The Supreme Court judgement on reservation – An analysis

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Reservation of posts for backward classes in Government appointments and in educational institutions owes its origin to pre-constitution days. Article 14 of the Constitution proclaims equality before law and equal protection of the laws as a fundamental right. Even the Preamble to the Constitution seeks to secure, among other things, Equality of status and opportunity to its citizens. But, Equality as an abstract concept, would do more harm than good and the following oft quoted observation would explain it more emphatically.

"In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."

So, it is by now well settled that the reservations policies pursued by the Government in the sphere of public employment and educational opportunities are not an assault on right to equality but a means to achieve equality. The Constitutional makers have realised the importance of reservation in public appointments and enacted clause (4) in Article 16 of the Constitution, providing for reservation in public employments, for any backward class of citizens.

The very first notable judicial pronouncement of the Supreme Court on reservation is in the case of Champakam Dorairajan[1] arising from the then State of Madras in 1951, where the communal G.O. providing for caste based reservation in medical and engineering colleges was set aside. This prompted the Government to bring in the first constitutional amendment, which introduced Clause (4) in Article 15, enabling Government to make special provisions for the advancement of any socially and educationally backward classes of citizens, as well as Scheduled Casts and Scheduled Tribes.

In the year 1962, when the reservations reached a level of 68 % in the State of Karnataka for admission to educational institutions, in the case of M.R. Balaji[2], the constitutional bench of the Supreme Court has laid down that the quantum of reservation should normally be less than 50 %. The issue of

[1] AIR 1951 SC 226
[2] AIR 1963 SC 649

reservation has occupied considerable time of the Courts and suffice to say that there were several judgements from various High Courts and the Supreme Court in different shades.

Then came the report of the second National Commission for Backward Classes, aka the Mandal Commission and its implementation by the Government, which paved way for 27 % reservation for other backward communities, which were identified based on various paraments, caste, among them being the primary one. With the already existing 22.5 % reservation in favour of SC/STs, the total quantum of reservation became 49.5 % at the centre level and it is for the first time reservation was introduced in public appointments under the Union Government for other backward classes, which hitherto was applicable only for SC/STs.

The decision of the Union Government to implement the recommendations of the Mandal Commission was challenged before the Hon'ble Supreme Court, which led to the decision of the 9 judges constitution bench in Indra Sawhney[3] case, of which 6 judges wrote their independent judgements. The crux of this decision can be summarised as that the quantum of reservations must always be kept below 50 %, though the ceiling can be breached in exceptional circumstances, arising out of the inherent great diversity of this country and the people and it may so happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life need to be treated in a different way, albeit with extreme caution and by making out a special case to breach the ceiling of 50 %. The Constitutional bench also held that reservations in promotions are not permissible and reservations cannot be given purely on the basis of economic criteria. The Court also directed the Government to form permanent bodies at both national and state level to deal with issues relating to backward classes.

Some of the conclusions arrived at by the Supreme Court in Indra Sawhney case and some later cases have since been overcome by constitutional amendments, such as introduction of clause (4A) in Article 16 to provide for reservation in promotions with consequential seniority; introduction of clause (4B) in Article 16 to save the carry forward rule in promotions from the applicability to 50 % ceiling; etc.

At this stage it is relevant to note that while drawing up the list of SCs and STs is the responsibility of Union under Article 341 and 342 of the Constitution respectively, it has been the regular practice that the Union Government and the State Governments would have their own lists of backward classes which would apply for appointments and educational institutions under Union Government and State Governments respectively.

Then came the 102nd amendment to the Constitution, which, inter alia introduced Article 338 B dealing with setting up of a National Commission for

[3] AIR 1993 SC 477

Backward Classes as a constitutional body (in compliance with the directions of the Supreme Court in Indra Sawhney); article 342 A empowering the President to draw up a "Central List" of Socially and Educationally Backward Classes (SEBCs); and defining the term SEBCs for the purposes of the Constitution.

Above is the contextual setting in which, we have to refer to the developments in the State of Maharashtra.

The Maratha community is one of the significant communities in the State of Maharashtra and there was constant endeavour to treat them as SEBCs and provide reservations for them. But, as much as 3 Central Commissions and 3 State Commissions have time and again, spawning the period from 1955 to 2013, rejected the request, after noting the status of the Maratha community in various spheres of life. The State Government has formed a special committee in the year 2014, under the chairmanship of a sitting Minister, which recommended for reservation in favour of Maratha community. Based on the report two ordinances were passed, which later became Acts of legislature, in the year 2014 providing for 16 % reservation to Maratha community. These ordinances were challenged before the Bombay High Court, which stayed the ordinances and subsequent legislative enactments.

In the meanwhile, in 2017, Justice (Retd) Gaikwad came to be appointed as the Chairman of the State Backward Classes Commission, which, after detailed analysis concluded that the Maratha community is socially and educationally backward and hence recommended for reservation for them. Armed with this report, the State Government passed fresh laws in the year 2018, declaring Maratha community as SEBC and providing for 16 % reservation for them and in the process, also breaching the ceiling of 50 % for reservation.

These Acts were also challenged before the Bombay High Court, which in its decision upheld the validity of these Acts with marginal reduction of the quantum of reservation to 12 % / 13 %.

Appeals were filed against this decision before the Hon'ble Supreme Court. While on the one hand it was argued that after 102nd amendment to the Constitution, the States no more have the power to identify SEBCs, the said 102nd amendment was also challenged before the Supreme Court, on the ground that by depriving the States of their power to identify and notify SEBCs within their State and by vesting such power solely with the Union Government under Article 342, the amendment is an affront on the basic structure of the constitution, viz., federalism and hence deserves to be struck down.

It was argued before the constitutional bench of the Supreme Court that the decision of the 9 judges bench in Indra Sawhney has to be referred to a larger bench in view of various subsequent developments. It was also argued that the exceptional circumstances test laid down in Indra Sawhney has been met in this case, in as much Marathas, who constitute 80 % of the population and backward could not be accommodated in the 30 % reservation, which is an exceptional circumstance. It was also argued that 102nd constitutional amendment, which deprived the States of their power to identify and notify SEBCs for appointments under respective State service and educational institutions maintained by the State, is violative of the federal character of our polity.

Curiously, the Attorney General and Solicitor General of the Union Government submitted before the Court that 102nd amendment to the Constitution, never intended to interfere with the rights of the States to identify SEBCs for the State. Reliance was placed on the discussions in the Select Committee of the Parliament to which this amendment bill was referred to and the assurances given by the Government in this regard. It was submitted that the "Central List" contemplated in Article 342 A is only the List for the purposes of appointments under the Central Government and Central Government educational institutions and States can very well have their own list of SEBCs. In as much as the States' power in this regard is not deprived off, it was submitted that the said amendment is not violative of the basic structure doctrine.

The constitutional bench of the Supreme Court comprising of 5 judges pronounced its verdict on 05.05.2021 and it has been held that the 50 % ceiling set by the 9 judges constitutional bench of the Supreme Court has stood the test of time and there is no need to refer the issue to a larger bench. Some of the observations of Justice Ashok Bhushan are worth quoting in this regard.

- "We have completed more than 70 years of independence. All Governments have been making efforts and taking measures for overall development of all classes and communities. There is a presumption unless rebutted that all communities and castes have marched towards advancement".
- "We are constrained to observe that when more people aspire for backwardness instead of forwardness, the country itself stagnates which situation is not in accord with constitutional objectives".

Though Justice Ashok Bhushan has also held that 102nd Constitutional amendment has not taken away the rights of the State Governments to identify SEBCs for the purposes of the State appointments and State educational institutions, by heavily relying on the debates of the Select

committee of the Parliament which examined the bill and the Parliamentary debates, the majority judgement by Justice S. Ravindra Bhat has come to the conclusion that reliance on parliamentary debates, being an external aid to interpretation can be resorted to only where there is an ambiguity and came to the conclusion that post these amendments, it is only the Union Government which can prepare the list of SEBCs for all purposes of the Constitution. The argument that the denudement of the States' power disturbs the federal character of the constitution is also rejected by observing that the States' views are not to be completely ignored and the President, while finalising the list of SEBCs under Article 342 would consult the Governor of the respective State, who, in turn would be aided by the Council of Ministers of the State and the State Commission for Backward Classes. Thus the challenge to 102nd constitutional amendment has also been negated. It has been observed that the legislative intention is to bring parity in the matter of identification of SCs, STs and SBECs.

This part of the ruling has sent shockwaves among the States, who always enjoyed the power to have their own list of SEBCs for appointment in State services. Predictably, the Union Government has introduced the Constitution (127th Amendment) Bill 2021, to overcome the effect of this judgement. The proposed amendment to Article 342 A seeks to make it very specific that the Central List mentioned therein is only for the purposes of Central Government. Clause (3) to Article 342 A further makes it clear that the States shall be empowered to a prepare and maintain a List of SEBCs, for their own purpose and such List can be different from the Central List. Consequential amendments are also made in Article 338B (9) and 366.

In this background it is also important to know as to what will happen to the 69 % reservation prevalent in the State of Tamil Nadu. It may be noted that in order to save this provision from the vice of violation of fundamental rights, the relevant State enactment in this regard has been reserved for assent by the President and the same was also obtained, so that, as per the provisions of Article 31 C of the Constitution the same would be beyond challenge. Further, the said enactment has also been placed under ninth schedule to the Constitution so that, as per the provisions of Article 31 A, the same is immune from challenge on the ground of violation of fundamental rights. But, as held by another 9 judges constitutional bench of the Supreme Court in I.R. Coelho case, the very placing of a statute under ninth schedule is amenable to judicial review and a case challenging the placement of the Tamil Nadu enactment under ninth schedule, is already pending before the Supreme Court.

To conclude, while the relevance and importance of reservation to achieve the must desired equality can never be under estimated, the problem lies in the fact that this pure social issue often assumes political dimensions. Reservation coupled with various other protective measures as suggested by the Supreme Court to ameliorate the conditions of backward classes, if

implemented in all earnestness, shorn of any political overtones, equality, which eludes our society for the past more than 75 years can be achieved at least in the next 10-15 years.