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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **RAWLS' VEIL OF IGNORANCE AND AFFIRMATIVE ACTION IN INDIA – A CRITICAL ANALYSIS**

AUTHORED BY - AMISHA SINGH

## **I**

In their quest for creating a more inclusive society, many developed and developing nations have embraced some form of *affirmative action*. Independent India is no anomaly: the desire to attain social justice and equity has fundamentally led to the visualization and implementation of preferential policies, referred to as 'Positive Discrimination' or 'Reservations.' Affirmative Action is viewed as an instrument aimed at securing "socio-economic justice for the vulnerable and downtrodden sections of society"<sup>1</sup> to create a level playing field for the initially disadvantaged groups by bringing them at par with others. Such policies may be categorized into two types, namely, *forward-looking*, or *backward-looking*, wherein the former supports affirmative action on liberal grounds of maximizing social utility, ensuring distributive justice, and curtailing,<sup>2</sup> whereas the latter involves "reparations for past injuries."<sup>3</sup> George Sher argues that India has essentially adopted a "backward-looking approach"<sup>4</sup> to affirmative action. Preferential treatment of certain sections of society has been constitutionally enshrined to indemnify the historical inequalities and injustices that certain groups have experienced due to the oppressive caste system in India. Weisskopf defines preferential treatment as "reserving a certain number of seats or positions, in a desirable institution or occupation, for members of groups that were underrepresented in such positions."<sup>5</sup> Although affirmative action is a widely studied area in sociology and politics, this paper will seek to examine it from a philosophical perspective, by primarily analysing Rawls' theory of justice through the prism of his 'Veil of Ignorance', a thought experiment introduced by him in his work *The Theory of Justice*.

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<sup>1</sup> C Basavaraj, *Reservation under the Constitution of India: Issues and Perspectives*, 51 JILI, 267, (2009).

<sup>2</sup> Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 Mich. L. Rev. 1311 (1999).

<sup>3</sup> See, George Sher's articles "Groups and Justice," *Ethics* 87 (1977): 174–81, and "Diversity," *Philosophy & Public Affairs* 28 (1999): 85–104, respectively.

<sup>4</sup> *Ibid.*

<sup>5</sup> T.E. Weisskopf, *AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (Routledge, 2004).

This essay attempts to analyse affirmative action policies from behind the veil of ignorance and briefly delve into the possible application of the same in the Indian context. It is divided into four parts: the first provides an introduction to the topic; the second elaborates on John Rawls' Theory of Justice, his Veil of Ignorance thought-experiment and the evolution of the Rawlsian Affirmative Action theories; the third addresses the critiques propounded by philosophers against the Rawlsian theory of justice and possible counters to these critiques in support of Rawls; the final section will address the implications of applying the veil of ignorance and deciding affirmative action policies in India, along with the conclusion.

## II

John Rawls has come to be recognized as a leading legal and political philosopher and theorist of the 20<sup>th</sup> century and has been accredited for the “rebirth of normative political philosophy”<sup>6</sup> after the publication of his seminal 1971 work *A Theory of Justice*. Justice can be understood through a plethora of different lenses but Rawls chose to explore the concept of social justice from the prism of “*justice as fairness*”, and conceived two principles of justice, which according to him formed the cornerstones of any just society.<sup>7</sup> The two principles are namely the *equality* principle and the *difference* principle;<sup>8</sup> the former emphasizes the importance of access to equal basic liberties and political institutions, such that an individual's liberties work in tandem with those of others in society without infringing upon them. The *difference principle* addresses socioeconomic inequalities by taking into consideration the social and economic institutions of a society. Such inequalities must satisfy two conditions, *firstly*, offices and positions should be open to all by ensuring “fair equality of opportunity”<sup>9</sup> and *secondly*, the least-advantaged sections of society should receive the greatest benefit from such inequalities. The objective behind enunciating the *difference principle* was to address the social reality of inequality in society and thus, favoured maximizing the improvement of the least-advantaged sections.”<sup>10</sup> Rawls gave chronological priority to these principles by making the first principle of basic liberties sacrosanct, similarly giving precedence to the *fair equality of*

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<sup>6</sup> Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 11 (Oxford, 1990).

<sup>7</sup> John Rawls, A THEORY OF JUSTICE (2<sup>nd</sup> ed., Belknap Press: An Imprint of Harvard University Press, 1999).

<sup>8</sup> Ibid.

<sup>9</sup> John Rawls, A THEORY OF JUSTICE (2<sup>nd</sup> ed., Belknap Press: An Imprint of Harvard University Press, 1999).

<sup>10</sup> Constitutional Rights Foundation, *BRIA 23 3c Justice as Fairness: John Rawls and His Theory of Justice*, CRF USA (2007), <https://www.crf-usa.org/bill-of-rights-in-action/bria-23-3-c-justice-as-fairness-john-rawls-and-his-theory-of-justice>.



*opportunity* over the *difference principle*.<sup>11</sup> Nevertheless, he iterated the importance of ensuring the actualization of both principles for any society to be regarded as legitimately just. Rawls' reasoning in favour of these fundamental principles was that rational individuals with no prerequisite knowledge about their society and individual circumstances would employ such criteria in envisioning a just society. Rawls was primarily concerned with the *basic institutions* in society since he believed that if the bedrock of society did not function fairly, social justice could never be achieved.<sup>12</sup>

A revivalist contractarian, Rawls “devised a hypothetical version of the social contract”, which was originally propounded by philosophers such as Rousseau and John Locke.<sup>13</sup> Contemporarily this has come to be known as the Rawlsian ‘thought experiment’ but Rawls himself referred to it as the Original Position, a special set of circumstances that are envisaged to collectively decide just principles for society, through a fair procedure.<sup>14</sup> To ensure that “specific contingencies” do not influence individuals in the ‘original position’ to “exploit social and natural circumstances to their advantage”, Rawls introduces the ‘Veil of Ignorance’.<sup>15</sup> Parties behind this veil are unaware of their demographic identity, their conception of good, their psychological propensities, and societal particulars but what is known to them are the circumstances of justice and general information, especially concerning the working of institutions and economic models.<sup>16</sup> Rawls posits that there will always be unanimous agreement about the principles since the differences between groups remain unknown and all actors are rational, mutually disinterested, and placed analogously behind the ‘veil of ignorance’.<sup>17</sup> The veil serves as a medium of ensuring that parties do not face unfair advantages or disadvantages, the result of natural distributions or social contingencies, once the principles agreed upon behind the veil are actualized. Rawls asserted that the same principles will be chosen behind the veil irrespective of who or when the experiment is construed since the situation would be such that “everyone is equally rational and similarly situated and would thus be convinced by the same arguments”.<sup>18</sup> The underlying argument here is that parties, being completely unaware of their position and status in society, will choose principles that are not only just but ones that work for the

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<sup>11</sup> *Supra*, note 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra*, note 7.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

benefit of all others, especially the least-advantaged sections, who may thereby be awarded special privileges to achieve the true essence of equality and social justice.

Affirmative action policies have garnered significant moral attention in the academic realm, especially in the west as a consequence of intellectual fervour that was generated about social justice upon the publication of Rawls' writings. While Rawls never directly addressed this in his work, philosophers like Thomas Nagel, Samuel Freeman, Elizabeth Rapaport, Edwin Goff, and Robert Taylor have come to interpret his social justice theory and apply it to this contemporary idea, allowing for the evolution and analysis of a Rawlsian theory of affirmative action. Before analysing the scope of affirmative action in Rawls' theory, it is important to distinguish between 'ideal theory' and 'non-ideal' theory, as expounded by him.<sup>19</sup> The ideal theory essentially is an "account of what kind of society one should aim for" and relies on two primary assumptions; *firstly*, absolute compliance by parties is necessary to meet the demands of justice, and *secondly*, it is assumed that the "natural and historical conditions of the society are largely favourable."<sup>20</sup> Conversely, the non-ideal theory sheds light on the process of transitioning from a non-ideal society to an ideal one by adopting rational and legitimate means.

It can be ascertained from the foregoing conversation that affirmative action policies would find a place in a non-ideal or unjust society, where special initiatives may be required to achieve just and fair conditions. Nagel recalls the emphasis Rawls laid on the necessity of defending the constitutionality of affirmative action in the years post the famous *Bakke* case<sup>21</sup> decision.<sup>22</sup> Rawlsian principles of social justice have become identifiers of unjust societies. Affirmative action policies have conventionally aimed at securing justice for historically, socially, and economically disadvantaged communities in society. Nagel opined that affirmative action, in light of Rawls' theory of justice, would aim to counter "a special form of the failure of fair equality of opportunity".<sup>23</sup> He

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<sup>19</sup> He first mentioned this in his book *A Theory of Justice*. Ibid.

<sup>20</sup> Christopher Thomson, *Ideal and Non-Ideal Theory in Political Philosophy*, Oxford Repository (Aug, 27, 2020), <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1383;jsessionid=E5C784E7B091E9304CF86D3DEF249A67>.

<sup>21</sup> "The Supreme Court in the California v Bakke ruled that a university's use of racial quotas in its admission process was unconstitutional, but a school's use of affirmative action to accept more minority applicants was constitutional in some circumstances." See, Alex McBride, *Regents of University of California v Bakke 1978*, Thirteen, (Dec. 2006), [https://www.thirteen.org/wnet/supremecourt/rights/landmark\\_regents.html](https://www.thirteen.org/wnet/supremecourt/rights/landmark_regents.html).

<sup>22</sup> Thomas Nagel, *John Rawls and Affirmative Action*, Spring JBHE, 82, (2003).

<sup>23</sup> Ibid.

went on to argue that Rawls' theory of justice would allow for the operationalization of affirmative action policies since they would be a step towards the rectification of injustices in a non-ideal situation, thus, creating a positive framework for the eventual establishment of a just society.<sup>24</sup> Samuel Freeman opined that Rawls in his lectures indicated the application of affirmative action policies as "a proper corrective for remedying the present effects of past discrimination"; however, all these measures would be temporary since a just society would not require affirmative action, owing to the fair equality of opportunities and absence of past injustices.<sup>25</sup>

Robert S. Taylor has provided an in-depth analysis of how affirmative action would be addressed in Rawls' theory of justice. He uses a modified version of Nagel's taxonomy of affirmative action measures, consisting of 5 categories that he addresses from Rawls' ideal as well as non-ideal theory situations. The five categories<sup>26</sup> are: "Category 1-Formal Equality of opportunity<sup>27</sup>, Category 2-Aggressive Formal Equality of Opportunity,<sup>28</sup> Category 3-Compensating Support,<sup>29</sup> Category 4-Soft Quotas,<sup>30</sup> and Category 5-Hard Quotas."<sup>31</sup> Taylor argues that Soft Quotas and Hard Quotas, which are the most commonly used affirmative action measures, are inconsistent in Rawls' non-ideal situation since they go against the Fair Equality of Opportunity Principle. Furthermore, he asserts that Rawls' proceduralism focused on "establishing fair conditions of competition rather than on guaranteeing ostensibly fair outcomes."<sup>32</sup> Taylor's aversion to the application of category 4 and 5 quotas is that it would involve "pursuing a just society by unjust means, which is a corruption of both deontological justice and those who would practice it."<sup>33</sup> Being an optimist, Taylor believed that historical and present disadvantages can be properly addressed by implementing category 1-3 measures, though his opinion has been criticized by other philosophers like Nagel, who strongly

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<sup>24</sup> Ibid.

<sup>25</sup> Samuel Freeman, *RAWLS* 90–91 (London: Routledge, 2007).

<sup>26</sup> Robert S. Taylor, *Rawlsian Affirmative Action*, 119 *Ethics*, 476 (2009).

<sup>27</sup> Such measures require the elimination of any kind of legal barriers on grounds of race, color, sex, etc and the requisite punishment for any kind of discrimination that takes place.

<sup>28</sup> This would involve sensitization and formal training, alongside external monitoring, and enforcement to achieve self-conscious impartiality.

<sup>29</sup> Special programmes which would cater to the disadvantaged sections to enable and foster their growth and empowerment.

<sup>30</sup> This involves compensatory discrimination in favor of disadvantaged groups by providing them "bonus points" in selection indices, without the explicit use of quotas.

<sup>31</sup> Hard quotas are the reservation of proportional shares of seats in education and employment for the underprivileged groups.

<sup>32</sup> *Supra*, note 24.

<sup>33</sup> Ibid.

advocated affirmative action measures of the 4<sup>th</sup> and 5<sup>th</sup> category to bridge the gap between the advantaged and disadvantaged section of society, to actualize the ideal just society that Rawls' had envisioned. Janelle Garcelon offers a contrary view to Taylor, by arguing that the Rawlsian theory of justice and the principle of fair equality of opportunity are both useful tools in identifying where affirmative action is appropriate and the people who should be targeted in such cases.<sup>34</sup> Unlike Taylor, she believes that disadvantaged sections of society are denied the basic right to equal opportunity on account of historical injustices and discrimination. Consequently, to ensure parity with regard to this sacrosanct principle, affirmative action policies may be brought into place to create just conditions and such measures would not challenge the priority of Rawls' two principles of justice since the difference principle would work in tandem with the fair and equal opportunity principle here.<sup>35</sup> Having delved into the different interpretations of Rawlsian affirmative action, the succeeding section will address some prominent criticisms of Rawls' theory of justice, the beautifully formulated Original Position and the Veil of Ignorance.

### III

Although the concept of the 'veil of ignorance' is extremely compelling, there remain certain imperfections. Philosophers have argued that it cannot be presumed that there will always be agreement about the principles of justice behind the 'veil of ignorance'.<sup>36</sup> This is because even though personal interests are eliminated due to the lack of information, there will always remain conflicting views about social priorities concerning distributive principles since parties know the circumstances of justice that prevail. Amartya Sen's example of the three children and the flute and the impossible decision about which child should get the flute is a good case in point to highlight the constant disagreement about social priorities.<sup>37</sup> Even though some basic principles such as having equal rights, freedom, and liberty may be agreed upon, it is impossible to decide other fundamental principles such as distributive justice, without having some knowledge of the kind of society one would be a part of. Moreover, knowledge about the circumstances of justice and the presupposition that all parties are mutually disinterested would divide parties behind the veil, based on differing perspectives of liberty,

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<sup>34</sup> Janelle Garcelona, *Fair Equality of Opportunity: Reconceiving Affirmative Action through a Rawlsian Lens*, Claremont Education (2015), [https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=2038&context=cmc\\_theses](https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=2038&context=cmc_theses).

<sup>35</sup> Ibid.

<sup>36</sup> Amartya Sen among others has argued against the unanimity of decision making behind the veil of ignorance.

<sup>37</sup> Amartya Sen, *What Do We Want from a Theory of Justice?* Jstor (2006), [www.jstor.org/stable/20619936](http://www.jstor.org/stable/20619936).

equality, and utility relating to distributive justice. Rawls' focus on individual interest and the failure to consider the different social priorities of groups, which arise due to the circumstances of justice, lead him to the conclusion that there will always be agreement behind the veil.

Rawls' theory has also been criticized from ideological standpoints. Libertarians have criticized his 'difference principle' for being violative of and infringing upon individual liberty to benefit some sections of society. Robert Nozick<sup>38</sup> has been Rawls' biggest critic since he introduced the 'entitlement theory' to counter Rawls' social and distributive justice principles.<sup>39</sup> He opined that individual rights were supreme and did not believe in the concept of societal and community well-being, in addition to being against the concept of redistribution and distributive justice.<sup>40</sup> Philosophers like Martha C. Nussbaum and Charles W. Mill have critiqued Rawls for his inherently white understanding of issues, a consequence of which was his failure to account for historical injustices that have been prevalent, in addition to side-lining the involvement of disabled individuals in society.<sup>41</sup> Rawls' non-ideal society fails to address historical inequalities and offer necessary remedies. Michael Sandel and Alasdair Macintyre have criticized Rawls' for failing to take into consideration moral doctrines and ideas that are necessary for affirming rights and liberties and in decision-making especially behind the Veil of Ignorance.<sup>42</sup> Sandel opined that individuals' "values and aspirations that defined them as a person, enabling them to determine what justice is" couldn't be divorced from their rationality behind the veil of ignorance.<sup>43</sup> Rawls' Original Position and the Veil of Ignorance may be criticized on multiple grounds, the most pertinent one being the negligible information available to parties behind the veil, making the effective actualization of principles agreed upon under such conditions much harder.

While there may be several criticisms offered against Rawls' theory of justice and his thought experiment, his ideas have provided extremely useful frameworks and tools to understand a subject as nuanced as justice. Unlike many famous philosophers, Rawls proceeded to address others'

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<sup>38</sup> An ardent Libertarian in his ideological philosophy.

<sup>39</sup> Robert Nozick, ANARCHY, STATE AND UTOPIA, (Basic Books, 1974).

<sup>40</sup> Ibid.

<sup>41</sup> Charles W Mill, BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM 205 (Oxford University Press, 2017).

<sup>42</sup> Metaphysics Research Lab, Stanford University *Communitarianism*, The Stanford Encyclopaedia of Philosophy (2020), <https://plato.stanford.edu/entries/communitarianism/>.

<sup>43</sup> Michael Sandel, LIBERALISM AND THE LIMITS OF JUSTICE (Cambridge University Press, 1998).

criticisms in his subsequent works, especially the problem of disagreement behind the veil. Rawls argued that parties behind the veil do not have the bargaining power to alter principles due to restrictions on the information available.<sup>44</sup> A direct counter to Amartya Sen's criticism about disagreement with respect to social priorities is that given the limited information available behind the veil, individuals will abide by the *difference principle* since advocating for the upliftment of the least-advantaged sections of society would ensure parity once the veil is lifted. Game theory rules are at play here and it is beneficial for parties to foster collective well-being rather than applying utility or merit as the criteria for decision-making since one is unaware of what their condition may be once the veil is lifted.

## IV

Affirmative action<sup>45</sup> was incorporated by the Constituent Assembly into the Indian Constitution to address historical injustices against the Scheduled Castes and Tribes and to provide them with the requisite support to ensure equality of opportunity and ensure parity between the privileged and underprivileged groups. Wendy Singer in her 2012 work *Seat at the Table*, written in the Indian context, highlights the “symbolic, instrumental, and systemic function” of reservations; which is increased inclusive participation, the opportunities that disadvantaged groups are provided for the upliftment of their communities, and the “strengthening the plurality of India’s democracy.”<sup>46</sup> While reservations for certain groups are constitutionally enshrined, other groups have secured the same through political mobilization.<sup>47</sup> India has a rich jurisprudence relating to affirmative action but that is beyond the scope of this paper. Instead, this section assesses the effective actualization of the Rawlsian theory of justice in the Indian context and makes a case in favour of affirmative action using his Veil of Ignorance.

A major contention that arises with respect to affirmative action in India is that it is opposed by the

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<sup>44</sup> *Supra*, note 7.

<sup>45</sup> The genesis of AA can be traced to the British times when the State of Mysore and subsequently Bombay and Madras Presidency introduced reservations for non-Brahmins in government employment.

<sup>46</sup> Wendy Singer, *A Seat at the Table: Reservations and Representation in India's Electoral System*, 11 *Election Law Journal*, 202 (2012).

<sup>47</sup> The introduction of reservation for Other Backward Classes took place in 1993 after the Mandal Commission agitation took place, which was subsequently nuanced by the Supreme Court in the 1993 *Indira Sawhney Judgment* that introduced the application of “creamy layer” for the OBC reservation.

general category, who have argued that it infringes on their right to equality, perpetuates reverse discrimination, and nullifies the principle of meritocracy. These criticisms are similar to those offered by philosophers against Rawls' theory making it a good case in point to highlight its significance in the Indian context. Rawls' first principle of justice aimed at securing everyone's basic liberties, while the first part of the second principle ensured fair equality of opportunity. Both these principles are enshrined in the Indian Constitution and thereby guaranteed to the citizens.<sup>48</sup> Similarly, the Constitution also has provisions that allow positive discrimination in favour of disadvantaged groups to foster substantive equality in a deeply unequal society.<sup>49</sup> This is in tandem with Rawls' *difference principle*. Contentions surrounding affirmative action policies in India can be resolved to a great extent by employing Rawls's Veil of Ignorance and situating citizens in the Original Position where they are unaware of whether they will be born an SC, ST, OBC, a woman or as an economically weaker section member.<sup>50</sup> As a consequence of the same, citizens would arrive at a consensus wherein special measures would be agreed upon for the upliftment of these groups to ensure substantive equality in the long run. If someone behind the veil is unaware of which category they will be born in, the obvious and rational step would be to decide on principles that ensure justice to all, without ever significantly violating the other principles of justice, especially once the potential of the affirmative action measures is realized. Reservations cannot be a permanent solution for redressing historical wrongs but should act as a stepping stone towards achieving an ideal just society, as propounded by Rawls.

Notwithstanding its criticism, John Rawls's social justice theory is extremely compelling and provides an insightful framework to understand and rectify unjust conditions that prevail in modern societies. The two principles of justice can be employed as the bedrock for expounding further theories of justice and distributive principles in politics and economics. The Veil of Ignorance is Rawls' most ingenious invention since it can be utilized across disciplines to test hypotheses and arrive at just and fair conclusions without being biased by any circumstantial information. It provides

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<sup>48</sup> Indian Const. Art. 14.; Indian Const. Art.15.; Indian Const. Art 16.; Indian Const. Art 17.

<sup>49</sup> Article 14 provides the Right to Equality and equal protection from the law, Article 15 provides a right against discrimination, while Article 16 provides the right to equality of opportunity. Each of these rights accommodated positive discrimination in favor of the disadvantaged groups in society.

<sup>50</sup> Reservation in India covers four major categories in the Union Government and varies across States. Principally, the preferred groups are Scheduled Castes, Scheduled Tribes, Other Backward Classes, Economically Weaker Section of general category and in some States, women.

a useful lens to test the validity of affirmative action and bears great salience in the Indian context.

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