

Politics of a Backward Majority : A Constitutional Dilemma in Kashmir

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THE PEOPLE OF INDIA have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity of the nation.¹ The concept of democracy has a wide import but essentially it is a form of government in which major decisions of government or the direction of policy behind these decisions rests directly or indirectly on the freely given consent of a majority of the adult government.² Secondly, it is a form of government where the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee to the minority the enjoyment of certain individual or collective rights, such as freedom of speech, and religion.³ The content of democracy varies but its postulates revolve round the adult franchise and the separation of powers, mainly the independence of judiciary, so that the individual does not suffer the executive or legislative arbitrariness or wide discretionary authority vested in them.

The Indian Constitution stands on an edifice of such a democracy and enshrines these principles in its perfect essence. The constitutional scheme for the creation of legislative bodies which are to govern the states and the Union, the basis adopted is that of adult suffrage enabling every adult citizen, whatever be his religion, to vote. There has to be one general electoral roll for every territorial constituency for elections to Parliament or the State Legislatures. The Constitution expressly provides that 'No person shall be ineligible for inclusion in any such roll, or claim to be included in any special electoral roll for any such constituency,

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1. The Preamble to the Constitution of India.

2. 8 *Encyclopaedia Americana*, 684 (1968).

3. 7 *Encyclopaedia Britannica*, 215 (1968).

on grounds only of religion, race, caste, sex or any of them.⁴ But at the same time a question crops up as to what adult franchise and democratic government connote. Does it mean majority rule in the ordinary sense or has it the relative content of minority protection also? If so, what sort of protection and to what extent the majority rule can afford to the minorities who constitute a living segment of our social structure? Further, is it the religious majority and the minority which is to be taken into account for the majority rule and minority protection or are the economic factors and other circumstances to be taken into account for such a classification? Alternatively, if religious majority considers itself backward, should it be permitted to thrive at the cost of a forward minority in our democratic set up by denying it the equal protection of the laws?

The problem of segmentation of our society into backward and forward communities is intertwined in between the politics of a majority group (ruling group) and the constitutional restraints designed to protect the interests of the minority groups. The obvious reason for this is that in our democratic set up, the legislative assemblies as well as Parliament are essentially forums for a majority group to ventilate its grievances, whereas a minority has essentially to depend on the majority support for getting its grievances redressed. Although, we have a lofty ideal that religion should not be the criterion for electing representatives to the state legislatures and Parliament, in actual practice it is not so. Religion plays a dominant role in getting the representatives elected to the legislatures and the last general elections have brought to light the fact that affinity of a candidate for a particular religion has a dominant part to play in getting him elected either to state legislative assemblies or to Union Parliament. This necessarily involves some sort of indirect interest in the minds of elected representatives to safeguard the interests of their electorate either for the fear of losing their support or for popularity. All these factors combine to make the representatives of the religious majority group compact in its thinking and inhibit an element of fear in the minds of religious minority. At the same time, it cannot be ignored that the task of law in our democratic set up is to ensure that 'ordinary human relationship exists in contacts between the dominant group and the minorities and that intercourse between them is not tinged with such emotions as fear, anger, suspicion and hate.'

4. Article 325 of the Constitution of India.

The basic premise of our Constitution is that there should be equality before the law and equal protection of the laws with reservations and preferential treatment to backward classes so as to secure to them social and economic justice. The Constitution enshrines this principle in articles 14, 15, 16 and 29 and empowers the state to provide for special benefits and preferences to such backward sections of the society in the form of reservation of posts in government services, public institutions, etc. The Constitution does not lay down any test as to whom and on what basis the state should consider backward. The problem of defining and segmenting our society into backward and forward classes is a stupendous task. An effort is made in the following pages to show that it is the majority both religious and political who decides on such a classification and for that a sample survey of the laws of the State of Jammu and Kashmir are undertaken.

Backward Majority and Forward Majority: A Historical Sketch

In order to evaluate the segmentation of backward and forward classes in the State of Jammu and Kashmir, it is necessary to state the evolution of such a concept in that state. The State of Jammu and Kashmir is composed of three distinct regions, culturally and socially, viz. Jammu, Ladakh and the Kashmir Valley, and is inhabited by people professing three distinct religions, viz; Hinduism, Islam and Buddhism. All these religious groups lived together in harmony but a sense of friction is noticeable after the commencement of the Constitution.

Historical record shows that Kashmir was ruled till 11th century by a series of Buddhist and Hindu dynasties and at the beginning of 14th century it fell into the hands of Muslim rulers. Before the advent of Muslim rulers, Kashmir had witnessed a homogeneous class of Hindus. In 14th century, Sikandar (Butshiken—Idol breaker) persecuted Hindus and converted a majority of them to Islam. Muslim rule continued for 400 years and it was only in 1819 that the Sikh forces of Ranjit Singh of Punjab established their supremacy in the state and ruled the state till 1846. By this time the Hindu minority had taken to Western education, while the Muslim majority was deterred by the Maulvies from going for Western education. This resulted in the formation of a Hindu educated class and an illiterate Muslim majority which took to agriculture. From 1846 to 1947, the state was ruled by Jammu Dogras. In this period a marked change took place. Hindus from the Valley became a sort of administrative class for the reason that they alone were educated and the Muslim majority

concentrated on agriculture; whereas people from Jammu became a warrior class and served in the defence forces of the state.

During Dogra rule as well as after the commencement of the Indian Constitution and the establishment of popular government in the state the Muslim majority started grumbling against the Hindu administrators and started thinking of reversing the position. This led the government as early as 1931 to appoint a Commission commonly known as Glancy Commission.

In regard to the question of employment in the public service of the state the Glancy Commission recommended that 'while there need not be different standards for different communities, the standard should not be more exacting than efficiency demanded and those who possessed qualifications in excess of that standard should not be held to deserve appointment as a matter of right.'

In regard to the claim that the Muslims, who constituted 78 per cent of the state population, should be given a corresponding reservation in government appointments, the Commission observed that it rested with the Muslims to work up the number of their representatives in state services availing themselves of the opportunities to be provided. It also observed that the hereditary occupation of a vast number of Muslims was agriculture and it was reasonable to suppose that a great majority of the agriculturists would continue to prefer that occupation to any other. While no community should be allowed to acquire a stronghold on state employment, the Commission wanted it to be recognised that certain communities were far in advance of others in education.⁵

On behalf of the Kashmiri Pandits, it was contended before the Commission that no scholarships had been reserved for them, that over 50 per cent of them were literate and the ministerial work was their hereditary occupation and that they had no other means of subsistence readily available. The Commission recognised the force of this contention and recommended that the need for other openings that could be legitimately provided for those who could not be absorbed in state departments should receive the sympathetic attention of the government; and that it should be carried to the best of government's ability, for example, in the field of industrial development.⁶

5. See the Report of the Commission to inquire into grievances and complaints, appointed under the orders of His Highness the Maharaja Bahadur, dated 12th Nov. 1931, at 24. (2d. ed. 1933).

6. *Ibid.*

The Glancy Commission was followed by Recruitment Rules Committee presided over by P. C. Moga, the then Revenue Minister, and its members included the Chief Justice and the Chief Secretary of the State.⁷ The Committee indicated that although no definite orders existed at that time on the subject of communal representation, 50 per cent representation for the Muslim Community was supposed to be the aim.⁸ In 1956, the Government of Jammu and Kashmir issued a notification recognising certain classes as 'backward classes.' The list was amended from time to time and finally in the year 1968 all the Muslims of the state who comprised 68 per cent of the total population; and Jammu Hindus, Sikhs and Buddhists who comprise 28 per cent of the total population have been considered backward.⁹ A bare minority of Kashmiri Pandits comprising 4 per cent of the total population have been considered forward.

Communal Reservation and Majority Politics

The State of Jammu and Kashmir is multireligious, multi-racial and multilingual and this gives it a composite culture. Muslims comprise 68 per cent of the total population of 35 lakhs. The percentage of population of Hindus and Muslims in Jammu region is 58.7 per cent and 38.1 per cent respectively. The districts of Uduppur, Jammu and Kathua have a concentration of Hindu population, i.e., 78.9 per cent. Kashmir valley has a majority of Muslims, i.e., 94.4 per cent and the rest are Kashmir Pandits. About 45 per cent Muslims and 54 per cent Buddhists besides one per cent of Hindus and Sikhs inhabit the territory of Ladakh. The Government of Jammu and Kashmir by notification from time to time defined backward classes in the state as under

- (a) every permanent resident Hindu of Jammu Province whose grandfather resided in that Province including every permanent resident Gaddi and permanent resident Scheduled Caste,
- (b) all permanent resident Muslims of the state including Bakarwals and Gujjars;
- (c) all permanent resident Sikhs of the state;

7. *Interim Report of the Recruitment Rules Committee re: Gazetted Services*, 1939.

8. *Ibid.*

9. *The Jammu and Kashmir Government Gazette*, 2 (11th Sep., 1968).

(d) all permanent residents of Ladakh district.¹⁰

Thus the entire Muslim population of the state, Jammu Hindus, Sikhs and Buddhists have been considered backward. Only the Kashmiri Pandits have been considered a forward class. In the Statement of Objects and Reasons the government justified the classification on political, historical and geographical grounds. All these pretexes are not convincing. They rather reveal the truth that the majority politics wants to reverse history by diluting the 4 per cent minority with that of 96 per cent majority. Here is a method devised for the majority politics to thrive at the efficiency and merit of the minority.

The Constitution prescribes that there should be an equitable share in government employment to various communities, having special regard to the claims of the Scheduled Castes and other economically, educationally, and socially backward communities. The Government of Jammu and Kashmir till 1968, did not follow any clear cut policy either in the classification of backward classes or in the matter of special benefits given to them. The latest working rule adopted by the government is that 50 per cent of the posts should be filled by the Muslims of the state and 40 per cent are to be filled by the Jammu Hindus. The state government sought to justify this rule in the Supreme Court on the ground that Muslims as a community in the whole of the state and Hindus from Jammu region formed a 'backward community' as they were not adequately represented in the services of the state and that reservations in the matter of appointment to posts and promotions in the services of the state were made in respect of both these classes.¹¹

This majority backward and minority forward classification is based on political inferno and leads one to conclude that the legislators representing the majority community cannot antagonise their fellow men. This classification in itself has started a mistrust in the majority group with the backward majority because the real backward groups of that class have to compete with its own forward groups. Actually, a majority of these two religious communities are forward in the sense that they are economically viable and because of this distinction they have an edge over the poor and backward classes of its own community. At the same time it cannot be ignored that a large number of Pandits who

10. *Ibid.*

11. *Triloki Nath v. State of J. & K.*, AIR 1969 S.C. 1.

have been categorised arbitrarily as forward are really backward economically and mostly live in rural areas.

Judicial Interpretation of 'Backward Classes'

The Supreme Court considered the scope of article 15(4) in *Balaji's* case¹² which was further clarified in *Heggade Janardhan's* case¹³ and explained in *Chitralkha's* case.¹⁴ In *Balaji's* case the question was how to strike a balance between the two fundamental rights guaranteed to citizens by articles 15(1) and 29(2) on the one hand, and the promotion of the educational and economic interests of the weaker sections of the people mentioned in article 46 on the other. There was also the question of national interest which, it was felt, would suffer if qualified and competent students were unreasonably excluded from higher university education. It was not disputed that these articles justified reservation of seats for the Scheduled Castes, the Scheduled Tribes and backward classes but the dispute was about the extent to which such a special provision should be made and the test that should be applied for determining backward classes. The Supreme Court held that the concept of backward classes was not relative in the sense that any class which was backward in relation to the most advanced classes in the community must be included in it. The division of backward classes into the backward and more backward classes, said the Court, was in substance a division of population into the most advanced and the rest, the rest being divided into backward and more backward classes and this was not warranted by article 15(4). The backwardness must be, in the view of the Court, both social and educational and not either social or educational. The special provision is contemplated for classes of citizens and not for individual citizens. As regards the social backwardness the Supreme Court held that article 15(4) referred to backward classes and not to backward castes and indeed the test of caste would break down as regards the backward classes which have no castes. As regards Hindus, it was observed, the caste may be relevant factor to consider but its importance should not be exaggerated and should not be made the sole or dominant test.

Social backwardness is in the ultimate analysis the result of

12. *M. R. Balaji v. State of Mysore*, (1963) Supp. 1, S.C.R. 439.

13. *Heggade Janardhan Subbaray v. State of Mysore* (1963) Suppl. 1 S.C.R. 475.

14. AIR 1964 S.C. 1823.

poverty to a large extent. The classes of citizens who are deplorably poor automatically become socially backward. Caste and poverty are both relevant in determining the backwardness of citizens; social and educational backwardness is ultimately and primarily due to poverty. The occupation followed by certain classes may contribute to make the citizens socially backward, for there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. The Supreme Court held that speaking generally, the reservation must be less than 50 per cent without laying down any hard and fast rule as to how much less. In the judgment a reference was made to the communication of the Central Government addressed to the Mysore Government stating that a uniform policy should be adopted by all the states and that a reservation of 25 per cent of seats for the Scheduled Castes, the Scheduled Tribes and backward classes with a marginal adjustment of 10 per cent but not exceeding 35 per cent, was reasonable. The making of reference to this communication would suggest that the Court would consider reservation to that extent as reasonable.¹⁵ This case was clarified in *Heggade Janardhan's case*¹⁶ by saying that it had not in any way invalidated the reservation for the Scheduled Castes and the Scheduled Tribes of 15 and 3 per cent respectively, which had remained constant in all the impugned orders. *Chitralekha's case* explained *Balaji's case* by saying that though caste was a relevant test for determining the social backwardness of citizens, it was not obligatory to apply that test and determination of social backwardness was not void merely because it ignored caste if such determination was based on other relevant criteria. In *Chitralekha's case* the Supreme Court further observed that the laying down of criteria for determining the backwardness of a class was a complex problem depending upon many circumstances which may vary from state to state or even from place to place in a state. The Supreme Court considered the nature and extent of reservations for backward classes in public employment under article 16(4) in several cases. In *Rangachari's case*¹⁷ the Supreme Court held that the condition precedent for the exercise of the power conferred by article 16(4) was that any backward class of citizens was not adequately represented in the service. This may either refer to numerical inadequacy of representation or even

15. *Supra* note 12 at 467.

16. *Supra* note 13.

17. *General Manager, S. Rly. v. Rangachari*, AIR 1962 S.C. 36.

to the qualitative inadequacy of the representation. The scope of article 16(4) was considered in *Devadasan v. Union of India*¹⁸ and the Supreme Court held that

A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under Cl. (4) would in effect efface the guarantee contained in Cl. (1) or at best make it illusory.¹⁹

In *Triloki Nath v. State of Jammu & Kashmir*,²⁰ the order of the state government reserving 50 per cent of the posts for the Muslims of the State of Jammu and Kashmir, 40 per cent for the Hindus of Jammu and 10 per cent for the Pandits of Kashmir was challenged. The contention on behalf of the state was that the majority community both in the valley as well as in Jammu region were inadequately represented in the state services. The Supreme Court held the order as violative of article 16(1) and (2) and characterised it not a reservation for backward classes but a system of distribution of posts on the basis of community or place of residence. Article 16(4) cannot be invoked merely because a class of citizens is not adequately represented in such services. If the contention was accepted that inadequacy of representation was the sole condition for invoking article 16(4), said the Court,

it would really exclude the backward classes from the benefit of article 16(4) and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life.²¹

To sum up, the Union and the state governments in India are under a great political pressure to make large reservations for the political majority both in services as well as admissions to technical institutions. If such reservations continue the whole spirit of equality would get whittled down. The political expediency would necessarily lead to inefficiency and consequently the minority would feel less secure. It would aggravate mutual illwill and bitterness. Although the Supreme Court has applied brakes

18. A.I.R. 1964 S.C. 179.

19. *Id.* at 187.

20. *Supra* note 11.

21. H. M. Seervai, *Constitutional Law of India*, S-29 (Supplement 1968).

by laying down an optimum limit which is less than 50 per cent but in actual practice the 50 per cent limit is enough to replace efficiency and merit by inefficiency and less merit for adequate representation in public employment and educational institutions.²²

An Appraisal

It is submitted that the optimum limit prescribed by the Supreme Court cannot be justified for the reason that 50 per cent representation is very high and may not be conducive to maintaining efficiency both in the public services, and educational institutions. Secondly, it is high time that Parliament as well as state legislatures come forward with a reasonable classification between forward and backward communities. In such characterisation it is hoped that only two criteria would be applied, namely,

- (i) the economic backwardness of a class (for this purpose a suitable ad hoc figure or annual income may be adopted),
and
- (ii) the occupation or occupations pursued by that class of citizens.

It cannot be denied that the determination of socially and educationally backward classes within the ambit of article 15(4) and article 16(4) of the Constitution is a very complex problem. Any test that is adopted for making such a classification should be objective. An objective test for grouping a class into social and educational backward class may be that such a class should be homogeneous, grouped together by certain likeness or common traits, and identifiable by some common attributes such as status, ranks, occupation, residence in a locality, race, religion and the like. This implies, it is submitted, that such a class should have some degree of cohesion and permanency of the structure of the group of people indicated by such a class. But it is arguable whether such a distinctive factor is possible to comprehend in the modern society where traditional class distinctions have blurred and completely done to extinction. Rather, in this technological age, the classes are being replaced by some sort of occupational classes with a different status and in such a case the above ob-

22. See the contrary view taken by M. P. Jain, *Indian Constitutional Law*, 520 (1970).

jective criteria for drawing up a nexus will in all probabilities fail and consequently the constitutional protection would be of little avail for the socially and educationally backward classes. In the extreme, if an entire class is regarded backward, the really needy in that class would get ignored by the multitude, and may not receive any attention or assistance.

What is needed for securing social and economic justice for a section of our society is the giving of economic assistance for a reasonable time so that weaker sections can stand on their own legs and compete with the advanced sections of the society. The classes should be determined in such a way and adopting such criteria as to effectuate the above policy but not to give weightage to advanced sections under the false colour of the caste or class or religion to which they may happen to belong. It is submitted that backwardness of any class of citizens is a hindrance to the general progress of the people as a whole and all segmentation of the society which in any manner maintain or perpetuate backwardness should be discouraged.