associated with the idea of egalitarianism, which sought to reduce injustice even if it could not deliver justice and to contest discrimination even if it did not seek equality. More often than not, the quest may have begun with a provision from above. Yet, in some places and at some times, it was pushed by claims from below. In retrospect, it is clear that, taken together, the institutions of nation state and political democracy played a critical role in this quest for social justice. So did ideologies.

In ideologies, I would focus on capitalism and communism. There can be little doubt that capitalism reduced, and sought to eliminate, pre-capitalist forms of discrimination embedded in feudalism, whether serfdom or bonded labour, but created new or different forms of discrimination or exclusion. Successive stages in the evolution of capitalism have been associated with exploitation, progress and dilution. It is possible to think of this sequence in terms of countries or of people. Consider countries in what is now described as the developing world: imperialism led to exploitation, nationalism was followed by some progress, and globalisation meant dilution if not regress. Consider people in industrial societies: early capitalism led to exploitation, which was corrected as political democracy introduced a role for the state in regulating the market, while the advent of social democracy as an ideology strengthened the quest for social justice, but it was followed by the rise of market fundamentalism and international capitalism in the age of globalisation which diluted the same quest.⁹

Socialism or communism set out to reduce, if not eliminate, forms of discrimination that were characteristic of capitalism (capitalists and workers), or persisted in capitalism (men and women). It made some of the transition from capitalism to socialism (from everybody according to their ability and to everybody according to their work), but none of the transition from socialism to communism (from everybody according to their ability and to everybody according to their need). In fact, socialism may have reduced some old forms of discrimination but it also created new forms of privilege and exclusion. This was experienced by citizens and understood by scholars of the erstwhile Soviet Union. It was carried over easily, in different manifestations and in accentuated form, into post-transition Russia. The Cultural Revolution in China did not create, as Mao Zedong had hoped, a new socialist man. Indeed, just a decade later, Deng Xiaoping's modernisations

ushered in what was described as market socialism, which developed some attributes of unbridled capitalism over time. In fact, among the socialist countries with communist governments, Cuba seems to be the solitary exception which eliminated discrimination based not only on gender but also on race, possibly the only society that created equality of opportunity in those domains even if it had failings in most other spheres. In retrospect, it would seem that communism did succeed in bringing about a substantial reduction in gender discrimination by creating equal opportunities. But why it failed elsewhere remains an open question.

5 Affirmative Action

The quest for social justice needs some form of affirmative action. In situations where exclusion takes the form of discrimination against identifiable groups defined or identified by race, caste, religion, gender or ethnicity, social legislation is necessary. But it may not be sufficient, because it is difficult to implement and to enforce a law of equal opportunities wherever discrimination is embedded in history. That leads me into the logic of affirmative action. In situations where discrimination and exclusion has a history, affirmative action, or positive discrimination, in favour of the underprivileged, or the excluded, is necessary as a corrective to compensate for embedded discrimination. The term affirmative action refers to a set of policies and practices that are used to create equal opportunity and maximum diversity. These target, primarily, workplaces and educational institutions while using race, caste, gender, or ethnicity as factors that must be taken into account when employment or admissions decisions are made. The object is to redress perceived disadvantages attributable to overt institutional, or involuntary, discrimination.

But we must recognise that remedial action does not always provide a sustainable solution. Affirmative action is almost always conceived of when it begins life as a transitional remedy that would end once there are equal opportunities for all citizens. In other words, even if affirmative action is both necessary and desirable it cannot continue in perpetuity. Indeed, I believe affirmative action is a success wherever and whenever it makes itself dispensable. But this may not, often does not, happen. The reason is simple. Discrimination is often embedded in beliefs and ideologies. Affirmative action cannot always combat these beliefs or ideologies, let alone change the initial conditions which created discrimination in the past. In the ultimate analysis the economic, social, and political empowerment of the excluded is essential. Affirmative action seeks to provide from above, but this must be transformed into a claim from below. For that to happen, political democracy is an imperative. However, it is necessary but not sufficient. That it is borne out by experience. Consider for example the oldest and largest democracies of the world: the US and India. Yet, there is a strong correlation between the idea of justice and the practice of democracy.

In contemporary political philosophy, democracy is best seen as government by discussion, given the central role of public reasoning supported by freedom of the press and intervention of civil society. There is a critical role in this process for government as a catalyst if not leader, through mediation and intervention, which has to be performed because in the ultimate analysis,

governments are accountable to people. This is obvious in democratic regimes, although even authoritarian regimes governments are ultimately accountable to their people. The idea of government by discussion is essentially about the importance of voice in political democracy.¹⁰ The problem is that democracy while conducive and necessary is not sufficient to actually produce development and deliver social justice.

Development and justice may or may not be provided from above by benevolent governments, but must be claimed from below by people as citizens from governments that are accountable. The empowerment of people then is an integral part of any process of change that leads to social justice, to development. A political democracy even if it is slow provides a sure path for two reasons. It increases political consciousness amongst voters to judge political parties for their performance. At the same time, it increases participation in political processes when it leads to mobilisation on some issues. This highlights the significance of Amartya Sen's conception of development as freedom.¹¹ Expanding freedoms for people at large constitute development but the same expanding freedoms which empower people are instruments that drive the process of change in development. Of course, elites in democracies, or those who rule, are not easily persuaded. Indeed, many governments might have a strong preference for silent people.¹² And, come election time, such governments would, if they could, change the people rather than allow a change in government! It is clear that democracy, while essential, cannot suffice to ensure affirmative action for social justice. And it should be no surprise that the task cannot be performed by governments alone.

There is a fundamental role for society. For people who have been subjected to discrimination, the transition from the creation of opportunities to the realisation of opportunities requires two essentials. First, there must be a social consciousness among those included, that is, the privileged. Second, there must be a rights consciousness amongst those excluded, that is, the discriminated. Yet, there are persistent difficulties and stubborn obstacles. For one, there is resistance on the part of those privileged, those included. Why? The answer is simple. It is about ceding social, economic, and political space which they occupy. This is particularly important in societies where people are poor and opportunities are scarce. There are vested interests on the one hand and there are embedded prejudices on the other. These are both very difficult to fight, let alone remove. What is needed, then, is social consciousness on the part of individuals and collective action on the part of communities. For another, there is resentment on the part of the discriminated, those excluded. People who have been subjected to discrimination in society for long, some times see affirmative action as a process that reinforces notions of exclusion. In their perception, identities are seen as labels, or as symbols of exclusion. In such situations, the struggle against social injustice through affirmative action becomes far more complex and difficult.

6 A Tale of Three Countries

There are three countries in the contemporary world that are characterised by a history of embedded discrimination and social injustice, which have sought to address the problem through affirmative action beginning in the second half of the 20th century:

India, us and South Africa. Their problems are similar in terms of consequences even if they are different in terms of origins.

Surprisingly enough, India was the first to introduce affirmative action soon after independence beginning 1950. The object was to address problems of discrimination and injustice which were embedded in history. For centuries, indeed millenniums, society discriminated against a significant proportion of its indigenous population, on the basis of a social hierarchy created by the *varnashrama dharma* which provided the foundations of a complex caste system. The outcome was social injustice experienced by a significant proportion of the population which is now estimated at about one-fourth the total population.

The us introduced affirmative action beginning with the civil rights legislation in the mid-1960s, and not since the civil war which ended slavery in 1865. The discrimination it sought to address was not embedded in the past. It began life, as an outcome of early colonialism, in the 18th century. The European migrant population began with discrimination against the indigenous people. But it was not long before the native population, the American Indians, was almost decimated. And, even now, the few who remain live in abject poverty in remote reservations with almost no integration into society. The same European migrant population imported labour from Africa, as slaves, to work on plantations. Slavery came to an end in 1865, but the black population continued to experience discrimination and injustice for a century thereafter. This population of African Americans is now estimated at about 10% of the total population.

South Africa was the last to introduce affirmative action among the three countries. It followed liberation in 1994. The discrimination it attempted to redress was not embedded in history. It was an outcome of colonialism, as in the us albeit somewhat different and somewhat later, during the 19th century. A small migrant population of white settlers from Europe practised discrimination against the native African population. However, the indigenous people were not eliminated but were turned into labour for mines and plantations. At the same time, indentured labour, which constituted a new form of slavery, was imported mostly from India to work on mines and plantations. In addition, a small number of people were brought in from India as traders, to create a middle class that did not exist. The black and the brown population were discriminated against by the white population, although there was a hierarchy in this triangular structure of discrimination. The African population is now estimated at more than 80%, while people of Indian origin are about 7%, of the total population. It should be obvious that the nature and scale of the problem is very different, as compared with the other two countries, because more than four-fifths of the population has been subjected to discrimination for at least 150 years.

What can we learn from the experience of affirmative action in these three countries? It is only natural that my focus is on India. But I would also like to consider, even if briefly, the us and South Africa as points of reference if not comparison.

India

Embedded discrimination and social injustice provided the rationale for affirmative action in independent India. The Republic

of India introduced it as part of the Constitution that was adopted in 1950. It is worth noting that B R Ambedkar played a lead role, as an architect and an author, in drawing up that Constitution.¹³ In considering the Indian experience, it is necessary to explain the logic of the model, recognise the successes, analyse the failures, and note the dilemmas that persist.

The model is simple enough. Its conception and design were based on two essential attributes. The first was *affirmative action* in favour of scheduled castes (scs) and scheduled tribes (sts), as discrimination against these social groups was embedded in history, so that caste was the defining basis. The second was *proportional reservation*, quotas roughly in conformity with their proportion in the total population, which was 15% for scs and 7.5% for sts at that time, in government employment and in higher education. These reservations were introduced when the Constitution was adopted, in 1950. The same reservations were renewed from time to time, most recently, in 2010. Such reservations were extended to Other Backward Classes (obcs), in 1991 for employment in the government sector, and in 2006 for places in higher education. The proportion in both was specified as 27.5% of the total, which was the estimated share of obcs in the total population. There is a draft legislation, pending consideration for quite some time, which proposes that 33% of seats in Parliament and in state legislatures be reserved for women. Such reservation for women was, in fact, introduced in panchayats in 1993. It is worth noting that affirmative action in each of these spheres, in the form of proportional reservations, is a legal right under the Constitution.¹⁴ Therefore, in India, affirmative action is a matter of right.¹⁵

Given the legacy of embedded discrimination, the experience of the past 60 years suggests that affirmative action did succeed, even if the success was modest. It would seem, at least prima facie, that the objectives of reservations have been met insofar as the quotas have been filled. There is proportional representation scs and sts in state legislatures and in Parliament, the Lok Sabha, just as there is proportional reservation for dalits and tribals in employment in the government, and in the public sector, particularly at lower levels. Clearly, there is an inclusion for some, and there can be little doubt that the situation would have been worse, distinctly worse, without such affirmative action. Success therefore lies in the counterfactual. But that has another dimension. In my view, outcomes could and should have been better.

At the same time, it is clear that there were failures. Outcomes of reservations in higher education were not quite as good as in government employment. The situation would have been much worse without affirmative action but could have been far better if such intervention had been more effective and purposive. Even after six decades of reservations, the quotas for scheduled castes (scs) and scheduled tribes (sts) in higher education remain underfulfilled by large margins. The stipulated quotas are simply not met, either because a sufficient number do not make the threshold in terms of a much reduced minimum, or because admission processes circumvent the stipulation by stealth yet design. The dropout rates are high, while the completion rates are low, among students from scs and sts who do obtain admission through reservations in higher education. The reason is clear. Their school education has not been good enough to prepare them for higher education. And

most higher education institutions, but for a few exceptions, do not make any serious attempt at remedial teaching. There are some exceptions as a few institutions make the effort, often supported by committed individuals. But most such students, who come into the higher education system through reservations, are first generation learners and are not at par with the average student who enters the world of work. Yet, reservations exist only at the point of entry. However, creating a hierarchy of reservations, at every level, is no solution. It could turn out to be worse than the problem, if performance is substandard. What is more, it does not address the real issue. In fact, it would be no exaggeration to state that the benefits of reservations have accrued mostly to the better off, the more educated, amongst dalits and tribals. Those included through affirmative action in the first instance are, in a sense, co-opted into the system. Thereafter, privilege is reproduced in the form of pre-emptive access for the next generation, as also the next, which continues in perpetuity. The outcome is that a small subset of people from groups that were subjected to discrimination have privileged access through affirmative action, whereas most people from the same groups are left out, marginalised or excluded. We have simply created what the Supreme Court describes as a “creamy-layer”. But exclusion persists for a large number, who constitute a substantial proportion of those for whom affirmative action is needed and of those for whom affirmative action was introduced in the first place.¹⁶

It is no surprise that dilemmas persist. There is patronage for those included rather than equal opportunities for all. There is co-option of those included rather than an empowerment – economic, social or political – of all people who are subjected to discrimination and injustice. There is exclusion on a massive scale. More than 60 years after affirmative action was introduced, an overwhelmingly large proportion of dalits and tribals remain excluded from higher education and from government employment because they have little, if any, access to social opportunities, most of which come from school education. It would seem that the real failures, as also the persistent dilemmas, are attributable to the limited spread of education in society, which is the only sustainable means of providing social opportunities for ordinary people, particularly those excluded on account of embedded discrimination. Such exclusion begins with school education and cannot ever end for those denied access because there is a path dependence in the process. It needs to be said that this exclusion is not based on caste alone. It is based on gender, religion, location and, most important perhaps, income. Hence, there cannot be any caste-based solution to the problem of economic inequality.¹⁷ What is more, addressing the problem of disparities between groups cannot resolve the problem of inequality among individuals in economy and society.¹⁸ This compounds difficulties for affirmative action in higher education, where the experience has been mixed if not disappointing, possibly not at par with outcomes of affirmative action elsewhere in society.

United States

It is interesting to consider the us as a point of reference for a brief comparison. The origins of the consciousness about social justice can be traced to the end of the Civil War in 1865. The

Thirteenth Amendment to the Constitution made slavery illegal. And the Civil Rights Act of 1866 guaranteed every citizen the same right to make and to enforce contracts. But the real quest for social justice in the us began almost 100 years later.¹⁹ The Civil Rights Movement, in the early 1960s, strongly protested against discrimination and segregation of African Americans in the southern us because it was seen as unjust, unacceptable and intolerable. The efforts and the struggle of this movement ended segregation through legal change. The Fourteenth Amendment to the Constitution guaranteed equal protection under the law. The Civil Rights Act of 1964 forbade racial discrimination in public accommodations and stipulated that there was to be no discrimination on the basis of race and sex in employment. The Fifteenth Amendment to the Constitution followed soon thereafter, as the Voting Rights Act of 1965 forbid racial discrimination in access to voting.

Interestingly enough, the us began affirmative action almost in the same mode as India. But it was not long before reverse discrimination surfaced as a problem. The famous example is the Alan Bakke case of 1978.²⁰ The Supreme Court of the us outlawed inflexible quota systems in all affirmative action programmes but upheld the legality of affirmative action. Strict quotas no longer exist. Discretionary diversity policies are present. Equality of opportunity laws are in force. In a more recent case in 2003, the Supreme Court upheld the University of Michigan Law School admissions policy, ruling that race can be one of the factors considered by colleges when selecting their students if it improves diversity. It is clear that affirmative action in the us is a matter of policy, which provides a sharp contrast with India where it is a matter of right.²¹

It would seem that, for almost a century after slavery was outlawed in 1865, progress on redressing discrimination in the us was little, just as it was slow, but it gathered momentum in the early 1960s after the success of the Civil Rights Movement. In the 50 years since then, there are some clearly discernible successes. The idea of equal opportunities, which was created in law to start with, slowly turned into some social consciousness in the sphere of higher education and in the world of work. The attitudes of elites to social mobility, of those discriminated against in the past, changed from hostile to permissive without becoming enthusiastic. Most important, perhaps, the sanctity of glass ceilings eroded slowly over time in politics, in corporates, in professions, in academia, and in media. Of course, there are still not enough African Americans, or women, in leadership positions in any sphere, as significant asymmetries persist. Yet, the election of President Barack Obama in 2008 represents the shattering of one such glass ceiling.

It would mean too much of a digression to enter into a discussion on the factors underlying progress in the us. Even so, it is worth noting some factors that could have been important in the process of change. The legal framework and the legal institutions made a significant contribution. The common schooling system, which created equality of opportunity in school education, made an enormous difference. The spread of education in society and levels of income in the economy were supportive of, rather than resistant to, the associated social change. And the task was more

feasible than elsewhere, as only 10% of the total population had been the subject of discrimination.

South Africa

South Africa is a very different story. The apartheid regime institutionalised discrimination. It was characterised by extreme repression embodied in a division of labour that locked the African population into poverty. The vicious circle of cumulative causation stretched beyond income poverty and living conditions. There was little in terms of access to education and healthcare. For large numbers of black people, the reality came close to disguised slavery. Given this context, where more than 80% of the population was subjected to acute discrimination, affirmative action was bound to be difficult and challenging. In theory, the process began in the late 1970s, with some loosening of the apartheid regime, when there was a small attempt at providing equal opportunities in terms of equal protection in the law for all employees. As the liberation struggle gathered momentum and the regime came under increasing pressure from outside, black advancement of sorts was introduced during the late 1980s, as non-white residents obtained legitimate status, mixed marriages were legalised, white educational institutions began to accept non-white students. But most of this was symbolic. Little of it was substantive. There was no arrangement for sharing political power.

In effect, affirmative action started after liberation when the African National Congress (ANC) captured political power. There were two key principles enunciated by the newly elected government: disadvantaged groups will see improvements in their quality of life, and past discrimination must be redressed. Hence, the social focus of the legislative effort in the Economic Equity Act of 1994 was on the black African population. The Employment Equity Act of 1998 went further. It extended beyond the government and stipulated that private sector firms must make their workforce demographically more representative: 75% black and 50% female. In addition, under the doctrine of "Black Economic Empowerment", white-owned firms are urged to transfer portions of their equity to black people, without which such firms will not be eligible for government contracts. Government employment, of course, is based on strict race and gender quotas. Since then, there has been some progress. But this progress is modest. Contemporary South Africa is sometimes described as a cappuccino society, which is mostly black at the bottom and has a thin layer of white at the top interspersed with a sprinkling of chocolate. It is obvious that affirmative action is necessary but cannot be sufficient. The time has come for the ANC to move from the phase of reconciliation to a period of social change. The real answer to past discrimination and social injustice in South Africa lies in education and land, because a very large proportion of the African people still do not have access to education and those who live in the rural sector have almost no rights in the land.

7 Conclusions

In conclusion, rather than sum up, it would be appropriate to reflect on the future. In doing so, I would like to start with some priors. This is followed by an attempt to outline some contours of the journey and some essentials about the destination.

There are three critical propositions that are priors. First, we must learn from the experience of the past 60 years. What went wrong and why? It would serve no purpose to wish away the problem like an ostrich that hides its head in the sand. Second, we must evolve a longer-term perspective about our time horizon for what we set out to do. It cannot be more of the same in perpetuity. Third, we need to recognise that words cannot be a substitute for substance. The time has come to shift from palliatives and correctives, often the soft option, to effective action and sustainable solutions.

The journey to a less unjust, or a more just, society in India, must follow some basic contours. First, equal opportunities in school education are an imperative. We know that access is unequal, completion rates are uneven, and dropouts are asymmetrical. The only way to address this issue in the long term is to provide access and create equal opportunities at school. Second, it is necessary to recognise that discrimination, hence exclusion, is multidimensional. We cannot turn a blind eye to that reality. In India, discrimination is not only about caste, which is confined to the Hindu population. It is just as much about religion, about gender, about ethnicity, and, ultimately, about income. Hence, there is a need to construct some composite index of deprivation, for which income could be a proxy, but only a proxy. Third, it is essential to accept the idea that affirmative action must be limited to first generation learners or first time entrants. And, even with this correction, reservations cannot suffice. The time has come for an Equal Opportunities Commission to ensure implementation and to adjudicate conflicting claims. Last, but not least, we need to think of a world beyond affirmative action. Whatever we do must unite rather than divide people in the quest for social justice. Therefore, policies that seek to address embedded discrimination must integrate rather than separate people in society. After all, we are a society plagued by so many divides that our quest for inclusion or social justice should not accentuate those divides. This is not an illusion. It is real, for it is about ceding economic, social, and political space. And, in societies where opportunities are scarce, there is bound to be resistance. It would be easier if we create more opportunities. School education and higher education provide the obvious examples.

In thinking about the destination, some reality checks are both necessary and desirable. First, equality is an ideal. It is an abstraction or a construct that exists in our mind. Second, justice is a Utopia, which is much like perfection of a just society in the contractarian approaches. The essential objectives that any humane society can aspire to are less abstract and more concrete: progressively reduce and eliminate discrimination, progressively reduce and eliminate social injustice. It is possible to make societies less unjust, or more just, by providing capabilities, opportunities, and rights to people who are subjected to discrimination and injustice. But we would delude ourselves if we believed, even for a moment, that we will create egalitarian let alone equal societies. Inequality will reproduce itself in society. Even so, a better world is possible if social injustice can be progressively reduced and ultimately eliminated. For that, equal opportunity is an imperative, so that every person has access to economic and social opportunities for a better life.

NOTES

- 1 For a more detailed discussion on markets and exclusion, see Nayyar (2003).
- 2 I use the word *capabilities* to characterise the mix of natural talents, skills acquired through training, learning from experience and abilities or expertise based on education, embodied in a person, that enable him or her to use these (capabilities as a producer or worker) for which there is not only a price but also a demand in the market. It follows that even persons with capabilities may be excluded from employment if there is no demand for their capabilities in the market. It is essential to note that the same word, *capabilities*, has been used in a very different sense by Amartya Sen, who argues that the well-being of a person depends on what the person succeeds in *doing* with the commodities (and their characteristics) at his command. For example: food can provide nutrition to a healthy person but not to a person with a parasitic disease; or, a bicycle can provide transportation to an able-bodied person but not to a disabled person. Thus, for Sen (1985), *capabilities* characterise the combination of functionings a person can achieve, given his personal features (conversion of characteristics into functionings) and his command over commodities (*entitlements*).
- 3 This interaction is considered, further, in Nayyar (2003). See also, Nayyar (1998).
- 4 Sen (2009).
- 5 Consider the example of India, where the concepts of *niti* and *nyaya* originated. The social context was characterised by distinctions based on *varna* and *jati*, in which there was a hierarchy, with the *brahmana* at the top and the *shudra* at the bottom. These social norms were embedded in the conception and understanding of *nyaya*.
- 6 For a detailed discussion on theories of justice, as also on different approaches to justice, see Sen (2009).
- 7 Rawls (1971). See also, Rawls (2001).
- 8 Sen (2009). See also, Dworkin (2000).
- 9 In his seminal book, Karl Polanyi (1944) analysed what he characterised as “The Great Transformation” in Europe in the 19th and 20th centuries. In doing so, he described a double-movement: the first from a pre-capitalist system to the market-driven industrialisation in the 19th century; the second (which he termed the “Great Transformation”) from the predominance of the market model to a more inclusive world in which the State played a corrective, regulatory, role. This transformation which began in the early 20th century was complete by the mid-20th century. But it did not last that long. There was a resurgence of the market model in the late 1970s. Hence, in the early 21st century, before the financial crisis surfaced in late 2008 and led to the Great Recession, the situation in developing countries was similar to that in pre-transformation Europe, while the situation in industrialised countries was such that the creation of equal opportunities in the quest for social justice was almost forgotten.
- 10 This idea is set out with remarkable clarity by Nelson Mandela in his autobiography where he describes how impressed and influenced he was as a young boy by seeing the democratic nature of the proceedings of local meetings that were held in the Regent’s house in the village of Mqhekezweni: “Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance amongst the speakers, but everyone was heard – chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer, the foundation of self-government that all men were free to voice their opinions and equal in their value as citizens” (Mandela 1994: 21).
- 11 For a lucid exposition of the idea, see Sen (1999).
- 12 It is ironic that former Prime Minister Clement Attlee, who played a leading role in the creation of a welfare state in Britain and was deeply committed to the idea of social justice, made the following statement in a speech at the Oxford Union, in June 1957: “Democracy means government by discussion, but it is only effective if you can stop people talking” (Sen 2009: 332). This Attlee epithet, even if said in jest, captures the sentiments of the many governments besieged by protests from citizens.
- 13 Ambedkar wrote at length about these issues. For some of his essential writings on the subject, see Ambedkar (2004).
- 14 Article 330 and Article 332 of the Constitution of India, which provide for reservations in the Lok Sabha and the state legislatures, respectively, are clearly mandatory provisions that create a legal right.
- 15 This is widely believed and accepted. But it could be a subject of debate in a legal sense. Article 16, which sets out fundamental rights, is an enabling provision, while Article 335, which provides for the State to introduce reservations as a matter of policy, is somewhat ambiguous in its mix of what is mandatory and what is enabling.
- 16 For a lucid and perceptive discussion on this issue, see Teltumbde (2009). He argues that reservations have created more inequality within castes which are meant to be beneficiaries than there may have been between them and other castes. Indeed, he suggests that the entire dalit population be divided into two categories of families: those that have availed of reservations and those that have not benefited from reservations so far. On this basis, he suggests a simple solution to the problem of reproduced privilege. The latter group who have not derived any benefit from affirmative action should have prioritised access to reservations, whereas families that have had access to reservations earlier would be eligible only if some places remain thereafter.
- 17 See Teltumbde (2009).
- 18 For a discussion on this issue, see Beteille (2003).
- 19 President John Kennedy first used the term *affirmative action* in 1961 in his Executive Order 10925, which stated that federal contractors must “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, colour or national origin. In 1967, President Lyndon Johnson extended protection of the affirmative action requirements to women.
- 20 Alan Bakke, a white male, had been rejected as an applicant for admission two years in a row by the medical school at the University of California, Davis, that had accepted less qualified black applicants, as the school had a separate admissions policy for minorities and reserved 16 out of 100 places for minority students. For a lucid discussion on reverse discrimination, see Dworkin (1985). In his analysis, Dworkin makes a distinction between the “right to treatment as an equal”, which is primary, and the “right to equal treatment”, which is secondary. In terms of this analysis, Alan Bakke was denied his right to treatment as an equal.
- 21 For a lucid analysis of the distinction between equality as a right and equality as a policy, see Beteille (1987).

REFERENCES

- Ambedkar, B R (2004): *Essential Writings of Ambedkar*, edited by Valerian Rodrigues (Delhi: Oxford University Press).
- Beteille, Andre (1987): “Equality as a Right and as a Policy”, *LSE Quarterly*, Vol 1, No 1, March, pp 75-98.
- (2003): *Equality and Universality* (Delhi: Oxford University Press).
- Dworkin, Ronald (1985): *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press).
- (2000): *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Massachusetts: Harvard University Press).
- Mandela, Nelson (1994): *Long Walk to Freedom* (Boston and London: Little, Brown & Co).
- Nayyar, Deepak (1998): “Economic Development and Political Democracy: Interaction of Economics and Politics in Independent India”, *Economic & Political Weekly*, 5 December, pp 3121-31.
- (2003): “The Political Economy of Exclusion and Inclusion: Democracy, Markets and People” in Amitava Krishna Dutt and Jaime Ros (ed.), *Development Economics and Structuralist Macroeconomics* (Cheltenham: Edward Elgar).
- Polanyi, Karl (1944): *The Great Transformation: The Political and Economic Origins of Our Times* (Boston: Beacon Press).
- Rawls, John (1971): *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press).
- (2001): *Justice as Fairness: A Restatement* (New York: Columbia University Press).
- Sen, Amartya (1985): *Commodities and Capabilities* (Amsterdam: North-Holland).
- (1999): *Development as Freedom* (New York: Alfred E Knopf).
- (2009): *The Idea of Justice* (London: Allen Lane).
- Teltumbde, Anand (2009): “Reservations within Reservations: A Solution”, *Economic & Political Weekly*, 10 October, pp 16-18.

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