

Possibilities of equality

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Like any prime minister in the final year of his term, Dr Manmohan Singh must be considering his legacy. While all attention is focused on the Indo-US nuclear deal, not enough attention is being paid to the fact that implementing the recommendations of some of his committees has the potential to recast social relations in the future. Ever since Dr Singh did his bit to liberalise the economy in the early 1990s, resulting in a significant shrinking of the state, there has been a growing demand to impose social justice obligations on the private sector. This demand has mainly been articulated as one for reservations, India's favourite vehicle for social justice. Caught between egalitarian constitutional imperatives and the constitutional guarantee of freedom of trade etc, wherein lies the appropriate balance? The task was delegated to two committees — the Madhava Menon Committee for an Equal Opportunity Commission, and the T.K.A. Nair Committee on Affirmative Action.

Let us first look at the Menon Committee Report, submitted in February 2008. The Committee has recommended that discrimination against 'deprived groups' identified on grounds such as a person's caste, sex, religion etc must be prohibited in the public and private sector. 'Deprived groups' are to be identified by a 'deprivation index' rather than left to political expediency. An Equal Opportunity Commission is proposed as the implementation body.

Anti-discrimination is conceptually different from affirmative action. While the latter imposes positive obligations, anti-discrimination, at least in its core cases, only requires that action is not motivated by prejudice or stereotype. Examples of private sector discrimination abound, but to cite just one of them, a housing society in Mumbai recently refused to sell a flat to television actor Aamir Ali because he is Muslim. His petition to the Bombay High Court was rejected because the Constitution does not cover discrimination by private parties and there is no parliamentary legislation to cover the field. An Equal Opportunities Commission Bill would hopefully fill in this statutory gap. Legislation, however, must be preceded by a public debate to remedy some of the drawbacks of the Menon Committee Report, including its silence on the housing sector and its rather weak enforcement mechanism.

Affirmative action is more complex, because private actors are told not only to refrain from doing evil but also to do good. The Nair Committee is reportedly considering FICCI's suggestion that the government should provide fiscal incentives to the private sector to undertake affirmative action measures. Before it finalises its report, the Committee would do well to read Professor Christopher McCrudden's recent book *Buying Social Justice* (OUP 2007). Drawing on countries as diverse as the US, Malaysia, the EU, Canada and South Africa, McCrudden provides an excellent empirical analysis of the way in which these

jurisdictions have tried to balance private freedom with social goals — by ‘buying’ social justice. Instead of relying on their ‘imperium’ (power of sanction), these jurisdictions have relied on their ‘dominium’ (power of purse) to achieve social justice goals.

The basic idea is simple — of imposing affirmative action obligations through government contracts. Although this will leave out private players who have nothing to do with the government, the number of companies, schools and housing societies that obtain cheap land and other subsidies from government and sell their goods and services to government is sizeable. If the affirmative action obligation is a necessary clause in all government contracts, at least some advancement of social justice may be achieved without infringing constitutional freedoms.

The idea is not entirely new to India, but the book provides an opportunity to learn from the experiences of others. McCrudden draws from his vast comparative survey to warn against the possible dangers of this approach, including crystallisation of vested interests and corruption. A flexible model that allows the private players to experiment with different ideas (while zealously guarding against tokenism and periodically assessing results) may develop more effective affirmative action strategies than reservations.

One point needs to be emphasised. A position demanding absolute freedom for the private sector is untenable. It cannot be sustained legally under our Constitution which allows ‘reasonable’ restrictions on such freedoms; nor philosophically — unless one adopts a libertarian (rather than a liberal) position. Perhaps most importantly, it cannot be defended empirically. Even the most capitalist of the liberal market economies have been employing the two measures discussed above for years (the US has had anti-discrimination legislation for over four decades). These suggestions are modest and minimally interventionist.

Anti-discrimination and contractual affirmative action are but two of the various compatible options that the government may concurrently explore. Given rising inequalities, inaction may be ruled out. Ultimately, as McCrudden warns, ‘The wise policy maker ... will not want to put all her eggs in one basket’. The Nair Committee would do well to advise the PM of the possibilities.

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