

Quotas and Reservations
- Imperatives of Affirmative Action

by

Justice (Mrs.) Sujata Manohar (Retd.)



FORUM
of Free Enterprise

"Free Enterprise was born with man
and shall survive as long as man
survives".

-A.D. Shroff
1899-1965
Founder-President
Forum of Free Enterprise

Introduction

The attached text of the address delivered by Mrs. Justice Sujata Manohar is a very incisive analysis of a very complex and sensitive problem of "Quotas and Reservations" facing the country today. The author has referred to selective quotes of great champions like Martin Luther King, Rabindranath Tagore and Dr. B.R. Ambedkar who truly believed that equality, unity and human dignity have cherished human values.

It is worth recapitulating what Dr. B.R. Ambedkar, the architect of our Constitution, said in the Constituent Assembly debates. "The castes are anti-national. In the first place because they bring out separation in social life. They are anti national also because they generate jealousy and antipathy between castes and castes. You must overcome all these difficulties if you wish to become a nation in reality. For, fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than the cast of paints."

The author has rightly stressed that the path of reservations for empowering weak is fraught with several inherent difficulties and is creating disunity. It should have been supported by strong affirmative action. It is most unfortunate that while the State has been forwardlooking in passing legislation for empowering the weaker sections of society it has done precious little in the areas of affirmative action.

A serious indictment of the policy is that even at the end of 60 years of reservations, it has not created a situation where any single Scheduled Caste or Scheduled Tribe has been removed from the list of the backward. On the other hand, we have been continuously increasing reservations. There is also no reliable data on the impact of the current policy on the reduction of backwardness which would result in a public discourse.

This has now become a major area of concern because divisive forces have been unleashed which are far stronger than the forces in existence at the time of attaining freedom and which may totally destroy constitutional aspirations of the people. Instead of affirmative support for generating equality, policies have been adopted which instead of increasing job opportunities restricted them. These policies lent themselves to misuse due to lack of incentives for those who are weak to become stronger and to excel, since they feel that they can secure admissions and jobs without possessing requisite skills.

The author has made a strong plea for evolving a programme for national development that focuses on empowerment of the poor and the backward with focus on development of human rights which enhances human capabilities and expand choices. It is unfortunate that this critical issue has assumed severe political overtones. The statement of the HRD

that 27% quota for OBCs will be pushed through even by an ordinance has created a great stir among professionals, particularly medical students and doctors.

The great pity is that social and economic realities have been largely ignored. The true situation is that: only 40 million, less than 10% of the total labour force, are actually employed in the organized sector and of which eight million are in the private sector. Barely 8% of the students who have cleared the Secondary Stage (10+2) go in for higher studies. Though India has the second largest pool of science and engineering graduates in the world, hardly 10% of them are found suitable by IT and High-Tech industries for employment.

The IT industry alone is likely to recruit a million people in the next three years and spend over \$2.5 billion on training. The irony is that even today IITs and IIMs have serious problems of recruiting new faculty. Besides, existing infrastructure facilities are inadequate. How can all these be accomplished within a short span of time?

Quotas are sought to be made applicable to the private sector as well. The Prime Minister, while addressing industrialists observed: "I urge all of you to invest much more in vocational training and technical education, particularly for youth from a less privileged background. I urge you to access at a firm level, the diversity in your employee profile and

commit yourself voluntarily to making it more broad-based and representative." A high power committee has been constituted (CII) to study this problem in depth and come out with recommendations by June 2006. The issue has assumed very heavy political overtones. The Minister concerned has even brushed aside the considered views of scholars and majority members of the Knowledge Commission. It is indeed a very sad reflection on the country's political leadership which shows scant respect for opinion of experts if they do not converge with those of the establishment.

In conclusion it may be stated that great leaders can change course of a nation but self-serving politicians can scar a country forever. The worst ones are those who choose to divide the nation on the basis of religion and caste.

Minoo R. Shroff
President
Forum of Free Enterprise

Mumbai, 29th May 2006

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By

Justice (Mrs.) Sujata Manohar (Retd.)*

It is a privilege to be invited to speak at the Annual Day of Leslie Sawhny Endowment programme. I am indeed happy to associate myself with this special Annual Day when on the occasion of the post birth centenary of Mr. Minoo Masani, a special award in the memory of Mr. Minoo Masani is being given. I had the good fortune to have known Mr. Minoo Masani and to have participated in some very stimulating discussions with him. His brilliant intellect, open mind and willingness to listen to a differing view point, often generated fresh thinking on subjects of critical importance to the country. And I cannot help thinking that he could have shed new light on the difficult subject of today's talk.

Let me begin by recalling the dreams of some of the most profound idealists of our time who changed the face of this earth. On 28th August 1963, Martin Luther King voiced his dream in a famous speech: "I have a dream that one day this nation will rise up and live

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out the true meaning of its creed: We hold these truths to be self evident, that all men are created equal." Rabindranath Tagore expressed his dream for a free Indian nation in his famous poem *Geetanjali*:

"Where the mind is without fear and the head is held high,

Where knowledge is free; Where the world has not been broken up into fragments by narrow domestic walls;

Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit....,

Into that heaven of freedom my father, that my country awake"-;

Equality, unity, human dignity, freedom to know, to reason and to express opinion - these are the cherished values.

That thin but clear stream of reason seems to have dried up, and our constitutional aspirations remain unrealized. Let us recall our dreams as a free nation, embodied in the constitution.

"To secure all the citizens Justice; social, economic and political.

Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; Fraternity, assuring the dignity of the individual and the unity and integrity of the nation.

As a new nation aspiring to justice and equality we had a major hurdle to overcome - the deeply embedded divisive caste system which was the very antithesis of equality or justice. Dr. Ambedkar, the architect of our Constitution, said in the Constituent Assembly debates "The castes are anti national. In the first place because they bring out separation in social life. They are anti national also because they generate jealousy and antipathy between castes and castes. You must overcome all these difficulties if you wish to become a nation in reality. For, fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than the cast of paint."

To create a strong and united nation with a binding commitment to justice in the widest sense and equality of all, irrespective of race, religion, caste, sex or place of birth. We needed to get over prejudices and preferences based on caste, in job allocations, in the availability of educational and training opportunities. We needed to get rid of discrimination in any form based on caste or colour, sex, race or religion.

Creating a social economic and political order which guarantees to all equality and justice has proved an uphill task. Constitution created a certain basic structure for attaining the goal of equality in Articles 14, 15, 16 & 17. First, there should be no discrimination between one person and another on the basis of race, religion, caste, sex, colour, place of birth.

The second programme for non-discrimination in the constitution is also under Article 15: enabling special provisions being made by the state for women and children; and later by an amendment made as early as 1951, special provision being made by the state for any socially and educationally backward class of citizens or for scheduled castes and scheduled tribes. Prima Facie, special provision is a negation of equality. But if the weak are to be made strong enough to compete with the strong, they need special measures till such time as they get empowered. In this sense, such provisions promote equality. But they cannot be permanent by their very nature. Disempowerment is not a permanent disability. It has to be redressed. Special provisions could and should have been in the form of affirmative action. They have however, taken the form of reservations.

The third prong of the constitutional programme is contained in Article 16 which provides for equality of opportunity to all citizens in matters relating to employment or appointment to any office under the state. It provides that no citizen shall, only on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible or discriminated against in respect of any employment under the state. However, the state can make reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state. There is a clear recognition

that those special provisions and reservation are a departure from the principle of nondiscrimination. This can be looked upon as reverse discrimination in favour of the backward groups in the country to enable them to compete more effectively with the more progressive or advanced group. The reservations were also contemplated as a short term measure which could be done away with as the weak protected by reservation became empowered. However there was no inbuilt programme for gradual reduction of reservations. Unlike U.S. we opted for reservations instead of affirmative action because it was felt that the strong prejudice in society against BCS would prevent effective affirmative action. In my view this was a flawed perception. I will come to it later.

The other important concern under the constitution has been voiced in Article 335 which states that the claims of Scheduled Castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in making appointments to services and posts in connection with the affairs of the union or of a state.

A major concern for a newly emerging nation under the constitution was promotion of national unity and national integrity. It is still a vital concern. It is apparent that the path of reservations for empowering weak is fraught with several inherent difficulties and is creating disunity. It should have been supported by strong affirmative action. It is

unfortunate that the article providing for special provisions has not been used imaginatively in the last 60 years to create effective affirmative action policies; though the special provision clause has been used in a limited way to promote socio-economic policies and legislation for another group of the discriminated - namely women. The state was proactive in passing legislation to remove discrimination against women especially under the laws which we had inherited. But even in this area, we have now, by constitutional amendments, taken the easy path of providing quotas for women in the panchayets and municipalities. There is also a demand for reservation of seats for women in parliament and legislative assemblies. The special provision clause has also been used to pass some legislation for protection of children and for their welfare. These legislations have not received the attention of policy makers including the executive. But atleast they have the merit of not arousing any serious opposition to such laws.

Let us first see how the reservations have worked. First problem is in deciding the extent of reservation in jobs or in educational institutions and for whom - should it be for socially backward, economically backward or both? The debate is still raging. Should the reservation be in proportion to the numbers for each and every group of backward people? Or should it be limited to a certain percentage of available posts? Time and again, the number of seats available to Scheduled Castes and Scheduled Tribes has been

increased on the basis of increase in their numbers in population. A serious indictment of the policy is that at the end of 60 years of reservations, it has not created a situation where any single Scheduled Caste or Scheduled Tribe has been removed from the list of the backward because it is empowered as a result of the reservation policy. We have had to, on the contrary, continuously increase reservations. This would indicate a serious drawback in the policy that we have adopted so far.

Unfortunately there is little reliable data on the impact of current policy on the reduction of backwardness. As Neeraja Gopal Jayal, Professor at the Centre for the Study of Law and Governance, JNU, has pointed out, we need a reliable assessment of our actual record of quota-based reservation since 1950 for this purpose. Unfortunately this subject does not inform our public discourse.

In deciding the question of extent of reservation, the Supreme Court has now laid down in the famous Mandal Case, *Indira Sawhney vs. Union of India*, that the reservations which are permissible should not exceed 50%. Nobody has given a thought to the question of how long should these measures continue. It is an easy political decision to continue the reservation, time and again, without any kind of assessment of the impact of such reservations. With the kind of unthinking policies adopted by the politicians for their own benefit, it has become impossible to have any rational debate on the

subject. We have at the moment the raging controversy on reservations in Institutes of excellence in this country such as IIMs and IITs. There are very strong emotions on both sides in the form of protests and demonstrations and it is very sad that programs which were initially devised to promote national unity, national integrity and to promote equality have instead proved divisive, and have generated claims to backwardness, and have also thwarted the aspirations of youth who wish to excel and shine under global competition.

The other difficulty in operating job quotas was to decide whether these quotas should be applicable only at the stage of initial appointment or at the stage of promotions also. The Supreme Court in *Indira Sawhny* confined reservations to initial appointments but tempered its impact by saying that this decision should become operative after 5 years. Article 16 was amended within these 5 years to permit reservation at the stage of promotion also.

One of the major problems has been difficulties in filling reserved vacancies. This has also generated litigation as also a further amendment of Article 16.

The question whether a single post could be so reserved, whether seats in educational institutions, especially in post graduation courses and super specialities, could be so reserved, whether creamy layers from amongst the weak categories should get the benefit of such reservations, have all come

before the courts from time to time. In the case of *Preeti Srivastava v/s. State of Madhya Pradesh*, the Supreme Court, (I was a member of that bench), had to struggle with some of these conflicting equities. It held that while the object of Article 15(4) is advancement of equality principle by providing for protective discrimination in favour of weaker sections, one cannot ignore the wider interests of the society while devising such special provisions. Undoubtedly the protective discrimination in favour of the backward including Scheduled Castes and Scheduled Tribes, is as much in the interest of society as of the protected group. At the same time, there may be other national interests such as promoting excellence at the highest level and providing the best talent in the country with maximum available facilities to excel and to contribute to society, which have also to be borne in mind. Special provisions must strike a reasonable balance between these diverse national interests.

It is now apparent that there is another important national interest of maintaining national unity, promoting fraternity and promoting justice in the country. Unreasonable or unacceptable provisions relating to reservations in particular, seem to generate tremendous hostility and a sense of injustice in the country – in all sections of it. Unless there is a dialogue on what are the reasonable steps for promoting equality, one cannot have further progress in this area and the policies devised may prove counter productive. This has now become a

major area of concern because politically, divisive forces have been released which are far stronger than the forces in existence at the time of attaining freedom which may totally destroy constitutional aspirations of the people.

The main reason for this kind of hostility has been, that instead of affirmative support to programmes for generating equality, policies have been adopted which have proved themselves to be inefficient. These policies, instead of generating job opportunities, have restricted them. They have lent themselves to misuse. It has created lack of incentives for those who are weak to become stronger and to excel, because they find that there is no need to excel since they can secure admissions and jobs without possessing the requisite skills and abilities. This is because there is no provision for gradual reduction of quotas, say at the rate of 1% or 2% every year along with policies of empowerment. Without the incentive to get empowered, instead of removing any stigmas, securing seats or jobs in the reserved category is creating new stigmas.

The vested interests have also created a resistance to social audit of existing policy. There is now a vested interest in backwardness which is the worst thing which can happen to this country. We want neither backward classes nor privileged classes. We want a classless society where all have the opportunities required to contribute to economic development and to excel. For this, any programme of reservation

has to be heavily supported by affirmative action and the administrative policies to generate excellence by creating an environment and opportunities for excellence for those who lack them. Instead of creating goodwill and support for policies to remove inequalities, wrong policies have generated frustration and lack of confidence all round.

It was this lack of confidence which initially made the Constitutional Assembly opt for reservation instead of affirmative action. We have before us the example of United States, where to remove discrimination on the ground of colour, they have opted strongly for affirmative action rather than reservation. We have with us knowledge of the entire history of struggle for equality in the United States, starting from *Dred Scott*, *Brown vs. Board of Education*, *Bakke* and *Michigan Universities* cases. There must be a constant assessment of policies of reverse discrimination to make sure that denial of equality which it entails, is proportionate to the benefit obtained. In this connection, the European Court of HR has evolved an interesting principle of proportionality to deal with policies that depart from or detract from well established human rights such as the right to equality. It has examined the public welfare to be promoted by the law as against the limits imposed on people's constitutional rights in order to see whether the infringement is proportionate to the public good. It has evolved a standard of rationality which can be used by the

courts to identify laws which are more invasive than they need to be. I am not sure if our policy of quota will pass this test.

The policy of providing quotas and reservations must be supported by massive affirmative action. In a recent interview the new President of the Confederation of Indian Industries has expressed the need to recognize that growth which has happened in India has not been inclusive. The growth in the economy has not touched every section of the society. One cannot leave it to market forces and expect that the benefits of economic prosperity would trickle down to all sections over time. The solution is to increase the competitiveness of the underprivileged and the way is to equip them with right skills and create the necessary conditions where they can get employed in their own right. Increasing the competitiveness of the underprivileged requires massive affirmative action and major policy thrusts. It involves a special effort on the part of the private sector as well as the public sector to create opportunities for the underprivileged for training, for education and for excellence. Well, throughout affirmative action policies have to be undertaken at every level and they have to start with basic education.

The quality of our basic education leaves much to be desired. Now that we have made education a fundamental right, the right to education must be broad enough to ensure access to education of

good quality for the underprivileged, an education which equips a child for participation in the country's economy. Unfortunately, schools which impart excellence in education are few and not accessible to the underprivileged. A factor which distorts access to quality education is the fees charged by most private institutions which claim to provide quality education. Educational Institutions are run as profit-making enterprises by non-educationists. Heavy fees for education which the underprivileged cannot afford, is also a denial of equality of opportunity. The debate on merit as a basis of admission is distorted because of this factor. Obviously all meritorious students do not have equal opportunities to receive quality education if they cannot afford high fees. Fees must be reasonable. If reasonable fees are beyond the reach of some, there must be a programme to provide need-based financial aid to those who would otherwise have got admission. This also brings out the need for proper economic policies to backup quality education which will generate excellence. Our economic policies have concentrated on the rate of growth - 8%, 9% to 10%. There has been no effective programme for economic empowerment of the backward classes.

In the area of education a combined effort by the civil society, by NGOs, by the private sector, by the public sector, and the government, has to be made to assure to all access to quality education and establishment of schools and colleges that generate

excellence in adequate numbers. There was a time when all the students of my generation refused to fill in the column relating to caste in our college admission forms. Everyone spontaneously put down his or her caste as "Indian". Where is that feeling of oneness now? Unless we provide opportunities to the underprivileged to avail of quality education on equal terms with the rest, we will not be able to regenerate this spirit.

Many such policies when adopted, have remained on paper and have not been effectively implemented. This might be a good time to look at some of the programmes of affirmative action adopted by South Africa in recent times. Their initial focus was on education. In India it would also include avoiding dropouts from school education. Our dropout rate for Scheduled Caste children is 76% before reaching class X. There must be a programme for retaining those children in schools across the country.

South African programme has now moved on to employment opportunities with the Employment Equity Act which focuses on ensuring diversity. Groups designated for protection include all discriminated groups and not just blacks. For example, it includes women. There is no quota. But a duty is cast on the employer not to discriminate against any employee on the ground of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, disability, religion,

HIV status, belief, political opinion, culture, language and birth. Under the Act a code of good practices calls upon employers to develop affirmative action measures so that the corporate culture is transformed in a way that affirms diversity. There is an obligation to report back to the ministry which will review the action taken by the employer and impose penalties on defaulters. It is time we specified our own strategies for empowerment.

There is also need for co-lateral empowerment programmes for health, access to medical care, employment generation, poverty alleviation, empowerment of the disabled and empowerment of women. Programmes for effective use of natural resources and the environment to generate sustainable development are also needed. These directly affect the underprivileged. Mahatma Gandhi once said that what we are doing to the forests of the world is the mirror reflection of what we are doing to ourselves and to one another. As the World Development Report 2003 which dealt with sustainable economic policies for the future, points out, lack of assets, opportunity, and effective voice for large segments of the population blocks the emergence of general welfare enhancing policies, blocks increased growth and undermines potential for positive change. At the national level, it robs us of the talent of those left out in society; and at the international level, it deprives the world of the contribution that a poor country can make to a more just and sustainable future.

We urgently need to look beyond quotas and to provide a policy that is just and fair to all groups in the country. We need a programme of national development that focuses on empowerment of the poor, the backward and those who have been denied opportunities for various historic, social and customary reasons. We need to move beyond quotas, and do far more than just the political arithmetic of dividing opportunities. We need programmes for development that focus on human rights. Development must enhance human capabilities, expand choices and opportunities so that each person can lead a life of respect and value. Globalization has created fresh opportunities for those equipped to avail of them. It is time we make the benefits of globalization available to all our people directly. It is time we train them, educate them and equip them to compete globally for economic prizes and for contributing to the world's progress. We have the manpower and we have the capabilities. We must learn to use these capabilities which are available with all sections of the people of our country. Only then can we secure all our people, a life with dignity, and a just social, economic and political order.

*The views expressed in this booklet
are not necessarily those of the Forum of Free Enterprise.*

"People must come to accept private enterprise not as a necessary evil, but as an affirmative good".

-Eugene Black

FORUM

of Free Enterprise

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