

Protective Discrimination: Need of Hour in Respect of OBCs of J&K.

Abstract : The Britishers have always been accused of exploiting the rich resources and looting of this country. The positive aspect of Britishers was to treat unequals with humanitarian approach. They were the first to provide the weaker depressed classes of Indian society with concessions of protective discrimination. This article gives brief sketch about the implementation of OBCs reservation in J&K and the sorry state of affairs of people belonging to these classes/ castes. As per the present OBC list of State of J&K there are 26 castes identified which qualified the criteria set by Govt. of J&K under sub classification as “Weak and Underprivileged Classes” or say Other Social Caste. The criteria and the percentage of reservation under the head Socially and Educationally Backward Classes clearly implies that the ruling class/ caste if desire can confer any undue benefit for political gain by diverting the benefit of rightful claimants who have suffered socially as well as educationally and have not been provided opportunities to live with dignity. According to Government of J&K these OBCs (OSCs or W&UP) have been appropriately provided the reservation proportionate to their population. Although the Government woke up from its slumber and ordered conduct of survey for OBCs (OSCs/ W&UP) but now bureaucratic inertia is another aspect which is to be looked into as the desired information is till awaited from the concerned districts.

IndexTerms - Reservation; Resident of Backward Areas; Line of Actual Control; Roster points; NCBC; Mandal Commission.

INTRODUCTION

*“There is equality only among equals.
To equate unequal’s is to perpetuate inequality”*

India is a country with a vast population of about 1.2 billion and second to China in terms of population. The world largest democracy with its Constitution as supreme edifice on which the legislations are tested and the policies are implemented. Traditional Indian society was caste ridden and social backwardness was mainly attributed to caste status and various other types of backwardness flowed directly from this caste status. The reservation policy in the country is governed by the various factors the most important is the criteria of being socially and educationally backward. Although the Central list of OBCs comprises of 21 number of castes while in the State of J&K the list of OBCs is displayed as “Annexure D” to the Jammu and Kashmir Reservation Rules 2005 and comprises of 26 castes, the last entry being “Sheer-Gojries” added vide SRO-73 dated 7th March 2011 of Social Welfare Department, Government of Jammu and Kashmir. These castes have struggled a lot to get themselves included in the State list of OBCs. However their struggle to get 27% reservation starts now and with liberal government at State and PM from OBCs the ray of hope seems clear that they will get their due share.

History

The British administration in India was aware of the fact about the limited access to education except depressed classes. The first step in the field of protective discrimination was taken by Madras Government while enacting the Grant-in-Aid Code in the year 1885 wherein the provision for providing financial assistance to the educational institutions which were extending special facilities for students of **depressed classes**. In 1918 Maharaja Of Mysore constituted a committee under the Chairmanship of **Sir L.C. Miller**, the then Chief Justice of Mysore to recommend measure for adequate representations to non- Brahmins in services of the State and in 1921 on the recommendations of the above committee special facilities of education and employment were extended to backward communities of the State. At the all India level the first attempt for the welfare of depressed classes was made in the “**Montague-Chelmsford Reforms**” 1919 wherein separate representation on public bodies were given to these classes.

In 1921 Madras Government took necessary measures for ensuring higher representation of non Brahmins in the Government services. In the year 1927 separate quota for each category was earmarked and reservation was further implemented for giving due representation to these communities. In 1928 Government of Bombay constituted Committee under **Mr. O.H.B. Starte** to identify the backward classes and recommend measures for their advancement. The committee submitted its report and identified three categories i.e, depressed classes, aboriginal and hill tribes and other backward classes and recommended measures in the form of education and employment in government services for their advancement.

On persistent and strident demand of traditionally neglected and socially backward classes for providing reservation to them those who had no or inadequate representation in the employment in Govt. jobs in the central and State Govt. the Govt. of India appointed 1st Backward Classes Commission under Article 340 of Constitution of India popularly known as “**Kaka Kalelkar Commission**” on 29th of Jan. 1953 it submitted its report on 30th March, 1955. While rejecting the main recommendation of this Commission the Centre Government informed the State Governments that they were free to determine and draw the list of Backward Classes.

In pursuance to the report of above Commission, the J&K State Govt. appointed a committee for identification of the backward castes/classes vide an **Govt. Order No. 826-C of 1956**. But the peoples of J&K state were constantly ignored and discriminated again in the matter of recruitment in Govt. services, public sector establishments, Educational institutions and allied fields in the state.

Again the J&K Govt. ultimately succumbed to genuine and reasonable demand of the Backward classes in consultation with Union Govt. of India appointed P.B. Gajendragadkar Commission vide **Govt. Order No. 878-D of 1967 Dated 6-11-1967**. The commission submitted its report to the state Govt. during December 1968. Out of its 42 recommendations one was in respect of recruitment for Govt. services and other was to revise the list of Backward classes by a high powered commission.

Consequent upon the Report of above Commission the State Govt. appointed a committee headed by **Justice J.N. Wazir**, a Retired Judge of J&K High Court vide **Order No. 252 -D of 1969 Dated 3-2-1969**. On the basis of Wazir committee Report the Govt. issued a Notification No. 37 GR of 1970 Dated 26-4-1970, vide which entire population of influential class of the time was covered for reservation purposes. Again discrimination was meted out to actual deserving Backward Classes. *These rules on being challenged in the Hon'ble Supreme Court of India were struck down by the Hon'ble Court as the Govt. had not followed the criteria laid down by the Gajendra Gadker Commission but instead had covered entire ruling classes of the State.*

In accordance with the judgment of Apex Court, the State Govt. appointed another committee headed by **Justice (Dr) A.S. Anand**, a sitting judge of High court of J&K vide order 540-GR of 1976 Dated 24-8-1976. The committee submitted its report in September 1977 and a fresh S.R.O 394 of 1981 was issued. The main recommendation were :-
Permanent residents of the State falling in the following categories be declared backward classes:-

- i) Twenty two weak and under- privileged classes; and
- ii) Residents belonging to specified backward areas.

The committee recommended following benefits for backward classes of the State:-

- a) Reservation of 42% of vacancies arising in all government services;
- b) Award of scholarships and stipends to students whose family income does not exceed Rs 3000/ annum and award of similar scholarships and stipends at higher rates to students from backward classes within same limit on their family income.

The validity of the said declaration of the classes and categories was challenged before Hon'ble Supreme Court and the Court upheld the list. Vide another SRO No. 272 Dated: 3-7-1982 Govt. laid down the procedure for admission in various institutions of the State providing filing of 50% vacancies by open merit and other 50% to be earmarked for the following classes and categories.

1. Schedule Castes	8%
2. Socially and Educationally backward Classes	
a. Weak and under privileged classes	
i. Gujjar and Bakerwal	4%
ii. Other Social Castes	2%
b. Resident of Backward Areas	
i. District Leh	2%
ii. District Kargil	2%
iii. Other Backward Areas	21%
iv. Areas near the actual line of control	3%
3. Children of Freedom Fighters	2%
4. Children of permanent resident of Defence personnel	3%
5. Candidates possessing outstanding proficiency in sports	3%

The State Govt. had issued fresh Notification vide **SRO No. 126 of 1994 Dated 28-6-1994** forming new categories for reservation purposes:

a. Schedule Castes	8%
b. Schedule Tribes	10%
c. Socially and Educationally Backward Classes	
i. Weak and under privileged classes Social Castes	2%
ii. Resident of areas adjoining line of actual control	3%
iii. Resident of backward areas	20%
iv. Handicap persons	2%
v. Ex servicemen and Children of defence personnel	5%

PRESENT CONDITION:

After covering the long distance from 1953 to 2003, the Backward Classes are still there as these were before independence. The then ruling class of the State has made a mockery of Backward Castes and has played a big fraud upon the Backward Castes. It is very clear from above that only 2% reservation is given to real Socially and educationally Backward Castes. The plain reading of the SRO-126 of J&K Government shows how this 23% reservation was given under the sub classification of Actual line of Control (ALC) and Resident of backward areas (RBA).

If this SRO is gone through minutely it will be proved beyond doubt that areas which are connected by metalled roads having Higher Secondary Schools, Sub Division, Tehsil Head quarters (for instance Sub Division Bani of District Kathua) and notified areas committees have been included in backward areas to give undue benefits at the cost of genuine Backward castes. Also dual benefits of reservations have been provided to them such as bad pocket areas, line of actual control, thereby depicting that same person may belong to social caste or S.C/S.T and at the same time he belongs to A.L.C/ R.B.A thereby providing more avenues to these people under the garb of these reservation rules. Thus J&K State earlier has denied social justice and doing discrimination, suppression and oppression of Backward Castes/Classes. But now with new dispensation both at Centre level and State level, the backward castes see new ray of hope and is sure that present dispensation may ameliorate their condition.

The same was in the case of earlier Central Govt. at Delhi who were not fulfilling the constitutional obligation under Article 340 and continuously thereby depriving Backward Castes from their Constitutional rights since Independence. The Central Govt. recognizing that a fraud has been played upon other Backward classes, realizing much on the issue and considering miserable plight of the Backward Classes, appointed a commission known as Mandal Commission under article 340 of the Constitution of India.

The Mandal Commission submitted its report on 31-12-1980 unfortunately the report went into the hands of the daughter of Pandit Jawahar Lal Nehru, Smt. Indira Gandhi and then her son Sh. Rajiv Gandhi who were totally against the interests of have-nots/ under represented people as they were representing only big houses/haves. The plight of other Backward classes fell out of frying pan into the fire during the Nehru/Gandhi regime and Mandal Report never saw the light of the day.

There was a change in the Central Govt. and power was shifted from the congress to a new political combination of non congress parties. The then Prime Minister **Sh. V.P. Singh** proclaimed and implemented the Mandal Commission vide No. 36012/31/9-est. (Sect) 13-08-1990. This Govt. order was stayed by **Justice Rangnath Mishra**, judge of Hon'ble Supreme Court. After a lapse of two years the Apex court in **Indira Sawhney V/S Union of India and other** case (1992 suppl (3) page 217) gave direction to provide 27% reservation to Backward classes in Govt. jobs. This order of Supreme court has been implemented by other Indian states except by J&K State.

In the Jammu and Kashmir "Socially and Educationally Backward classes" are not getting 27% reservation in Govt. jobs as directed by the Apex Court. Instead these communities have been provided 2% reservation which is a clear denial to equal protection of law and equality before the law which is guaranteed under the Article 14 of the Constitution of India. It was also directed by the Apex court to constitute a permanent body within four months for inviting, examining and recommending upon the requests for inclusion of complaints of over inclusion and under inclusion in the list of Backward classes of citizens.

The Mandal Commission has after thorough enquiries, studies, scientific methods and other criteria fixed for identifying Backward castes, recommended 63 castes in J&K as Backward castes. But the then Govt. of Jammu and Kashmir by notifying only 26 castes as socially backward castes has not adhered to the list of Mandal Commission and thus deprived 41 deserving castes from the benefit of reservation rules.

In the 1st Schedule under **Article 14** of the Constitution of India the J&K State/its residents have the same equal protection of law as is available to the residents of other states of India. Also all decisions /judgments of Supreme Court are equally binding on the state of Jammu and Kashmir under Articles 141 and 142 of the Constitution of India. The Govt. is following the Anand Committee report vide which only 2% reservation to backward classes has been recommended and cleverly introduced a new idea of bad pocket areas category and adjoining areas of Line of Actual control.

The then State Govt. has also dodged the Supreme Court by submitting an affidavit that Mandal Commission report has been implemented in the State intentionally denying equal protection of the law. The J&K govt. has wrongly mixed the identity and cause of backward classes with other citizens of State on the ground of resident of Backward Areas and resident of areas adjoining actual Line of control vide SRO 126 dt. 28-06-1994. Only President of India has the power to appoint such commission under **Article 340**. So the Mandal commission report prevails and is to be applied to TOTO in the state.

The Mandal Commission has recommended these Castes are Backward and has never identified the so called bad pocket areas which have been given 23% reservation as Backward areas by the State Govt. so they cannot stand the test on the anvil of the national and statutory Mandal Commission. Though the reservation for Backward Areas should continue in the J&K State however, they should be placed under separate head and not under educationally and socially Backward Classes and their reservation that must be excluding 27% reservation for Backward castes and not at the cost of Backward castes.

The State Govt. of J&K again framed rules called **J&K Reservation Rules 2005** also called as **SRO-294** and notified the same on 21st October 2005 and the presently the said reservation rules provides

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|---|-----|
| a) SC | 8% |
| b) ST | 10% |
| c) Socially and Educational Backward Classes: | |
| i) Weak and under privileged classes (Social Caste) | 2% |

- ii) Resident of areas adjoining Line of Actual Control (ALC) 3%
- iii) Resident of Backward Areas 20%

The **J&K Reservation Act 2004** section 3 provides that **total percentage of reservation shall in no case exceed 50%** (is in consonance with judgment of Indira Sawhney V/S U.o.I) as such the State Govt. enacted the J&K Reservation Rules, 2005 (SRO-294) but the above reservation is 43% (8+10+2+20+3) thereby indicating that **7% reservation is still lying unutilized**. Now J&K Government has introduced a new idea to defeat the genuine OBCs by introducing one new class on the basis of language 'Pahari' and provided 3% reservation on the sole basis of language and 4% reservation to people of unreserved category under the garb of Weak and under Privileged. The list of OBCs as per the State of J&K is as under:-

The J&K Government Gazette 21st October 2005/29th Asv.1027(No.29-c)
(J&K Reservation Rules, 2005)

Annexure "D"

Weak and Under Privileged Classes (Social Caste) every person who belongs to any of the following Social Castes namely:-

1. Bahach Hanjie and Shikara Wallas excluding house boat owners.
2. Fishermen including Gada Hanz.
3. Markabans whose sole livelihood depends on Markabani.
4. Potters (Kumahars).
5. Shaksaz.
6. Shoe repaires (working without the aid of machines).
7. Bhangies Khokrobes (Sweepers).
8. Barbers.
9. Washerman.
10. Bhands.
11. Mirasis.
12. Madari/Bazigars.
13. Kulfaqir.
14. Dambali Faqir.
15. Doods.
16. Shupri Wattal.
17. Sansis.
18. Silkigars.
19. Jheewers.
20. Gharati (Rural only)

Explanation:-Gharati shall mean a Gharati who runs "Gharat on water" and shall not include the grinding machine running on electricity.

21. Teeli.
22. Lohars/Aianger.
23. Tarkhans/Nazar.
24. Gilkar(Mason),.
25. Labane.
26. Sheer Gujjari. (Added by SRO-73 of Social Welfare Deptt, Govt of J&K on 07.03.2011)

The first J&K State Advisory Board for the Welfare and Development of OBCs highlighted the need to enhance reservation to 27% for OBCs in consonance with the Mandal Commission recommendations and Government ordered the **conduct of survey in respect of OBCs in the State vide Order No. Rev(Gaz) 141 of 2014** dated 19.06.2014 wherein the same was supposed to be submitted to the Social Welfare Department within period of two months. The Deputy Commissioner and District social Welfare Officer of concerned district were made Chairman and Member Secretary respectively. The format circulated vide above order is shown below:-

S.No	District	Tehsil	Village	Caste	Head of the family	Total no. of souls in the family

The survey of OBCs also met the same fate as these OBCs had with the reservation in J&K State. No official figures have been published by the Government till 31st December 2017 despite of the lapse of more than three years.

Conclusion

Although much should have been done but an overview shows the meagre reservation has been provided to these neglected people (OBCs) of the State. The survey of OBCs is of utmost importance and the conduct of survey as ordered if done with devotion and sincerity, will pave way for the government to augment welfare measures like adequate reservation in employment and education commencing with the population of OBCs in the State. These may include skill development training, loan facilities, book banks for poor and needy people of these Backward Classes. After survey is completed and total population of OBCs (26 castes) is published, the government should facilitate these OBCs by identifying their socially and educationally backwardness and providing them 27% reservation in educational/ professional institutions and government employment exclusively to 26 Castes(OBCs) herein known as **“Weak and Underprivileged Classes.”** These classes have yet to reap the benefit of reservation in direct recruitment as the roster in 100 vacancies fits at 49 and 98 so in case there are only 10 vacancies per district then there is no chance of person belonging to OBC being selected while in case of persons having RBA category, 02 persons will be selected while one in case of person having ALC certificate. Its suggested that OBCs roster be also in first 10 enabling these child of lesser God to have fair chances of selection in employment. Moreover as the data from the survey of OBCs is yet to completed and the Government intentions are if really fair they can **enhance the reservation for OBCs in J&K from 2% to 11.4%** as the MoSJE handbook of Social Welfare Statistics, 2016, although the 26 castes under Weak and Underprivileged of J&K does not matches with the OBCs Central list which has only 21 entries (castes). The Government of Jammu and Kashmir should get the survey of OBCs conducted at an earliest with proper sensitization to concerned Deputy Commissioners of the State and when the exact figures comes after compilation by Social Welfare Department, it will be eye opener for those people in Government and Commissions who says that 26 castes (W and UP) have been provided reservation as per their population. Moreover the creamy layer criterion should be applicable to R.B.A as well as ALC as they are also reaping the benefit of reservation of OBCs and this concept should not applied to weak and under privileged classes (OSCs/ OBCs) only. The limit as proposed by NCBC should be applicable in toto and Govt. should not be allowed to fix its own limit ignoring the advice/ proposal tendered by the NCBC.

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