Backward Class Reservation in Local Bodies

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The 73rd and 74th constitutional amendments have failed on multiple fronts due to a combination of poor drafting and unclear intent. The current impasse over the implementation of reservations for "backward classes" in panchayati raj institutions and urban local bodies is a result of poor drafting of these amendments and unclear policy objectives. The impasse threatens the future of grassroots democracy in India by putting on hold the local body elections for indefinite periods of time and can only be addressed through a constitutional amendment.

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In the recently concluded budget session of Parliament, Rajya Sabha member P Wilson highlighted a "constitutional deadlock" that had taken place when it came to the reservations of seats for "backward classes" in local bodies. The states such as Karnataka and Maharashtra have not held elections for local bodies since they have not been able to comply with the "triple test" laid down by the Supreme Court for such reservations. This suggested that the caste data collected in the Socio Economic and Caste Census (SECC), 2011 necessary for states to fulfil the criteria laid down by the Supreme Court, was available with the union government and should be released to break this constitutional deadlock (*News Minute* 2022).

While Wilson's concern about the stalled elections is valid as the impasse damages the grassroots democracy in India, the solution may not necessarily lie in the release of the SECC data. Rather, as I argue in this column, the constitutional provisions related to reservations for "backward classes" in the local bodies are poorly drafted and need to be rectified by a constitutional amendment. While courts have attempted to partially address the problem through interpretation, they are trying to guess what the reservation provisions were trying to do and do not offer sufficient clarity to states on how to implement reservations for the backward classes.

After discussing the constitutional provisions and their judicial interpretations, the source of deadlock is identified and the solution of constitutional amendment suggested.

Reservations in Local Bodies

The Constitution (73rd and 74th Amendments) Act, 1992 were intended to address (among other things) the inadequate representation of the Scheduled Castes (SCs), Scheduled Tribes (STs), and women in panchayati raj institutions (PRIs) and urban local bodies (ULBs). This was done through the insertion of Article 243-U in the context of PRIs and Article 243-T in the context of ULBs. Both articles are more or less identical in their structure insofar as they provide reservations in positions at PRIs and ULBs to the members of the SC and ST communities as well as women. However, somewhat out of the blue, clause (6) in both the articles provides that the state may reserve seats for "backward class of citizens." This clause arrives unexpectedly, since the statement of objects and reasons for either amendment makes no mention of reservations for "backward classes," though it explicitly mentions reservations for other communities mentioned in the articles.

The term "backward classes" used here is the source of confusion. The problem becomes clear when this clause is compared with Articles 15(4) and 16(4), which provide for reservations in education and employment, respectively. While similarly structured (they are all clauses aimed at enabling reservations), one key difference is obvious—the criteria for identifying the backward classes for the purpose of reservations are being outlined in the clause itself. In the context of Article 15(4), classes have to be "socially and educationally backward," whereas in Article 16(4) such "backward class" has to be "[in]adequately represented in the services under the State." No such qualifier is present in Articles 243-D(6) and 243-T(6).

This distinction is important since the category of "backward classes" is not uniform nationwide. Unlike the SCs and STs who are identified at the union level through a constitutional mechanism,[1] there was no constitutional mechanism for the identification of "socially and educationally backward classes" until the introduction of Article 342A by the Constitution (102nd Amendment) Act, 2019. This was intended only to apply to the preparation of a list of such

classes for the purpose of reservation at the union level and did not per se interfere with the states' power to identify the backward classes for reservations at the state level. While the judgment in *Indra Sawhney v Union of India and Ors* (1992) has laid down certain criteria as to how "socially and educationally backward classes" may be identified for the purpose of reservations, this is only an expansion of the principle laid down in clauses (4) of both Articles 15 and 16, respectively. From a plain reading of either Articles 243-D(6) and 243-T(6), it is therefore not clear how the "backward class of citizens" ought to be identified to grant them the benefit of reservations.

Judicial Interpretation

A constitution bench of the Supreme Court interpreted Articles 243-D(6) and 243-T(6) in *K Krishna Murthy & Ors v Union of India* (2010) where the two clauses were challenged as being contrary to the basic structure of the Constitution. While upholding the two clauses, the then Chief Justice of India K G Balakrishnan also attempted to clarify the scope of these clauses. His judgment, on behalf of the bench, did note the unclear wording of clause (6). Specifically:

> Admittedly, Articles 243-D(6) and 243-T(6) do not provide guidance on how to identify the backward classes and neither do they specify any principle for the quantum of such reservations. Instead, discretion has been conferred on state Legislatures to design and confer reservation benefits in favour of the backward classes. It is, but natural that, questions will arise in respect of the exercise of discretionary power.[2]

While saying so, the Court agreed with the argument that reservation in local self-government is distinct from that in educational institutions and employment, and a mechanical application of the interpretation of Articles 15(4) and 16(4) to Articles 243-D(6) and 243-T(6) could not be done.[3] While rejecting the "creamy layer" test from *Indra Sawhney v Union of India,* it did import the 50% cap on reservations applied in the context of reservations under Articles 15(4) and 16(4). As regards the criteria as to which classes would be "backward," the Court leaves it to the states to carry out a "rigorous investigation" into the barriers to political participation for such communities. Given that the case only concerned the constitutional validity of Articles 243-D(6) and 243-T(6), the Court did not go into the specific state legislation.

A decade later, in *Vikas Kishanrao Gawali v the State of Maharashtra* (2021) the Court subjected the law, providing for reservation of seats in PRIs, that is, the Reservation Notifications under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 to the judgment in Krishna Murthy and struck down the reservations for backward classes in the state as unconstitutional. In Gawali,[4] the Court distilled a "triple test" out of the judgment in Krishna Murthy, requiring the state to

> (1) set up a commission to identify the backwardness, in terms of political participation, (2) have the commission determine the extent of reservation in local bodies, and (3) limit the reservation to 50% of the positions in the local bodies.

Finding that the Reservation Notifications under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 fulfilled none of these three, the Court struck it down.

Given the poor drafting, the Court's interpretation of Articles 243-D(6) and 243-T(6) in Krishna Murthy is, at best, an educated guess; yet in Vikas Gawali, the Court insists that the states should hold to the full rigour, the best guess of the Court, how they determine the backward classes and the quantum of reservations. The states' attempts to overcome Vikas Gawali through ordinances have come to a cropper in Court, and as matters stand, the states are unsure how they ought to identify backward classes for the purpose of reservations under Articles 246-D(6) and 246-T(6), and

elections to the local bodies have stalled as a result (Anand 2022).

Conclusions

The Court's concerns about the nature and quantum of political reservations in Krishna Murthy and Vikas Gawali are not entirely unfounded. A "backward caste" (with adequate representation educationally or employment-wise) enjoying disproportionate representation in political bodies is not unprecedented or unimaginable. In states such as Karnataka and Haryana, it is a reality (Hariss 1999). Reservation in political bodies cannot look to further entrench the power of already well-represented castes. Rather, it should look to enhance the representation of the otherwise under-represented groups who are also educationally and socially deprived.

Attempted compliance with the Supreme Court's ruling may cause further uncertainty as each state looks to set up its own commission that might interpret the requirements of the Krishna Murthy and Gawali judgments in their own way. This will lead to additional litigation and further confusion about the law, causing more delay in the conduct of local body elections.

Given the importance of local body elections in strengthening the grassroots democracy in India, such confusion and delay would only weaken these institutions. While the union government should release the data from the SECC, 2011, it will not suffice in addressing the problem. The core of the problem remains the unclear intent and bad drafting of Articles 243-D(6) and 243-T(6). The term "backward class" needs to be qualified precisely. If the intent is to give representation to politically under-represented backward classes, two key amendments will be needed—one, to qualify "backward classes" as "socially and educationally backward," and two, to limit the reservations only to such backward classes whose representation in local bodies has been less than their proportion in the total population.

Such an amendment serves a few purposes: (i) states need not undertake a fresh survey to identify backward classes; (ii) it will exclude socially and educationally backward castes that are already well-represented in the local bodies, at or beyond the proportion of their population in the state; and (iii) it will provide an objective criterion to fix the percentage of reservation for such backward classes.

If any study is undertaken by a commission, it will only determine the proportion of the existing backward castes in the population and their representation in the local bodies. Such an exercise does not even require a nationwide caste census and can be carried out periodically by the state government itself with a view to fine-tuning the reservations for the backward castes.

We have seen in the recent past that the union government has been able to get consensus from all political parties to make amendments to the Constitution to address the problems arising out of the faulty interpretation of the Constitution by the Court in the context of reservations of the "Other Backward Classes."[5] The impasse over local body elections affecting multiple states serves no one—a workable solution that will not give rise to further litigation is necessary, and one hopes that the fundamental defects in Articles 243-D(6) and 243-T(6) are addressed forthwith.

NOTES

1 Articles 341 and 342, respectively.
2 Krishna Murthy, para 58.
3 Krishna Murthy, para 51.
4 Gawali, para 13.
5 For instance, the Constitution (105th Amendment) Act, 2021 was passed to overcome the judgment of a constitution bench of the Supreme Court in *Jaishri Laxmanrao Patil v Union of India* (2021) 2 SCC 785 in the context of the interpretation of the powers of the state governments to identify socially and educationally backward classes.

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