On the Road to Racial Equality - Plessy v Ferguson, US, vol. 163, p. 537 (SC 1896)

Apurwa Baral* and Mamta Siwakoti **

It has been a hard fought road to racial equality, a journey worth retelling. This paper sets out to examine the Plessy v Ferguson case that so infamously birthed the separate but equal doctrine. The paper also sets out to explore the Brown v Board of education decision half a decade later that overturned the doctrine. Along the way, this research draws parallels between rights guaranteed today that were once considered equivalent to finding an oasis in a desert. In the Plessy v Ferguson decision the court interpreted the 14th amendment in such a way that it claimed equality could be achieved through segregation. It gave rise to the separate but equal Doctrine. It was only in 1954 that the doctrine was overturned, through another Supreme Court ruling. The effort it took, and the ruling it made- the paper examines both these aspects.

Plessy v. Ferguson and Separate but Equal Doctrine

Today *Plessy v. Ferguson*[1] is synonymous with the separate but equal doctrine, which it helped constitutionally validate. *Plessy v. Ferguson*, in all its notoriety, cemented the legacy of racial inequality in the United States when it infamously upheld 7 votes to 1 in the 1890 railroad segregation statute of Louisiana and legitimized state-mandated segregation of the two races in question. Ergo the decision has gone down in history as a serious miscarriage of justice.

Although the case was brought before the court in regards to segregation, interestingly the Plessy case was an outcome of genius manipulation of events on the part of the committee of citizens who persuaded one Homer Plessy, one-eighth black to sit in the compartment of whites. A Policeman was then bribed to arrest Plessy and so began a long and harrowing journey for equal rights.[2] It is bestowed with the badge of infamy for the very narrow interpretation of the 14th amendment of the Constitution of the United States of America which clearly

* Apurwa Baral has graduated law from Kathmandu School of Law, Nepal and is working as an intern in United Nations Regional Centre for Peace and Disarmament in Asia and the Pacific.

** Mamta Siwakoti has graduated law from Kathmandu School of Law, Nepal and is working as a Research Assistant in Kathmandu School of Law, Nepal.

1 *Plessy v Ferguson*, US, vol. 163, p. 537 (SC 1896).

2 'Plessy V. Ferguson: 1896', *Law.jrank.org Official Website* available at http://law.jrank.org/pages/2726/Plessy-v-Ferguson-1896.html, accessed on 18 June 2016.

states:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, and property, without due process of law."[3]

In delivering the majority opinion, Justice Brown distinguished between political equality and segregation, being of the opinion that the 14th amendment protected the former and not the latter.[4] Although grudgingly recognizing certain political rights of the group the ruling refused recognition of economic and social rights through the fourteenth amendment. Coming to the defense of the separate but equal doctrine, the court audaciously faulted the arguments of the plaintiff for claiming that segregation violated the thirteenth, fourteenth and the fifteenth amendment. Justice Brown with his colleagues concluded that "inferiority" was a label chosen by the African-American community itself. In so many words, the decision dusted off the struggle of the blacks for equality by affirming the constitutionality of separate but equal doctrine. The court crudely washed its hands off of the plaguing issue of subordination, strictly limiting itself to reaffirming the existing norms of the time. As Lili Kunfalvi points out in her writing[5], Plessy v Ferguson decision was an easy fall back for a country plagued by the habit of segregation. The effect of the *Plessy* ruling was immediate spawning decisions affirming and reaffirming separation in different sectors of life.

In fact, in 1919 when Japan proposed the inclusion of a clause recognizing racial equality in the League Covenant, it was opposed by the United States who blocked adoption despite the majority in its favor.[6] The country was reluctant in dismantling a system of segregation, to say the least.

Does this mean *Plessy v Ferguson* has nothing to contribute to the African American populations struggle for civil rights?

But it does.

Probably the most quoted phrase from the case itself is one made by Judge Harlan.

Coming from the only dissenting opinion to the ruling, Harlan writes

"Our Constitution is color-blind and neither knows nor tolerates classes

---

3 Ibid.

4 Ibid.

5 Lili Kunfalvi, 'Separate But Equal: Racial Segregation of United States', *Cultural Relations Org Official Website* available at http://culturalrelations.org/Resources/2014/ICRP_Human_Rights_Issues_2014-02.pdf, accessed on 18 June 2016.

6 William A Schabas, *The Universal Declaration of Human Rights*, Cambridge University Press, Cambridge, 2013.

among citizens." Inconsistent with the views of his compatriots Judge Harlan aggressively advocates respect for civil rights and equality before the law for all Citizens.[7] Emphasis added on his use of the word citizen, which entails both the races. Harlan comments that racial equality is impossible without integration.[8] And it still holds true today. CERD today doesn't just impart negative obligation on states to refrain from enacting policies that are discriminatory but also requires them to take affirmative action in reducing disparity. It advocates for integration in all walks of life.[9]

The essence also reverberates in Declaration such as UDHR which require states to refrain from making distinctions of any kind on the basis of race.[10] Both CERD and UDHR in their definition imply the necessity of a de facto equality, one that was denied by the Plessy case.[11] In fact, the importance of achieving de facto equality can be traced through general recommendation 32. The separate but equal doctrine de jure legitimized segregation stance leading to a de facto inequality as well. The outpouring of Jim Crow laws in response to the doctrine further consolidated the fact that when the text read separation was not inequality, the subtext was a consolidation of an unjust system given free reign by such validation.

This leads us to question whether a different, more progressive decision would have been complied with in the post-reconstruction world of 1896, where power players did not see it economically nor socially viable to "grant" these rights unrestrictedly.[12]

Judge Harlan's dissent rang true more than fifty years later when the precedent set in the *Plessy* case was overturned by the rulings in *Brown v Education board*. *Brown v Board* of education which came half a century later defined monumentally the race relations in America. Although the next ten years were virtually stipend, it would be wrong to assume that Brown decision was ineffective. In fact, the Civil rights act that came after was only made possible on the legal ground of *Brown v Board of Education* ruling.[13] Yes, one cannot

7 *Brown v Board of Education of Topeka*, US, vol. 347, p. 483 (SC 1954).

8 Ibid.

9 *International Convention on the Elimination of All Forms of Racial Discrimination*, UNGA Res 2106 (XX), adopted on 21 December 1965, (CERD) art 2.

10 *Universal Declaration of Human Rights*, UNGA Res 217 A (III), adopted on 10 December 1948, (UDHR); Ibid, art 1.

11 Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination', vol. 79, *The American Journal of International Law*, 1985.

12 Michael J. Klarman, 'Brown, Racial Change, and the Civil Rights Movement', vol. 80, *Virginia Law Review*, 1994.

13 Ibid.

discount that racial desegregation had to happen one day owing to changes in the social, political and economic bearings, it is nonetheless important to understand that it didn't have to happen at the time that it did. Both *Plessy v Ferguson* and *Brown v education board* epitomize the judicial trend of its time. An outcome of different social bearings, political thinking their contribution or lack thereof to the Civil rights movement is without parallel, albeit in polar opposite ways. Right before the *Brown* ruling, there were a number of Supreme Court cases that had attempted establishing de facto equality. In *Sipuel v. Board of Regents* of the University of Oklahoma, the Court ruled that Blacks must be admitted to state universities because they provided many more opportunities for advancement than Universities designed for blacks. *Sweatt v. Painter* and *Laurin v. Oklahoma* echoed similar disintegration ruling in Cafeterias of universities. However, they avoided taking stance on the de jure segregation. Interestingly, World War 2 became a precursor to not just the civil rights movement in the national forums of the United States but also in the international arena.

In 1948 the world had just welcomed the Universal Declaration on Human Rights, a document that has since defined Human Rights standard throughout the world. The universal declaration on Human Rights became one of the catalysts, pressing for racial equality. The UDHR began the genesis of an International Human rights system.

One of the principles in its preamble was observance and recognition of inherent dignity as well as equal and inalienable rights of all members of the human family.[14]

Even before the Declaration, a number of international agreements had already graced the international platform, advocating for equality. The Philadelphia declaration was one such document that advocated for equality and freedom in the employment sector.[15] The International Labour Organization brought attention to this declaration during the drafting of the Universal Declaration of human rights.[16] Yet the United States was still struggling with the shadows of equal but separate doctrine fathered more than fifty years ago. The doctrine was most visible in the education sector, where children of African American descent were forced, through state segregation laws, to attend separate schools than their counterparts- the White. But the Jim Crow laws hampered the full realization of said right. If the 'new' document UDHR was to be used as a centerpiece then human rights were 'inherent' and not gifts to be imparted or restricted. As such the separate but equal doctrine held no value. But could the immerging trend in

14 *Universal Declaration of Human Rights* (n 10).

15 International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, adopted at the 86th session, Geneva, June 1988.

16 Schabas (n 6).

international law be emulsified into national legislation so easily?

Alas, not. The declaration was new. Since it was a declaration it was not legally binding. Although a landmark achievement, it hadn't fomented to the degree that it was either mentioned or referenced in the case.

But importantly it should be noted that the rationale behind the adoption of these declarations, until the later 1969 International Convention on the elimination of all forms of racism was discriminatory practices by one towards the other states, the difficulties within the domestic arena were largely bypassed.[17] However, the change was slowly but surely brewing internationally. In 1951 UNESCO in its bid to tackle the great evil of the century- racism released a fifteen pointer document examining the social economic and political aspect of the issue. The race question debunked race theories of inferiority.[18] These developments in international law signalled a wave of ideological readjustment and the United States was also caught up in this movement of change. It was not as though progress had permanently halted. Several northern states had passed fair employment acts as far back as 1951[19] with these states banning segregation in schools. However, The Confederacy war had divided the whole nation into two. Thus, the problem lied in the Jim Crow laws of the south. With considerable autonomy given to states, with its own constitution and judiciary up to the Supreme Court level, the problem was consolidating the south and civil rights without distinction for race, color sex.

The *Brown v Board of Education* case at length discussed the scope of the Fourteenth Amendment of the constitution of the United States of America. The fourteenth amendment not only afforded citizen status to all born in the United States but also provided them equal protection of the law. The plaintiffs who were minors, in this case, contended that schools for Blacks were not equal and could never be made equal.[20]

In the majority opinion delivered, the validity of separate but equal doctrine perpetrated by the *Plessy v Ferguson* decision itself came into question. The ruling recognized that over the years there had been six cases where the separate but equal doctrine was challenged Vis a Vis education. However, in all of these

17 Ibid.

18 Kunfalvi (n 5).

19 Klarman (n 12).

20 There have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged. [n8] In more recent cases, all on the graduate school [p492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629.

cases, the court reserved decision on the question.Coming to the Brown v Education Board, The court was tasked with the matter of examining the doctrine again -

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?

Now, the court could either uphold Human Rights or it could revert back to the narrow interpretation of the 14th Amendment. The answer was a green signal to the brewing civil rights movement. The Court opined that the separate but equal doctrine did not have any place in the education field. Deeming separation to be inherently unequal, the court also concluded that in light of this it was not necessary to delve into its effect on the due process of law. Thus, the decision also implicitly acknowledged that the doctrine obstructed due process of law. Right to education, which is guaranteed by various human rights instruments today[21], is aligned with the *Brown* decision. Interpreting article 13 of ICESCR[22], its treaty monitoring body in the general comment 13 describes education both as human rights in itself and necessary for the realization of other human rights. Adding on, CESCR comments on the purpose of education as ensuring full participation and empowerment of groups that are economically and socially marginalized.

A similar stance was taken by the Brown ruling when it highlighted education as an important aspect in realizing opportunities. The Justices in delivering the ruling did not focus on the nominal equality in schools, but the psychosocial impact the segregation had had on children. As such, the Brown decision was based on research and data far more than case laws and statutes. The strength of the *Brown* decision also comes from its unanimous nature sending out the message that no matter the background, the political affiliations, and the personal mandate everyone stood against the discriminatory practice. It was made more significant by the fact that Judges presiding in the *Brown* case were initially divided in their opinions but were later in agreement regarding the unconstitutionality of the doctrine. The decision called for speedy desegregation, following which five hundred schools entered the process. Although the decision cognized the illegitimacy and immorality of the doctrine, it did so in light of the education sector only. However, it sparked a movement in all spheres of life. Likewise, the case brought to attention to the importance of the judiciary in facilitating change.

---

21 *Universal Declaration of Human Rights* (n 10), art 26; *International Convention on the Elimination of All Forms of Racial Discrimination* (n 8) art 13.

22 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, available at https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d) GeneralCommentNo13Therighttoeducation(article13)(1999).aspx, accessed on 18 May 2016.

Brown became a poster example of a litigation strategy that could undermine the legal foundations of southern segregationist practices.[23] However, this required individuals to transcend racial barriers and be ready for the potential snub they could face. The reaction to the *Brown* decision came in three tiers. There were those who welcomed and rejoiced at the desegregation ruling. And there were those who wanted to bury themselves in their conservative thought. And the third was plain and simple skeptical. But slowly but surely the civil rights movement was gaining momentum. At the time of the *Brown v Board of Education*, a human rights standard against racism or discrimination did not exist. However, the UN charter did, under multiple provisions guarantee freedom from race-based discrimination.[24] If the Brown ruling had reiterated the validity of the separate but equal doctrine, it would have been in contravention to the Charter itself. UDHR had already been adopted at the time but the decision made no reference to these international documents leaving us to speculate whether a reference to these two documents in the decision of *Brown* would have encouraged adherence or raised controversy all the more further.

What started as a legal campaign turned about and took the form of a mass movement by 1955.[25] The stride made in the United States was parallel to the strides made in International Human Rights Law. A short time after the Civil Rights Act was passed in their Home country, the international Community took a huge commitment by adopting the ICERD, which remains one of the most ratified documents amidst the core treaties, a step behind UDHR. In the 1960s The Organization of American States also adopted a human rights instrument[26] which called for respect for all rights of persons, wherein persons was designed to mean all human beings.

Both *Plessy v. Ferguson* and *Brown v Board of education* demonstrate a clear pattern, it showcases the power judiciary wields in decomposing or reiterating any social norm. In the case of the United States, the Judiciary became both the means and an end to achieving human Rights. It became a means since it bolstered the confidence of the community when segregation was outlawed and the end game was ensuring rights and justice.

---

23 Bet Washington, 'Civil Rights Movement - Black History - HISTORY.Com', 2016, *HISTORY.com Official Website* available at http://www.history.com/topics/black-history/civil-rights-movement, accessed on 28 May 2016.

24 *Charter of the United Nations*.

25 BBC, 'KS3 Bitesize History - The Civil Rights Movement In America: Revision, Page 2', 2014*, Bbc Official Website* available at http://www.bbc.co.uk/bitesize/ks3/history/20th_century/civil_rights_movement_america/revision/2/, accessed on 28 May 2016; 'America's Civil Rights Timeline', International Civil Rights Center and Museum, 2016, *Siting Movement Official Website* available at https://www.sitinmovement.org/history/america-civil-rights-timeline.asp, accessed on 18 May 2016.

26 Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.