

# AFFIRMATIVE ACTION IN PRIVATE SECTOR

## IN INDIA

Written by *Dr. Saji Sivan S*

*Assistant Professor, CSILS*

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### ABSTRACT

Right from the time the reservation issue was discussed in the Constituent Assembly, it has come under severe scrutiny. Over the years, the very provision of reservation for Scheduled Castes and Scheduled Tribes has been questioned by a small segment of Indian population. On the other hand, members of the SCs and STs have demanded for proper implementation of reservation. The statement made about affirmative action in private sector by the UPA Government. “The UPA Government is very sensitive to the issue of affirmative action, including reservation in private sector. It will immediately initiate a national dialogue with all political parties, industry and other organizations to see how best the private sector can fulfil the aspirations of Scheduled Caste and Scheduled Tribes youth”

The demand for affirmative action in private sector emanates from the fact that this would enable participation of the weaker section in employment and market, since they suffer multiple discriminations. There is another fundamental reason due to which reservation in private sector is being demanded. That is, in the name of rightsizing and optimizing by the Government, employment rate is on the decline. Given the discriminatory and exploitative social milieu, the Dalits and the Tribals are the one who would be victims of this process.

Providing reservation in public Sector would automatically raise the issue of implementation of reservation in the Private Sector, and thus, both these processes would lead to the inclusion of the excluded communities. It is also a fact that the Private Sector continues to be one of the major sources of employment. The reason for the demand for reservation in Private Sector is that the Government provides safeguards to the private sectors to promote their business, creating better situations for the encouragement of business and trade. Foreign policy and

export-import policies of the Government contribute towards the betterment of the businesses set-up by the individuals. Uplifting of the weaker section is a stated objective of our Country and thus, reservation in Private Sector is part of social responsibility of the Government, as well as the Private Sector.

With the implementation of the Mandal Commission Report, 1980, in 1990, which have advocated reservation for the Other Back ward Castes (OBCs), the issues once again come to the centre stage. But in the last two decades, the debate has progressed further and has included in its ambit the demand for reservation in private sector.

Significantly the issue found in international visibility during the World Conference against Racism held in Durban. A strong contingent of Dalit activists, intellectuals, and human rights activists from India raised this issue at the World Conference against Racism held in Durban (WCAR).

The Congress Party in its Shimla Conference made it public that is in favor of introducing reservation in the private sector. The former Prime Minister, Atal Bihari Vajpayee made public pronouncements in favor of reservation in the private sector when he addressed the SC and ST Members of Parliament on 19 December 2003. The election manifesto of both political parties promised to initiate the process of providing affirmative action in the private sector. Now, in power, the Congress with its alliance partners appears to be serious on this issue, and thus, this demand has found in its Common Minimum Programme (CMP).

The statement made about affirmative action in private sector by the UPA Government. “The UPA Government is very sensitive to the issue of affirmative action, including reservation in private sector. It will immediately initiate a national dialogue with all political parties, industry and other organizations to see how best the private sector can fulfil the aspirations of Scheduled Caste and Scheduled Tribes youth”.<sup>1</sup>

The argument in favor of affirmative action in the private sector foregrounds this fact that there is a segment of Indian population, which is excluded from socio-economic and political spheres. Social exclusion leads to subjugation, deprivation and discrimination. Those who

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<sup>1</sup> . *Common Minimum Programme of the UPA*, May 2004

profound and practice social exclusion do not want to introduce any change and thus, the system becomes highly resistant to change and transformation.<sup>2</sup>

## **AFFIRMATIVE ACTION**

The term 'Affirmative' action has been used since the early 60s when President Kennedy employed it in Executive order to describe public policies intended to overcome the present effects of past racial discrimination<sup>3</sup>. Also known as preferential treatment or reverse discrimination, affirmative action is based on arrangements, whereby the law sanctions special measures or differences in treatment that, when certain conditions exist, depart from the differences in treatment that, when certain conditions exist, depart from the principle of formal equality.<sup>4</sup> Usually, such special measures aim at protecting, or promoting the welfare of the members of a group previously discriminated against, provided that the group desires such measures.

## **AFFIRMATIVE ACTION IN PRIVATE SECTOR IN INDIA**

The demand for affirmative action in the private sector emanates from the fact that this would enable participation of the weaker section in employment and market, since they suffer multiple discriminations. The liberalization, privatization and globalization process are ushering in the power of markets. Privatization has further marginalized the weaker sections

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<sup>2</sup> Prakash Louis. *The Political Sociology of Dalit Assertion*, Gyan publishing House, New Delhi, 2003

<sup>3</sup> The origin of affirmative action is modest and rooted largely in a number of Executive orders issued by Presidents Roosevelt, Truman, Eisenhower and Kennedy: Order No. 10925, interjected the term "affirmative action", The Order directed Departments and Agencies to take special measures appropriate to insure that such programs are administered without discrimination. Under Title VII of the Civil Rights Act of 1964, 29 CFR this definition is similar to the Glass Ceiling Commission's affirmative action as "the deliberate undertaking of positive steps to design and implement employment procedures that ensure the employment system provides equal opportunity to all."

The Clinton Review defines affirmative action as any effort taken to expand opportunity for women or racial ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration. The Civil Rights Commission definition seems to have adopted a legalistic finesse to it.

The EEOC's guideline on affirmative action defines affirmative action as "those actions appropriate to overcome the effects of past or present practices, policies or other barriers to equal employment opportunity"

<sup>4</sup> John Edwards *Affirmative Action in a Sectarian Society: Fair Employment Policy in Northern Ireland*, 1995 p.5.

by reducing the scope of available in public sector, since the public sector itself is being disinvested<sup>5</sup>.

The significant fact is that according to the Industrial Act 1948, 18 sectors were reserved as public sector enterprises. Over the years, these have been also converted in to private sector and now a very less of these remains as public sector. This has directly and definitively given a death blow to the Dalits and the tribals in terms of job opportunities.

There is another fundamental reason due to which reservation in private sector is being demanded. That is, in the name of rightsizing and optimizing by the Government, employment rate is on the decline. Given the discriminatory and exploitative social milieu, the Dalits and the Tribals are the one who would be victims of this process. There was a decline of job opportunities. This is notwithstanding the loss of opportunities in the State Governments. It is this social fact that has driven the Dalit and human rights activists to demand for reservation in private sector<sup>6</sup>.

In response to this contention, those calling for affirmative action in private sector argue that since the reservation policy is not implemented, it is all the more necessary to demand for its implementation, and also for reservation in the private sector. Keeping this fact in mind, the National Commission for Scheduled Caste and Scheduled Tribes has recommended, "It is essential to workout short-term and long-term measures to increase the representation of the Scheduled Caste and Scheduled Tribes.

The State should make special efforts to make up the shortfall in the reserved 'quotas' by taking steps such as special training and coaching for Scheduled Castes and Scheduled Tribes, passing of Central legislations to enforce reservation in Government Services and Public Sector Enterprises, Banks, Universities, Grant-in-aid bodies, etc".<sup>7</sup>

Providing reservation in public Sector would automatically rise the issue of implementation of reservation in the Private Sector, and thus, both these processes would lead to the inclusion

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<sup>5</sup> Jothika pragya kumar. "Policy of Reservations: its envisioned perspective", JILI Vol. 39 (1997)330 : Om Prakash Sharma, *Equality and Protective Discrimination under the Constitution of India*, Indian Journal of Law and Justice, Vol.1 (Mar. 2010) 92

<sup>6</sup> Prasath Negi, *Affirmative action in the Private Sector*, 2003

<sup>7</sup> National Commission for Scheduled Caste and Scheduled Tribes, Fifth Report, 1998-99, Vol.-1 pp130-31.

of the excluded communities. It is also a fact that the Private Sector continues to be one of the major sources of employment. And the Private Sector with its every increasing role will be the chief employer in the time to come and reservation in Private Sector should be initiated at once.<sup>8</sup>

According to the Government data, it is clear that nearly 3 lakh Dalit and tribal students at a given time have enrolled for academic and professional courses. This is a great asset to these communities and to the country. To argue that among these lakhs of young men and women, not a single one with merit and ability is to engage is lying.

The fact of the matter is that these candidates are denied equal opportunity to exhibit their capability, commitment and entrepreneurship since they belong to a discriminated social group due to which end up becoming unemployed and underemployed.

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, retreats in the following words the need to ensure equality of opportunity to those in special needs:

“Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely, and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential”.<sup>9</sup>

One of the four categories to promote the principles of Rights at Work is the elimination of discrimination in respect of Employment and Occupation. The entire member Countries reiterated the need to mobilize and encourage International; regional and national efforts aimed at resolving the problems, and promote effective policies aimed at job creation for these social groups. But, when it comes to implementing a Policy in favor of the weaker sections, both the national and international instruments seem to be thrown to the winds.

Another overarching reason for the demand for reservation in Private Sector is that the Government provides safeguards to the private sectors to promote their business, creating better situations for the encouragement of business and trade. Foreign policy and export-

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<sup>8</sup> Raja Sekhar Vundru. “*Future of Scheduled Castes*” *Unpublished Manuscript*.(Economic and political weekly,December,2003)

<sup>9</sup> *ILO Declaration on Fundamental Principle and Rights at work 86<sup>th</sup> session, Geneva, June 1998* : website: [www.ilo.org/declaration](http://www.ilo.org/declaration).



import policies of the Government contribute towards the betterment of the businesses set-up by the individuals.

Foreign investors are investing in the private sector *via* purchasing their share; this is possible because of the policies of the Government. And thus, it is expected from the Private sector that they should fulfil their social responsibility. Private sector uses public money via public financial institutions; even then, there is no reservation to SCs and STs and OBCs in the private sector.

Uplifting of the weaker section is a stated objective of our Country and thus, reservation in Private Sector is part of social responsibility of the Government, as well as the Private Sector. It is nothing, but the fulfilment of the Constitutional agenda of distributive justice enshrined in various articles and clauses of the Constitution. If the Private Sector does not fulfil its social responsibility, then the Government should make such provisions by initiating legislative measures.

## **GLOBAL EXPERIENCE OF AFFIRMATIVE ACTION**

There is growing awareness among the victims of discrimination and inequality, as well as a segment of the ruling elite to assess the impact of affirmative action in other countries, so as to learn lessons for our specific situations. In this regard, it needs to be stated here that in Northern Ireland 'sectarianism', in America 'race', in Malaysia 'control by outsiders', and in India 'caste', and ethnic principles and practices lead to discrimination.

Hence, these countries have opted for affirmative action as a remedy to remove obstacles imposed by discrimination and inequality. This section briefly assesses the success in transferring affirmative action principles in to concrete situation.

It is frequently asked whether preferential policies are necessary in countries, which have attained formal equality. Where there has been a long history of prejudice, discrimination and exclusion sanctioned by law or religion as in the case of Blacks and Native Americans in USA, Dalits and Tribals in India and women in everywhere. Even, if the legal and ideological

basis of discrimination and exclusion can be overcome, prejudice and psychological conditioning may continue to hinder progress for a long period.<sup>10</sup>

Goldman's believe that "affirmative action programme seek to rectify the consequences of social discrimination. It involves, among other things, discrimination in favor of communities that have been victimized by society and in law. Although, Policies involving reservations and quotas for members of disadvantaged communities has been the most widely used, and also the most hotly contested, Policy within the affirmative action programme, it is by no means the only way of remedying the socially victimized communities. Under the affirmative action programme, Governments have sought to supplement positive discrimination in jobs with special economic packages, social facilities and preferential spending".<sup>11</sup>

Let us briefly review the policy of affirmative action in US as practiced in the Indian context. On a comparative note, Thomas Weiss Kopf states: India and US are in many obvious ways very different. In some important respects, however, the two nations are similar. Both have functioning democratic electoral systems and are constitutionally committed to preserving civil liberties and individual rights, both have multicultural population including significant minorities with a long history of deprivation and disadvantage<sup>12</sup>. And both have sought to address the needs of these minorities via certain forms of positive discrimination, generally labeled 'Reservation Policies' in India and 'Affirmative Action' in US.

The policies of Positive discrimination in favour of the disadvantaged groups, enacted initially with strong public support, have proven increasingly controversial in both India and the United States. In each Country, the debate over these policies become sharper, as participants wrestle with the inherent tension between the individual right to equal treatment and the societal goal of overcoming profound inequalities of opportunity.<sup>13</sup>

Going by a labor theory of value, the lower caste people as the laboring class can rightly stake claim to the entire wealth of this Country. But they are not doing so. The upper caste elites

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<sup>10</sup> . Devanesan Nesiah. *Discrimination with Reason? The policy of Reservation in the United State, India and Malaysia*, Oxford University Press: Delhi, 1997, p277

<sup>11</sup> Quoted in Gurpreet Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India*. Oxford University Press: Delhi 1998, p143.

<sup>12</sup> Brent E. Simmons "Affirmative action, the legislative debate in the Michigan house of representatives" (1997) 14 *TM cooley Law Review*, 267

<sup>13</sup> Thomas E. Weisskopf. "Consequence of Affirmative Action in Us Higher Education: A Review of Recent Empirical Studies". *Economic and Political Weekly*. Vol36(51)December,22,2001

better understand that it is the born right of all such people who are socially discriminated against to avail reservation. Reservation in the Private sector thus, becomes just a correction to the basic policy enshrined in the Constitution of India.

Our Constitution unfortunately implies the constricted premise for Reservation: it may need correction by way of suitable Amendments. The Constitutional Experts opine that reservation in the Private sector also cannot be implemented without an amendment to the Constitution. It is in the interest of all, which the re-articulated premise behind reservation as suggested above is agreed, and incorporated in to the Constitution. Mere policy is never enough. There needs to be a genuine political will backing the policy to get it implemented.

The business class must realize that their argument against reservation basically stems from the age-old prejudices in the Indian society vis-à-vis the lower castes. There is absolutely no rationale in them. There is no connection of merit with reservation. Reservation never meant accepting anyone just on the criterion of birth. Reservation simply means that a person have the requisite qualifications for the job should not be denied it just because of he or she born in a certain caste. Reservation does not have any connection with efficiency too.

The right premise behind reservations in private sector would necessarily involve re-articulation of the basic premises behind the Constitutional reservation. It is a countervailing measure by the State against the socio-cultural disability of the Indian society. This disability does not restrict only to the state for restricting the domain of reservation to the State sector. Rather, it pertains more to the civil society than the State, which is supposed to be enlightened enough to see the need for the reservations.

The premise behind reservations in the private sector thus, should be restored as the belated correction to the original premise behind the reservation. It is a mechanism with which the rights of certain sections of the society are ensured because if left to it, the society will never allow them to exercise their rights.<sup>14</sup>

The State government of Maharashtra, home to India's commercial capital Mumbai, passed a Bill mandating up to 52% reservations in the private sector for Schedule Castes, Scheduled Tribes and Other Backward Classes. The State Government plans to announce

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<sup>14</sup> Anand Teltumbde, *Reservation in the Private Sector "An overview of the Proposition"*



details for the execution of the policy in July. Indications are that the quotas will apply to every company in the state regardless of size.

Similar Policies are also being contemplated at the Federal level. In its recent Common Minimum Programme, the Congress led United Progressive Alliance (UPA) Government stated that it is “very sensitive to the issue of affirmative action, including reservations, in the private sector.” It suggests a national dialogue “to see how best the Private sector can fulfill the aspirations of Scheduled Caste and Scheduled Tribe youth.

“Affirmative action proponents are generally of two types. The more conservative view of affirmative action is that government must ensure equal opportunity for all individuals through the removal of State-imposed barriers to fair treatment. More liberal (left-leaning) backers of affirmative action envision going a step further and advocate using ‘Positive discrimination’ to redress past wrongs and achieve desired social outcomes”.<sup>15</sup>

## **CONCLUSION**

To enforce the principle of affirmative action in the private sector has become a compulsion, when the public sector is being dismantled so rapidly. Industry, as expected, has already raised a hue and cry, and tried to create an impression as if something unmentionable is being done. This will give a fatal blow to the emerging private sector with its global perspectives.

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<sup>15</sup> *Ibid*