

Reservation in Private Sector

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Introduction

In a country like India where a person is identified by its caste which tell about his profession, here caste is like a sticker which stick on his birth & remain stick even after death .the history of caste starts after arrival Aryans & as different caste get different occupation like worship for Brahmin, warship for kshatriya ,business for vaishya & to serve all the three varnas has been assigned to lower caste called shudras or named avarnas. As we all know what position of different caste has been in Indian society, sudra has been place below all & treated as polluted they are being restricted on holy places. Worship & other occupation so they have nothing to do & grow them self Political thinker when start making constitution for independent they keep in mind the grief & sorrow of the depressed class and name scheduled castes & scheduled tribes & economically backward class named as backward class or other backward classes, The idea behind special provision for these class was to establish equality of those people who have not represented them self in prestigious places.

Even society has changed due to urbanization or globalization different person from different castes have gone though inter change of occupation but castism has not leave them. So policy or an affirmative action named reservation In education & public employment under article 16 has been made so that the downtrodden people of society can be uplift this was started for 10 yrs & review but even after so many yrs of independence the required result has not been achieved. Yet the state cannot treat the two unequals equally as it would be against the basis of equality i.e, treatment of unequal equally results In inequality how this reservation policy is fruitful can be seen from this surprising report that less than 1.7 percent of the dalits have benefited from it over the last 50 yrs, Reservation has remain most hatred issue not among upper caste but also have remained stigma for the people who are getting reservation

Need for reservation in private sector.

The need for extending reservation to the private sector was mentioned in the political circles, whenever the issue of shrinking employment opportunities for sc/sts in the government service were discussed but it was not seriously debated. the issue got transformed into a demand after the country introduced several structural economic reforms after the acceptance of economic liberalization & globalization process, economic liberalization brought in its wake a shift of emphasis from the public sector to private sector it was decided to purne the size of the public sector by disinvesting the capital not to extend the nationalization process. particularly in the banking sector ,& allowing investor to invest in those areas of economic activity like power generation & distribution which were once reserved exclusively for public sector ,thus the policy of liberalization & privatization reduced the number of employment opportunities for scs/sts .obc in govt ,administration & govt., owned enterprises, (1)

The demand for reservation in private sector is getting increasing momentum in the country these days, with every passing day, various sc & st dalit organizations, including employees. Welfare associations, are now on warpath, they are demanding the govt to maintain social equilibrium, in all public spheres, particularly in the spheres of education and employment .on 19th December 2003, Mr. A B Vajpayee ,the prime minister ,while speaking before the sc & st member of parliament ,said

Emerging demand of private sector

Today an important issue has come up. 'if there are reservation in jobs in the govt, why not in the private jobs ? an atmosphere has to be created for this , this discrimination has to be removed. The govt of India had created a separate ministry of disinvestment ,to disinvest and privatise. Public sector units and other public sector enterprises in the country. all psu s and pes s have been established ,built up and created with public funds and tax – payers money , they are to be the public assets, owned by the people ,hence, they are to be managed and held in trust by the govts, that ignoble ministry of dis-investment in gol is now selling the public assets to the people .whatever be the justifications, and legal interpretations,

that is nothing but a betrayal, and fraud on the people – the poor and voiceless, the marginalized and helpless, the govts in facts are really without any moral and constitution authority, to do that, billions of rupees worth industries corporations and assets of the people in this country, are deliberately being given always, that, to the masters financiers and bosses or friends of the parties in power, now, big windfalls are also being reaped by foreign multi-national corporations of the countries that are financing greasing or dictating and twisting the arms of those in govts,

Today, many govt industries and PSUs have already been sold off, through various forms of disinvestments and privatization, as a result, employment opportunities for the poor from the general public, have drastically gone down, it is reported that in the central secretariat at Delhi alone, 60,000 posts, particularly at the lower levels, accessible by the poor and the helpless, have been abolished, during the current year of 2003-04. And about 2 lakh employment all around the country, have been erased, thus, the unemployment is going up very rapidly, it is very very high, amongst the youth of the weaker sections, like the SC & ST dalits and other backward classes including the minorities (2)

The private sector industries and business, had always enjoyed many benefits and concessions from governments at the centre, as well as in the states and Union territory and these days, pro-business governments of business controlled and financed parties, are giving many more sops to private business, government of Andhra Pradesh and Pondicherry as well as government of India are providing millions of rupees worth of subsidies to private sector, on investment, cost of land, power and water, so are the exemptions from excise and sales tax, and what not, the government of India in further extending many more benefits, such as exemptions from income tax, and concessions in export and import levies etc.

We must all clearly realise with out any doubt that, those are all at the cost, of the poor, most particularly the SC&STs, further, the private sector is known for discriminating the SC&ST dalits in the matter of employment, how can they be allowed to do that, and still go Scot-free? That too in a democracy! this is not yet a dictatorship of private sector, or vaishyas /baniyas and businessmen and women. the proof the pudding is eating it. how many SC & ST dalits are employed in the private sector? why so negligible representations? that, because of the prevailing social biases, caste discriminations and personal prejudices, they are all traditional and historic. Hence, to overcome them, there must be reservations for SC&ST dalits, backward castes and minorities, the prevailing biases, prejudices and discriminations at time of every employment can be overcome, only by reservations! and there can be no other better way!!

Caste and caste biases, discriminations and prejudices based on racial considerations like colour, language, religion and race, those are all behind the marginalization of SC&ST dalits everywhere in India Today, they are all clever means of exclusions of SC&ST dalits. that, from their birth to death, admissions to schools and passing out, employment to retirements, look at the number of forced “voluntary” or compulsory retirements, and then there are so many dismissals, why only SC & ST dalits? and so many of them. even the tell tale stories of misery discriminations and harassments at the times of normal retirements are endless and horrifying, it is because of these that SC&ST dalits organizations, right from the villages to the national capital in new delhi, are demanding legal protections in employment in private sector, the importance of this demand becomes crucially significant, as the pro-business baniya govt is consciously and deliberately handing over the control of all peoples industries and employment to the private sector.(3)

Govts, it is said, exist for the benefit of the people – their security, safety, welfare, development, growth, peace, and also maintenance of law and order in the nation. the best thing that can ensure these for the poor, weak, helpless and marginalized is secure and safe employment when an

Political feedback:

There is a political background to this issue which has got several facts. the first political fact is genuine in that those political parties, which have been supporting the general cause of SC&STs & OBCs have only been repeating their support for the demand for extending the reservations to private sector, they include left parties, Dravidian parties & the dalits oriented parties like the BSP. Their demand is consistent with their general political philosophy. It may be noted in this contest that Dr. Manmohan Singh as the finance minister introduced several economic reforms in the 1990's which involved liberalization, privatizations & globalization, but after becoming the prime minister, he has become a champion of reservation in the private sector.

Arguments in favour of reservation in private sector:

1. The minister for employment and social justice meira kumar has argued that since the government provides free land, tax exemption, credit from government-owned banks and many other infrastructure facilities to private industries, it is morally entitled to ask in return reservations for socially backward people. (4)

2. Though the private sector strongly says that we do not consider colour of skin or last name or caste for the purpose of employment yet it is striking fact that the depressed class is being discriminated in private sector on the ground of sex, caste, place or other considerations (5)

Thus, the policy to liberalization and privatization reduced the number of employment opportunities in the public sector, which, in turn, reduced the job opportunities for SC/STs and OBCs in government administration and government-owned enterprises, however the private sector strictly refused to accept this proposal as it would affect their competitive capabilities and profit margin and would in turn Narendra Modi who is famous for their Gujarat Uday programme making policies to attract foreign investor & NRIs to invest in country so it seems that he will help in growing privatization, a hope arises as after getting in parliament election he sign to work for downtrodden people, so definitely there is a hope for the some active step toward reservation in private sector.

Private Sector's Reaction

I am not against reservation, but it should be based on economic & not caste. If a person is hampered by resources, I think those people should be given reservations.

-----N. R. Narayana Murthy, chairman & chief mentor, Infosys

If our hands are tied behind our backs we cannot race ahead. many of us employ people from these classes & everyone treated on merit. why then create an artificial division within employees.

----- arun bharat ram, chairman srf

Outlook an English magazine has published their views in its issue. Not a single businessman outlook spoke to was pro-reservation on caste basis.(6)

How can these people can be said to helping the downtrodden people through reservation who find their engineers through placement from institution having fame, high donation. whether a person who is a labourer in construction home can send his boy in such prestigious educational institution.

Merit---merit is the patent & permanent argument against reservation. which is thrown around as though It were self evident. the simple fact is that the entire argument of merit is bogus play. what is merit? they will never tell u what they meant by merit. so much (7)

Reservation in private sector employment; its constitutionality

Equality is the order of nature. Life in nature does not discriminate the two of a same kind. Discrimination is the human concept. it is he who propelled by the emotions of nearness favours one and discriminates other. but is also true that the nature also does not follow equality in mathematical sense. Therefore equality being a natural and human right requires a special favour from the highest institution of human being i.e. the state. yet the state cannot treat the two unequal's equally as it would be against the basis of equality i.e. treatment of unequals equally results in inequality. However when two human beings born as human being and hence are equal but one stands at a disadvantageous position whether due to the historical reasons or because of the perpetuating discrimination, the principle of equality becomes worthless, he is required to be favoured and pushed forward in order to bring him equal to one who is at advantageous position. this would be equality in the real sense of the term. however it is also a striking fact that the Indian society been unequal and where few were exploited and depressed from the historical times. Different from one that one has suffered due to his color or race in Western societies the kind of inequality in our society has totally a different complexion as it has stemmed from caste. Historically the dalits have been unable to access education and professions, because of the sickening and inhuman system of purity and pollution, which remains embedded in religious communities across India.

Hence justice PB sawant says,

The right to equality without the capacity and the means to avail of the benefits equally is a cruel joke practiced on the deprived sections of the society. it widens the social and economic inequalities progressively with the have making use of the guaranteed right to amass the fruits of progress, and the have not remaining where they are the exceptions the benefits which otherwise they would not be able to do. it is to give effect to the principle which intends to become egalitarian "to treat two unequal equally causes as much injustice as to treat two equals unequally the jurisprudence of equality therefore requires that those below are leveled up to those above.(8) On this backdrop we come to examine the issue of constitutionality of reservation in private sector employment if has been employed in practice. For this purpose the

discussion in the following parts have been examined firstly the concept of equality, then equality as accepted in Indian context followed by the human right aspect of equality.

The concept of equality;

The idea of equality is one of the foundational values of our republic. This was one of the core values shared by the various visions of India articulated by the different strands of our freedom movement. Equality of states and of opportunity to all citizens 'as one of the guiding values for the new republic'.

The idea of equality is not merely a principle propounded by legal experts and respected by courts of law. It has a much wider resonance in the country's public life. The egalitarian strands in the freedom movement acquired a much wider presence in post-independence India and have come to shape the language of state policy, political discourse and public opinion. Every one of the eleven five year plan documents talks of elimination of poverty, reduction of inequalities and securing just conditions of life for the most deprived groups in society. The national policy on education identified that its main task was to strengthen the base of the pyramid. Thus one of the aspects of equality is the equality of opportunity which has been examined in the succeeding part.

The concept of equality of opportunity;

The equality of opportunity derives its content from the idea of equality, which is that there should not be discrimination. This idea can be further articulated by saying that any person in the matters of employment and work opportunity should not be discriminated on the irrelevant grounds. It is almost universally recognized principle that law should impliedly or specifically should prohibit the employers from discrimination in the matters of employment on such irrelevant grounds.

However as we have seen in the above discussion that the person suffering from some kind of disability due to which he is unable to avail the equal opportunity available to him, such hollow and formal equality becomes worthless. Therefore in such a situation the concept of substantive equality becomes indispensable.

a) Formal approach of equality;

The formal approach to equality of opportunity places minimum demands on the states. In the approach, the requirements of equality of opportunity are satisfied

1. If all the public officers and resources are in principle open to everyone,
2. If there is no discrimination on grounds only of immutable group identity and
3. If the outcome reflects a criterion relevant to the task(9)

B) substantive approach of equality;

The substantive approach to equality of opportunity differs from a formal approach in three fundamental but related ways. First, a substantive approach goes beyond the absence of direct discrimination and includes within the scope of equality of opportunity a mandate to eliminate indirect discrimination. Secondly, a substantive approach requires the state policy to take into account and neutralize not just the current circumstances but also historical burden of circumstances.(10) Thirdly, following from the first two, this approach implies an obligation on the state and thus creates a positive duty on public authorities. The state cannot limit itself to a negative role of non-discrimination; in this understanding, the state carries a responsibility to strive to create parity of circumstances.

e) Judicial view on equality of opportunity;

This foundational value was secured through two kinds of provisions in the constitution. Articles 14, 15, 16, and 17 secure formal equality before the law, stipulate equal opportunity in employment and prohibit unjust discrimination based on accidents of birth. Having secured this, the constitution goes on to make some provisions for substantive equality. Some of these provisions for substantive equality were included in articles 15(3),(4) and (5), 16(3),(4),(4a),(4b) and (5) and 17 in fundamental rights in part 3 of the constitution and articles 330 to 342 in part xv of the constitution. (11) A substantive reading of the idea of equality in the constitution is considerably strengthened by directive principle of state policy in part IV. The directive principle expands the scope of the idea of equality beyond political equality to include in the socio-economic sphere.(12)

The supreme court of India has variedly spelt out the rich dimensions of art 14 of the constitution. The court has perceived the mandate of art 14, as the obligation every citizen is able to realize her welfare and well-being without any externally created impediment. Some of the landmark judgments of the supreme court provide an interpretation of the idea of equal opportunity.(13) N.M Thomas case the proviso to rule on departmental tests for promotion of lower division clerks to

upper division clerks had been challenged as it granted a temporary exemption of two years to scheduled castes and scheduled tribes whereby they got additional time to take the tests after they had been promoted. What then, Is a priori exclusion ? it means exclusion on grounds other than those appropriate or rational for the good (posts) in question, equality of opportunity is not simply a matter of legal equality, its existence depends, not merely on the absence of disabilities, but on the presence of abilities.(14)

Human right aspect of equality of opportunity;

India is obliged to implement the principle of equality in all fields of human work including employment and work under international covenants, which she is signatory. The main provisions relating to equality of opportunity in international jurisdiction are as follows;

1 . Universal declaration of human rights (UDHR)

Articles 1,2 and 7 of the UDHR guarantee all persons with the right and freedoms provided in the declaration without any distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All persons are entitled to equal protection before the law and to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

2 . International covenant on civil and political right (ICCPR)

Article 26 guarantees the right to equality and to the equal protection of the law. It prohibits discrimination based on the grounds of race, colour, religion, national or social origin, birth or other status, property and political or other opinion.

3 . International covenant on economic, social and cultural rights (ICESCR)

Article 7 guarantees the right to the enjoyment of just and favourable conditions of work as well as fair remuneration, and in particular recognizes that equal opportunity be provided so that everyone can be promoted to an appropriate higher level based solely on their seniority and competence.

Article 13 recognizes the right to education for all persons and states that secondary and higher education, including technical and vocational education shall be available as well as accessible by all persons by appropriate means. Secondary and higher education shall progressively be made free.

4. Convention on the elimination of discrimination against women (CEDAW)

Article 3 mandates state parties to take appropriate measures in the political, social, economic and cultural spheres to ensure the full development and advancement of women.

Article 4 states that temporary special measures aimed at accelerating de facto equality between men and women shall not be considered as discrimination as defined in the convention, and shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

5. Convention on the right of persons with disabilities.

Article 3 lists non-discrimination, equality of opportunity and, the respect for difference and acceptance of persons with disabilities as part of human diversity, as the general principles of the convention. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the present convention. The above mentioned international instruments clearly show that the human right of equality of opportunity that binds in India under the international obligation to secure equality of opportunity to all and to protect from discrimination on the ground either of sex, caste, place or birth, religion etc.

Reservation as strategy to achieve substantive equality

The strategy of reservation of equalizing opportunities for identified groups long discrimination has been in vogue for the last several decades. However, for a variety of reasons, the strategy of removal of disabilities could not automatically bring about equalization of life chances to many groups in our heterogeneous society. Deprivation and exclusion are complex processes which warrant multi-pronged approaches by way of creation of parity of conditions through legislative and executive action. This is the affirmative action agenda which is in addition to the reservation strategy that is now available only for certain deprived groups. In other words, we need to look now for policies and programmes to supplement the existing system of reservation to enable the deprived groups to find equal opportunities to access rights and entitlements.

Approaches justifying affirmative action;

There are two kinds of major conventional approaches for justifying affirmative action;

1 . backward looking approach ;

The backward – looking (I e, reparations based), that focuses on past injustice and demands reparation.

Backward –looking ‘ ‘ argument , a very different frame – work from the second one , focuses on injustice of the past , and stresses that because these past events occurred , we have certain duties and responsibilities now to ameliorate the injustices of past and pay back the dues. Backward – looking argument concentrates too narrowly on the allocation of blame , and not adequately on contemporary disadvantages. Compensation and reparation may be due for certain specific wrongs but cannot by themselves carry the burden of rectifying the kind of systematic injustice victims suffer from.

2. Forward looking approach;

The thrust of the forward – looking argument is that what has happened in the past is not itself relevant to what should we do and to what is reasonable from humanitarian perspective . the aim of affirmative discrimination is not to compensate anyone for harm caused by past wrongdoing , but rather simply to promote certain highly desirable forms of social change to break endlessly continuing cycle of poverty and subservience .

Problems relating to reservation in private sector

1. Legal status; the constitution makes provision under article 16(4) for reservation in employment for socially and educationally backward people. Without taking into consideration the language of article 16(4), one state government propared legislations in the private sector. Though it was not enacted, that draft has become a reference document for even the central UPA government to threaten the private sector with legislation. the argument on the part of government in favour of reservation is that since the government provides free land , tex exemption , credit from government – owned banks and many other infrastructure facilities to private industries , it is morally entitled to ask in return reservations for socially backward people . in some states the state government have forced private educational institutions which receive government grants to provide reservations in admissions as well as in jobs . however such government is not sustainable in respect of those private industries which do not receive any such sops from the government and fail on constitutional touchstone . this constitutional issue will have to be decided by the supreme court .15

2. Implementation; in respect of implementation of reservation policy in private sector involves a number of issues.

i. identification of beneficiaries; the first issue to be decided is whether job reservation in private sector will be confined to the SC/STs only or OBCs too . the is because there is no uniformity of the castes included on OBCs lists across the states and in some states Brahmin also fails in OBCs list.

ii. demerits of prevalent policy ; private industries are already employing a large number of OBC candidates but based only on their merit and performance . therefore , the case for reserving jobs for OBCs in the private sector is not as strong as it is in the case of SC/STs .

iii. Magnitude of reservation ; there is on mention of either the magnitude of reservation or duration of such a policy under article 16(4) .proportional representation In the principle only for article 330 and 332 and not art. 16(4) the state governments which implemented reservation in government jobs followed the guideline in indra sahwney case under article 16(4) .

the mandal commission recommended for OBC s reservation upto half of the 52% total population .even after adding the reservation for SC/STs the total reservation does not exceed the above limit . but ,as per the lakur committee recommendations ,if SC/ST reservation quota is reduced by one –third , it will stand at 12 per cent. Similarly if we exclude the undeserving OBC on the basis of the creamy layer criterion , their share may come down to about 12 per cent. Together the whole reservation will be about 24 or 25 per cent.

3. Cost effectiveness; the next question is the costs which the proposed policy may impose on the private sector. most of the industry spokesmen have argued that reservation will ruin their competitive edge because of relaxation of merit as the sole criterion for selecting the workforce.

I. lower productivity level; the dilution of merit in the name of reservation will impose a cost (in terms of lower labour productivity) on the industries, which may not be able to compete in the global markets . this is a genuine fear because our

past experience in PSUs and even in government departments has shown that those who get secured jobs become indifferent to their duties and responsibilities. This is much more so among persons who enter government service under the reserved category. Consequently, governments have become inefficient and ineffective. Though, in theory, public enterprises and the governments in power are accountable and responsible to the legislature, in actual practice, nobody has enforced accountability and responsibility .

II . Merit of aspirants ; there is another angle to the cost of reservation in the private sector . merit for civil services and jobs in public enterprises is mainly determined by the marks secured in university examination and / or prescribed tests besides , articulation and ability to make decisions , a pleasant personality, an attitude to get along well with others in the organization and an ability to work in teams are required .

III. Application in respect of promotions; another issue relates to the security of the jobs provided under the reservation policy and the applicability to reservation in promotions. The private sector in India has gradually moved away from the practice of appointing personal until their retirement age to making contract appointments to get over the costs imposed by stringent labour laws. Skilled and talented manpower which will adversely affect its competitive edge.

Beneficiaries of reservations; in the whole debate on reservations in the private sector there is an implicit assumption that job opportunities are growing. This is a doubtful assumption because most of the countries whose economies are driven by the private sector are experiencing job- less growth resulting from the spread of sophisticated technology. in India it is not only the use of sophisticated technology in the production process, but also the stringent labour laws that are creating resistance to employing more labour. So job opportunities may not increase in the private sector as rapidly as some would expect.

4. Availability of Talent pool; the arises the question of the availability of talent pool in the target group . for the last 50 years it has been possible for the sc/st s to enter IITs & IIMs in significant number because of the very high standard of tests prescribed. The private sector makes large recruitments from IITs and IIM s. if qualified SC/ST candidates are not available in talent pool, they will not get benefit of reservation, because the government cannot force the private sector to lower the standards as it will adversely affect its productivity. The range of marks required for selection is 80-95% in engineering and / or management courses, not many SC/ST candidate may qualify that range of marks. Therefore reservation in the private sector may not benefit a significant number of SC/ST

References

- [1] Thimmaiah. G, Globalisation and reservation ; Reservation and Private sector p..287 edited by/ Sukhadeo thorat, Aryama, Prashant negi (2007)
- [2] supra note .1
- [3] report by the expert group to examine and determine the structure and functions of an equal opportunity commission set up by the ministry of minority affairs, government of India , February 2008.
- [4] Anand telumbde , reservation in private sector , an overview of the proposition , edited by sukhadeo thorat , aryama ,prashant negi, reservation and private sector : p :274: (2007)
- [5] ibid – p :276
- [6] p.b sawant ,the constitution ,equality and reservation ,(june ,14,2003) mainstream, supra note 5 at , 16 turunabh khaitan (2008), transcending reservations: a paradigm
- [7] state of kerala v N.M Thomas (1976) 2 scc 310., per k.k. article 46.
- [8] supra note 11 at para 2.6
- [9] state of kerala v N.M .thomas (1976) 2 scc 310.
- [10] supra note 4, at p.745
- [11] supra note
- [12] ibid.