

Judging the “Muslim” quota

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AP High Court’s judgment is precise, concise and clear

Andhra Pradesh High Court has struck down the Government of India (GoI) orders on the minority reservation sub-quota in the Other Backward Classes (OBC) quota in central education institutions under the Central Education Institutions (Reservation in Admission) Act, 2006. The Judgment was delivered by Chief Justice Madan B Lokur and Justice Sanjay Kumar. It is precise, concise and clear.

The Judgment says: “Article 15 (5) of the Constitution requires that a special provision for the advancement of any socially and educationally backward class of citizens shall be made by “law”. Such a law has not been enacted... We are of the view that the Office Memo (OM) is nothing more than an executive instruction and that an executive instruction cannot be a substitute for the “law” postulated by Article 15 (5) of the Constitution. That being so, there is no law to sustain the creation of a sub-quota of 4.5% out of the 27% reservation for OBCs”

Any addition or deletion in the OBC list under the National Commission for Backward Classes Act (NCBC) 1993 is the sole responsibility of the National Backward Classes Commission which recommends such additions/deletions to the GoI. This was not done in this case. The Judgment said: “The NCBC has been totally ignored and by-passed by the Central Government in culling out some of the categories of citizens from the generic class of OBCs. This is impermissible.... This statutory function cannot be given a go-bye – the NCBC Act does not provide for it. On the contrary, in terms of Section 9 (2) of the NCBC Act, the advice of the NCBC shall ordinarily be binding upon the Central Government.”

The OM specifically referred to “minority” OBCs without specifying their castes/communities. "Minorities" however, are defined in the National Commission for Minorities Act 1992, Section 2(c). There are five religious minorities – Muslim, Christians, Buddhists, Jains and Zoroastrians (Parsees). Discrimination based on religion has been debarred by the Constitution.

But for the purpose of Article 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly offend the Constitution.

In the case of OBCs identified by the Mandal Commission, 2,150 number of OBCs were previously identified based on their caste/community characteristics of which 76 OBCs happened (by coincidence) to belong to minority religious faith. One contention was that on the basis of number of OBCs identified, the 'minority' quota would only be 0.95% in the 27% OBC reservation.

The OM depended on the recommendations of the National Commission for Religious and Linguistic Minorities (NCRLM). The Chairman was former Chief Justice and MP, Ranganath Misra. But as the Judgment says: "The NCRLM is not a statutory body and consultation with it is as efficacious or non-efficacious a consultation as with any other third party and has no relevance to the provisions of the NCBC Act."

NCRLM stated clearly in its Report in 2007 that there was no solid data and no real way for identifying minorities among OBCs. But it relied on the 1931 Census data which showed that 52% of the population was OBCs and of them, nearly 8.4% were non-Hindu minorities. On this basis, NCRLM recommended that the 8.4% sub-quota of the 27% OBC quota be reserved for 'religious minorities' - this was to be further subdivided with 6% for Muslims and 2.4% for other "religious minorities" based on the assumption that 73% of the OBCs were Muslims.

The Judgment added: "The application of mind of the NCRLM is to a completely different issue altogether, therefore, by relying solely on the report of the NCRLM, the Central Government has failed to apply its mind to the constitutional requirements... In our opinion, and reliance on the report of the NCRLM is misplaced and inappropriate."

Without explaining why it rejected the NCRLM recommendation of 8.4%, the OM carved out only 4.5% for 'religious minorities' out of the OBC quota but did not subdivide it further between Muslims and others. But the effect would have been to allow Christians, Buddhists, Sikhs, Jains and Parsees to compete on the basis of merit with Muslims for this 4.5% quota! With this competition from the other religious minorities would Muslims candidates have a chance? Also bear in mind that religious faith can be changed to suit the individual and his/her circumstances!

The judgment also considered the use of the 1931 Census for determining what should be the true picture 80 years later, unacceptable when more recent data should have been sought for and used, if at all. The Judgment on the OM's is sound and even the Supreme Court is unlikely to overturn it.

The only way such a quota based on religion can be implemented is by amending the Constitution. Even if the Constitution is amended, the Supreme Court is likely to strike it down as altering the basic structure (secularism) of the Constitution, which cannot be amended as held in the Keshavananda Bharati case.

Question now is why did GoI go through all this trouble knowing full well that it could not be implemented? Surely Kapil Sibal, a Senior Advocate of the Supreme Court, whose HRD Ministry issued the OM would have applied his keen legal and constitutional mind to the issue? Or did Salman Khurshid, Minister for Minority Affairs, need to garner votes for his wife's candidature together with other Congress Party candidates in the UP Legislative Assembly election?

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With the Office Memo, the Government of India and the Congress Party have once again raised the expectation of Muslims unrealistically and have been shown to let them down. False promises are the desperate habits of weak rulers and cause harm to the body politic as well as to the ruling party. But when will they learn? Or will the judiciary always have to teach them after they make a mess of it?

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