Reservation for Dalits is not to undo economic backwardness, but as remedy for untouchability

The Centre has called upon the Supreme Court to constitute a three-judge Bench to examine whether the ‘creamy layer’ concept should be applied to Scheduled Castes (SCs) and Scheduled Tribes (STs) for promotions in service. In a conversation moderated by K.Venkataramanan, Sukhadeo Thorat and Ashwini Deshpande discuss the basis for reservation and the myths associated with it. Edited excerpts:

Can you give us a perspective on the idea of applying the creamy layer concept to reservation and, in particular, to SCs and STs?

Sukhadeo Thorat: Reservation in politics, services and institutions is given to SCs particularly because they are denied the right to property, education and industries for nearly 2,000 years. Besides they were treated as untouchables. Discrimination was constitutionalised starting in the 17th century and the argument was that we have to provide them the safest (against discrimination) and compensate them to some extent for past exclusions. So, they should be given representation as per their population share. Because otherwise, due to persisting discrimination in services, education and industries, they won't get their due share.

They continue to be landless. I think there is the policy should have some reconsideration. That has not been done. What we are doing is simply giving some protection against discrimination in the present, and giving a share in proportion to the population. So, instead of going to the Supreme Court, the government should have so far not done any study. We need a study to actualise the reservation.

Ashwini Deshpande: I agree that the reason for having reservation, at the entry level and then in promotions, is to combat discrimination, which can be economic or social. So, if we want to make sure that the poor are getting represented, we need a separate set of policies.

We have to recognise that while both OBCs and SCs get reservation, they are two very different social realities under which Dalits live and the situation under which OBCs live are very different. So, I would make a case for justifying the ‘creamy layer’ exclusion from within the OBCs, because for them a lot of it is economic backwardness. And if you are rich enough to cross a certain threshold, there isn't the kind of social discrimination that happens towards Dalits. In fact, there is an argument in the U.S. that rich Black people are more privileged than many Europeans. We don't have the data to show that discrimination actually increases with a rise in economic position. Even after Dalits get entry into jobs or higher education, there are little micro-aggressions that they face. For example, in educational institutions students complain of harassment because they are worse off in terms of economic advantage. We need more data, but to link it with economic status is wrong.

How far do you think the test of backwardness, the adequacy of representation, and the impact of reservations on the efficiency of the society or economic growth affect or do not affect the prospects of SC/ST candidates?

ST: The reservation policy type of affirmative action is against discrimination; it is not based on economic consideration because the discrimination is independent of your economic status. We have to look into the socio-cultural need for reservation. Have they ever raised the issue that relatively better-off women should not get political reservations? Because they are discriminated based on gender, poor or non-poor. So, I think this clarity has to be there.

I take the view that economic concessions should not be given. Don't give them subsidies, scholarships, because some of them are economically better-off, but you cannot extend that argument to say that reservation should not be given to the economically better-off. So, I think the Supreme Court has to understand the point academically; I don't think the issue is legal.

If there is a question of limit, the limit can be modified. If promotion harms others, there are other ways of helping them. The Supreme Court should not put a legal limit on it, 50% or otherwise. Find out the alternative ways of benefiting non-SCs/STs, while retaining reservation for SCs/STs.

AD: One more point. If you treat the unfilled vacancies as a separate unit to be filled, you actually don't exceed the 50%. In any case, the 50% limit is a bit arbitrary. It also has to be rethought. But even if you don't go into that today, the point is that if you consider the unfulfilled vacancies as a separate unit, and not club that with upcoming vacancies, it is possible to not violate 50%.

The economically better-off also face discrimination, in service and many other spheres. They also need a safeguard and that safeguard is the affirmative action policy off SCs. And if at all the Supreme Court has to take a pen, it should ask the government to set up a comprehensive committee to study the practice of untouchability and discrimination faced by SCs and STs. The court should revise its position and see where they continue to face discrimination in all spheres of life. If a community does not face discrimination, then you can develop an anti-poverty policy for the poor. But when there is discrimination, you have a separate policy all over the world.

AD: The point that both of us are repeating is that the reason for reservations for Dalits is not economic backwardness. It is the stigma that comes on account of the untouchability status. And even though legally untouchability has been abolished, there is a lot of data that show that people still practise untouchability. So the stigma that comes on account of an untouchability status – reservation is only a tiny remedial measure for that. This continuous clubbing together of economic backwardness and stigma because of the untouchable status is wrong. Because you can talk about economic backwardness, but for Dalits you have to address the stigma.

AD: One argument was that while at the entry level a person is genuinely deprived, and reservation is a remedial measure, as he goes up the ladder in both income and status there may not be any need for reservation in promotions. And that the creamy concept should be applied at that level.

ST: We are emphasising the point that the policy of reservation or affirmative action is against discrimination, that is denial of equal opportunity which others enjoy. And the economically better-off also face discrimination, in service and many other spheres. They don't have a safeguard and that is the affirmative action policy. What I had also said is that since they are economically better-off, don't give them economic advantages like subsidies. They can afford that but you cannot extend this argument to say reservation should be withdrawn for the better-off. There is need for reservation in promotions because they face discrimination in promotion too. So, I think this policy should be continued. The Supreme Court and government should undertake a study.

Reservation is sort of peanuts. This is seen sometimes as a sop for a small portion of jobs. And it is there they get some share. In private, there are no protections against discriminations. What you require is compensation, reparation, supplemented by reservation.

There is a provision in Article 16 on how affirmative action should be subject to overall efficiency. A Division Bench recently rejected the idea that reservation was required to impact on efficiency, but even then I think the view is still prevalent.

AD: This belief that reservations affect the efficiency of public services is a complete myth. I have done a study with the Indian Railways. And that is the only long-term, big-scale result of affirmative action which I attempted to evaluate the impact of reservations on efficiency. Reservations have no negative impact on efficiency. If anything, at the top level, they actually have a positive effect. Recently, another study came out looking at IAS officers’ performance indicators, and that study reached the same conclusion. There is another study too.

The courts insist on quantifiable data — whether it is on backwardness, on inadequacy of representation, or Efficiency. Do you think it's too onerous a requirement for the government to demonstrate everything through quantifiable data?

AD: I strongly support a data-based, evidence-based approach to judging reservations. We need to have greater transparency and data-based evidence to support any claims.

ST: I would like to add that under the SC and ST (Prevention of Atrocities) Act and the Protection of Civil Rights Act, it is the government’s responsibility to undertake a study every five years, to bring out the nature of discrimination and untouchability faced by Dalits. The government report is supposed to have a separate chapter on untouchability. That report has not been brought out in the last 20 years or so. The government has already presented a study. There are quantitative techniques that will capture qualitative relationships but unfortunately such surveys have been commissioned by the NSSO.

The reservation policy as it exists has been helpful and is a pro-poor policy. More than 60% of govern ment employees are from Class 3 or Class 4 employees and are poor and less educated. At the same time, there is massive privatisation of public sector jobs and the public sector is increasingly taking on contractual jobs for which there is no reservation. There is a need to extend reservation to the private sector as well.

AD: We need a strong anti-discrimination framework. There are so many barriers for the oppressed to apply for jobs. I think it is difficult for somebody with genuine grievances about discrimination to seek justice. There is now a recognition about social discrimination and institutions are making sure they develop structures to tackle it. We need similar responses for economic discrimination in the workplace.

The point is that this myth is so strong that people are not willing to publicise the rigorous examination of this question.