

Reservations in Judiciary – A Myth or Reality

Abstract

The Constitution of India under Article 14 guarantees the right to equality as the fundamental right to its citizen. To accomplish the right of equality the makers of the constitution recognised and recommended introduction of reservations for downtrodden, suppressed and oppressed segment of the society. They thought that only providing of special status can result into attain of the equality in the society. . In this process the SCs, STs and OBCs have accorded special status in the constitution to enter into main stream of the society. The rule of law only properly safeguarded if we have independent and effective judicial system. To achieve this end the constitution also makes provision for independent and supremacy of judiciary. The system of reservations were very much vague in our country before to the coming into force of the constitution. It has gained the constitutional nod when our constitution came into existence. Over the years we have seen that reservations have been introduced in legislative and executive domains and same is denied in the higher judicial arena, for reasons beyond comprehension. Because of non existence of reservation system in the higher judiciary severally resulted into less representation of majority people in the system. The demand for reservations to SCs, STs and OBCs in higher judicial system is making very much strident since long time but the successive governments for reasons beyond of any comprehension have paying deaf ears to it. The international obligations prescribes that it is the duty of state parties to see that there should be adequate and fair representation of all walks of people in the all spheres of government.

My paper highlights on historical perspectives of reservations in our country, the international obligations for fair and adequate representation of downtrodden people in all spheres of government, need for reservations in the higher judiciary and also stand of apex court of the land over the reservations in the higher judiciary etc. matters.

Keywords: Varna, lineage, Mahatma Jyothi Rao Phule, Shahu Maharaj, Schedule caste, Schedule tribes, Other Backward Classes, moorings,

Introduction

The concept of reservation in the government sphere is not a new phenomena. It is very much in existence since time immemorial in our country as well as around the world.

Ancient Period

During the Vedic period, the varna system was in full practice. However, it was based on the profession one chose rather than on the birth. In earlier Vedic period, all castes considered to be equal. The varna system resulted into the division of the society and its people.. A person's varna was defined by his or her socio-economic duties. These duties were either voluntarily performed or were assigned by the local administrator— one's varna was initially not defined by one's birth into any particular family. However, over the centuries, especially during the 11th century on-wards, the system has changed so that one is born into a varna based on lineage.¹

British Period

Reservations in favour of Backward Classes (BCs) were introduced long before independence our country during the rule of princely states. The Britshers appointed Hunter Commission and at that time only Mahatma Jyotirao Phule made a vociferous demand of free and compulsory education along with proportionate representation in government jobs. In 1891, there was a demand for reservation of government jobs with an agitation (in the princely State of Travancore) against the recruitment of *non-natives* into public service overlooking qualified *native* people. In 1901, reservations were introduced in Maharashtra (in the Princely State of Kolhapur) by Shahu Maharaj.

He provided free education to everyone and opened several hostels in Kolhapur to make it easier for everyone to receive the education.

Jetling Yellosa

Chairman, Board of Studies,
Department of Law,
Telangana University,
Dichpally, Nizamabad

He made strident efforts for class-free India and the abolition of untouchability. The notification of 1902 created 50% reservation in services for backward classes/communities in the State of Kolhapur. This is the first official instance (Government Order) providing for reservation for depressed classes in India.²

Objective of Reservation system

The main objective of the Indian reservation system is to increase the opportunities for enhanced social and educational status of the underprivileged communities and thus enable them to take their place in the mainstream of Indian society.³ The reservation system exists to provide opportunities for the members of the Scheduled Castes, Scheduled Tribes and other Backward Caste people to increase their political representation in the State Legislatures, the Executive Organ of the Union and States, the labour force, schools, colleges, and other public institutions.⁴

Constitutional Mandate

The coming into force of the Constitution heralded in providing of positive discrimination for advancement of the SCs, STs and OBCs, who have to come into mainstream of the society as they were denied their basic rights for centuries together under foreign rulers. The Article 16(4) of the constitution reads as : "Nothing in [article 16] or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes". The Article 46 of the Constitution states that "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Because of the constitutional mandate the Government has embarked upon providing of reservations in educational and government job opportunities for SCs, and STs from 1950 and for OBCs segments from 1993, after much heated and embroiled episodes of implementation of Mandal Commission recommendations.

For successful functioning of any democratic set up the judiciary plays a paramount role, in view of its sacrosanct position under the Article 12 the word judiciary is not added for the meaning of the State but it is apparent that the state includes the judiciary at all levels.

International Guarantees

In the international arena, the International Convention of Elimination of All Forms of Racial Discrimination 1965 though directly does not prescribe reservations to oppressed, suppressed and backward classes but inner reading of its articles 4 and 7 clearly prescribes that the State parties shall take appropriate measures for bringing oppressed, depressed sections to mainstream of the society. The charter of the United Nations Organisations also speaks about ending of all sorts of discrimination and accomplishment of egalitarian society around the world.

Ground reality of Reservations in Judiciary

Because of not having reservations in higher judicial system severally resulting into non access or denial of social justice to SCs, STs and OBCs to

reach to higher judicial echelons. Since coming into force of the Constitution only few personalities have able to reach the top echelons. After 60 years of its coming a person belonging to this background became the Chief Justice of the Supreme Court, though they occupy more than 55% of population of the country.

Ever since the Supreme Court wrested from the executive primacy in the matter of the appointment and transfer of Judges in the Advocates-on-Record case in 1993, the political class has unwittingly conceded more ground to the judiciary than is required under the Constitution. As a result, for instance, the executive and the legislature have been unable to ensure that the members of weaker sections - the Scheduled Castes and the Scheduled Tribes - and women get meaningful representation in the judiciary⁵.

It is not as if the shrinking social base of the judiciary had not caused concern earlier. In the Advocates-on-Record case, Justice S.R. Pandiyan, while concurring with the majority opinion that the Chief Justice of India (CJI) in consultation with his senior colleagues should have the decisive influence over judicial appointments, added that it was necessary to make judicial appointments as broad-based a process as possible. Justice Pandiyan's estimate - valid even today - was that less than 4 per cent of Judges in the higher judiciary was from among the S.C. and S.T. sections and that less than 3 per cent were women⁶.

In his ruling Justice Pandiyan, outlined the contours of interaction between the executive and the judiciary in order to achieve the requisite social justice: "There is every justification for the government to forward lists of candidates belonging to diverse sections of the people to the Chief Justice concerned, who has to ultimately scrutinise the list and take his decision on the merit of the candidates without giving room for any criticism that the selection was whimsical, fanciful or arbitrary or tainted with any prejudice or bias."⁷

It is pain to note that persons from the oppressed and depressed have not represented in the apex court of the land finally J. A. Varadarajan elevated to it in 1980 that means it took 30 years of time to reach a person from oppressed and depressed to the pinnacle of highest court of the land.

The lopsided appointment process within the judiciary has come under sharp focus in the context following a widely shared perception that there is inadequate representation of S.C.s, S.T.s, and the other backward classes (OBCs) in the judiciary. The Committee on the Welfare of S.C.s and S.T.s, in its report presented to Parliament in March, concluded that only a firm policy on reservation can remedy this problem. The committee, consisting of 20 Lok Sabha members and 10 Rajya Sabha members, is headed by Kariya Munda, a BJP MP from Bihar. Asked about the silence of the government and the political parties over the report, Munda remarked: "The government should respond and submit an Action Taken Report in Parliament. We will demand an explanation from the government regarding its stand on our recommendations. I expect the government to respond within six to eight months." He asked, "If you

have 80 vacancies all over the country reserved for the weaker sections, is it difficult to find at least 50 eligible candidates for the posts of Judge s?"⁸

Stand of Judiciary on Reservations

After much persuasion from various quarters the reservations system was introduced in the subordinate judiciary as the subordinate judiciary is administrated and governed by the Higher courts in their respective states. There is no universal mode of reservations have been available and in various states various kinds of reservations have been existing. The apex court of the land in the below mentioned case has occasions to discuss the contours of reservations in subordinate judicial services.

In State of Bihar and Ant. V. Mukund Sah and Ant.⁹ in this case the Supreme Court in length discussed the having of reservations in subordinate judicial services and observed that

"It cannot be disputed that social composition of judiciary is of crucial importance in the administration of justice in any country. The decisions rendered by the Courts on the economic and social aspects would, to a large extent, depend upon the economic and social outlook of those who administer justice. There is no justification for an a priori approach that social backwardness pre-supposes lack of merit and efficiency, even when the candidate meets the minimum qualifying standards set up to safeguard the efficiency of administration. When minimum standards are set up for selecting the candidates they usually take care or ought to take care of the efficiency aspect, because, even a general category candidate who satisfies only such minimum standards of eligibility criteria for selection, can be appointed in the absence of candidates having higher comparative merit than him. When the Scheduled Castes and Scheduled Tribes have a dismal representation in judiciary which is not omitted from the ambit of the reservation policy underlying the constitutional provisions, it should be a matter of grave concern for the High Court prompting it to frame its own rules or scheme providing for the reservation of appointments or posts in accordance with the provisions of Article 16(4) read with Article 335 of the Constitution". It accepted the state decision to provide reservations in lower level of judiciary in that state.

The Supreme Court in the most landmark judgment *Indra Sawhney v. Union of India*¹⁰ in thread bread discussed on the implementation of Mandal Commission report by then Central Government providing reservations to other backward classes students in central educational institutions. In this case it paved the way for constitutional mandate for providing of reservations to OBCs with some limitations like introduction of creamy layer policy but it did not made any negative observations with regard to providing of reservations in the higher judicial system.

It is stated that "Judges take oath that they uphold the Constitution and the laws. But the Supreme Court, and a few High Courts, by claiming power above the Constitution, practise untouchability and are disobeying the Constitution with regard to Article 16(4) and 16(4)(A)." Article 16 (4) enables the state to make provision for the reservation in

appointments or posts in favour of any backward class that is not adequately represented in the services under the state. The committee has also questioned the exclusion of the judicial wing from the definition of the state in Article 12.¹¹

Conclusions and Suggestions

Even after passage of sixty years of period does not resulted any good upon the SCs, STs and OBCs with regard to their hounourable position in the higher judicial echelons. It is high time that the Constitution should be suitably amended that in the higher judiciary and as well as in the subordinate judicial appointments on par with population those sections of people should be provided of reservations. Unless and until we give constitutional mandate for their reservations it is not possible that they would be reaching to highest pinnacles of judiciary.

The former Chief Justice of India Justice P. Sadhasivam has strongly favoured reservation for members of the Scheduled Castes, Scheduled Tribes and the Other Backward Classes in the higher judiciary, such as Supreme Court and high court judges' posts and argued that members of the SCs, STs and OBCs could be elevated to the higher judiciary by giving them certain concessions in the appointment process, provided they fulfilled minimum requirements. This kind of arrangement would go a long way in assuring all sections of the society that their well-being was taken care by the country, irrespective of their social moorings.

References

1. "Verna, Caste and Other Divisions". [U.S. Library of Congress](#), Retrieved 20th August, 2013. ([www.Wikipedia.org](#)).
2. History of Chhatrapati Shahu Maharaj. By Bahujan Samaj Party. Retrieved 20 October 2011
3. Sheth, D. L. (14 November 1987). "Reservations Policy Revisited" *Economic and Political Weekly* 22 (46): 1957–1962. JSTOR 4377730.
4. "Finanacial Support". University Grants Commission, India. Retrieved 20 October 2011
5. Venkatehan V. "Judiciary and Social Justice" *Frontline* Vol.17, issue21, Oct.14-27, 2000.
6. Supra
7. Supra
8. Supra
9. 2000 (4) SCC 640
10. 1992 Supp.(3) SCC 219