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Brahmanism and Patriarchy in Corridors of Law

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ABSTRACT

The Indian Caste System is one of the main dimensions of the social division of people in India by class, place, tribe, religion, gender, and language. Not only in the Indian caste system, but discrimination is also seen in the family structure. In the ideals that are being taught to the new generation, patriarchy or dominance of men in a family has been rooted. Judges' own biased views and their impartial thinking are very different from what the statute seeks to offer, which leads to tension between different members of society's hierarchy. The purpose of this paper is to explain the discrimination in determining a matter specifically involving lower caste individuals and how the Indian Caste System promotes the statistical representation of a specific caste and gender of judges in court. After objectively studying how caste plays an important role in the decision of a case, a new way out has been suggested for a fair and better tomorrow as intended by the constitution drafters.

Keywords: *Brahmanism, Patriarchy, Caste System, Judiciary, and Equality.*

I. INTRODUCTION

“I measure the progress of a community by the degree of progress which women have achieved.” (“B.R. Ambedkar Quotes (Author of Annihilation of Caste)”, 2020) – B.R. Ambedkar

The differentiation happens in all human society in different forms including unequal wealth, power, social status, etc, but when a country has to progress, then the progress of oppressed class should also take place as pointed out by B.R. Ambedkar. Historically, the Indian Caste System is one of the key dimensions in which people are socially divided by class, region, tribe, religion, gender, and language in India. The term caste is very hard to define, but according to Risley it means “a collection of families or groups of families bearing a common name; claiming a common descent from a mythical ancestor, human or divine; professing to follow the same hereditary calling, and regarded by those who are competent to give an opinion as forming a single homogeneous community.” (Nearing & Hutton, 1947) This system is considered to be known for grouping or stratifying the humans on basis of their

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social status to which they were born into. Thereby, limiting their interaction with people from another social status. (Sekhon, 1992) *Varnas* classify people in the Indian Caste System into four main hierarchical categories or ranks based on their power, wealth, and privilege, namely, Brahmans, Kshatriyas, Vaishyas, and Shudra. Brahmans are often considered to be the first creators of God, which makes them superior to other social classes. They were often seen to have a socially powerful and influential position in society that dominated the lower caste people, mainly Shudra or Untouchables. Not only in the Indian Caste System but inequality is seen in the structure of family too. Patriarchy or domination of men in a family has been embedded in the values that are being taught to the new generation. The superiority of men over other genders, their dominant role in a family is being followed till date, which misses out the opportunity of other genders in the structure to have a respectable position. Even in the *manusmriti*, this role of men is defined and it has been explicitly saying that a woman must not be independent. (Omvedt, 2000)

The aim of the Indian constitutional drafters headed by Dr. B.R. Ambedkar was to ensure a sovereign, socialist, secular, democratic, and republic country that aims to guarantee basic fundamental rights along with the right to equality. (The Constitution of India, 1950) The Constitution of India empowers the judiciary to keep a checks and balances system among all the three wings of the Government i.e. Legislature, Executive, and Judiciary. The role that is exercised by the judiciary is to give decisions following the law formulated. At the time of deciding a case, it has been often observed that the personal biased opinion of judges and their independent reasoning is quite different from what the law aims to provide which leads to conflict among different hierarchal members of the society. This paper aims to understand the prejudice in deciding a matter especially involving lower caste people and how the statistical representation of a particular caste and gender of judges in court supports the Indian Caste System. After critically analyzing how caste plays an important role in deciding a case, a new way out has been put forward for an equal and better tomorrow as aimed by constitutional drafters.

II. BRAHMANICAL AND PATRIARCHAL VIEW OF COURTS IN DECIDING A CASE LAW

Patriarchy and Brahmanism have been embedded in our social structure for a very long time which tends to dominate everywhere. Judiciary was formed to provide equal justice to all people following the law. But the worldview and personal opinion of judges tends to supersede this aim as these judges tend to give judgement on those opinions they have in the

society. The Protection of Civil Rights Act (PCRA) provides for a provision in which an act committed by anyone against the Scheduled Caste (SC) and Scheduled Tribe (ST) are presumed to be on the ground of untouchability. But in the case of *E. Krishnan Nayanar v. Dr. M.A. Kuttappan*, it was observed by the Kerala High Court that no offense can be made out under the PCRA because “the complaint was insulted or attempted to be insulted on the grounds of untouchability.” (*E. Krishnan Nayanar v. Dr. M.A. Kuttappan*, 1997) The court also stated that such insult should happen in front of the public and not in private and only in the case of dumping waste matter at the premises of untouchable without his presence can be treated seen as an insult. Also, in the case of *Phulsing v. State of Madhya Pradesh*, the court held that abuse of backward class by the Casteist might not be on the grounds of untouchability. (*Phulsing v. State of Madhya Pradesh*, 1991) All these instances in the High Court clearly state that how judges are being biased and using their own experiences and knowledge in deciding a case by not being following the law. It has also been observed that the discrimination was continuously happening against the backward classes but still they were not given due status even in the court. Article 14 of the Indian Constitution guarantees a Right to Equality to all its citizens before the law, but in reality, it is not the case and this Article is being one of the most violated Articles in our Constitution. (*The Constitution of India*, 1950) The Karnataka High Court in the case of *State of Karnataka v. Irappa*, the court acquitted the proprietor who had kept separate utensils for Dalits, on the grounds of a mere 12-hour delay in filing a complaint. (*State of Karnataka v. Irappa*, 1981) Furthermore, it was found that the police complaint never mentioned explicitly that such practice was being followed in the hotel. Such instances show us how even the policemen, who were present for the welfare of the public, discriminates against some section of our society in some ways.

Discrimination is not only done with lower caste people but also been done to the women too especially lower caste women, who are the most oppressed community of the Indian Caste System. In the case of Bhanwari Devi, she worked as a volunteer for the prevention of child marriage in our society. One day, she attempted to intervene in child marriage and got raped by a gang of five local people who belonged to the upper class, whereas she was Other Backward Classes (OBC) woman. Her husband was beaten up in front of her wife brutally for protesting against child marriage. The Sessions Court judges said that rape is usually committed by teenagers and not by middle-aged men who are respectable members of society. They also stated that “Since the accused are upper-caste men, the rape could not have taken place because Bhanwari was from a lower caste.” (Shukla, 2006) This case was further taken up by an NGO Vishakha and later came out to be known as *Vishakha & Ors. v. State of*

Rajasthan & Ors. (Vishakha & Ors. v. State of Rajasthan & Ors., 1997) The Supreme Court issued guidelines under the case for prevention of sexual harassment, which was later on repealed by the Workplace Harassment Act of 2013. The guidelines were applied “only to organized office set-up, and not to the unorganized sector where the employer-employee relationship is not fixed.” (Krishnan & Arasu, 2020) Therefore, such an act rules the unorganized sector out of its scope where violence on lower caste women happened the most, clearly showing the domination of the upper class and loophole to continue to oppress the lower backward class. (Rowena & Rowena, 2017)

III. BRAHMANICAL AND PATRIARCHAL INFLUENCE IN JUDICIARY

Caste Bias plays an important role in deciding and influencing a judgment and its delivery mechanism. All these biases are put forward by the prejudice of judges of the court who themselves are surrounded by a bubble of Caste. Therefore, it can be said that our Indian Judiciary is not free from such sphere of Brahmanism and Patriarchy, rather it's a by-product of them. (Pattanayak, 2018) The same judiciary system is formed of archaic and feudal laws that award nepotism (Justice Y.V. Chandrachud and D.Y. Chandrachud) and serves the ruling class but punishes dissenters. Also, the Indian court doesn't see marital rape below the age of 18 years as a cognizable offense, clearly showing how it is a by-product. The Judicial appointment has been seen as a major factor to support Brahmanism and Patriarchy in Judiciary, even though the appointment of judges has remained opaque for a long time. (Ramachandran, 2019) There have been many written and unwritten criteria for the appointment of judges which are not included in the Indian Constitution. The Gadbois conducted extensive research and interviews of former Supreme Court judges which concluded that until 1989, 42.9% of judges were brahmins, 49.4% other forward class while OBC's were 5.2% and Dalits were around 2.6%. They also noted that “the usual explanation for the over-representation of Brahmins is that they were the privileged group before the British arrived, that they were the first to learn English and take advantage of modern education and as a result, quickly secured high positions in the professions, law in particular, where English was the language of the courts. Scheduled Castes and Scheduled Tribes have received any education in English until after interdependence. Those who would come to be designated OBC were hardly much better off.” (Gadbois, 2011) Also, Justice V.R. Krishna Iyer in his book wrote about the judicial appointment by stating that “I remember on Chief Justice telling me long ago that he owed his position to his caste and so would, gratefully, help his caste.” (Iyer, 1983)

The Indian Judiciary is not only dominated by the upper class by also by the Male upper class where females are not given an equal representation to provide justice to citizens. The statistics provided by the Ministry of Law and Justice provided the data about the representation of Judges in courts based on sex. The data that came out was shocking wherein out of 676 serving judges only 70 are women, and the apex court had only one female judge in 2016.

	Working Strength	Number of Female Judges	Number of Male Judges	% of Female Judges
Supreme Court	24	1	23	4.2
Allahabad High Court	85	7	78	8.2
High Court of Judicature at Hyderabad	23	1	22	4.3
Bombay High Court	62	12	50	19.4
Calcutta High Court	38	3	35	7.9
Chhattisgarh High Court	11	-	11	0
Delhi High Court	39	11	28	28.2
Guwahati High Court	17	1	16	5.9
Gujarat High Court	31	4	27	12.9
Himachal Pradesh	10	-	10	0
Jammu & Kashmir High Court	10	-	10	0
Jharkhand High Court	13	-	13	0
Karnataka High Court	30	4	26	13.3
Kerala High Court	38	4	34	10.5
Madhya Pradesh High Court	39	3	36	7.7
Madras High Court	57	6	51	10.5
Manipur High Court	3	-	3	0
Meghalaya High Court	3	-	3	0
Odisha High Court	18	1	17	5.6
Patna High Court	32	2	30	6.3
Punjab & Haryana High Court	47	7	40	14.9
Rajasthan High Court	34	2	32	5.9
Sikkim High Court	2	1	1	50
Tripura High Court	3	-	3	0

Uttarakhand High Court	7	-	7	0
Total	676	70	606	10.4

(Photo Courtesy: Quint)

The domination of males in the judiciary has affected the justice delivery system especially for the lower caste women as seen in the case of Bhanwari Devi. The last time a lower class judge retired belonging to the Dalit community was in 2010. Since then there has not been any member of the backward class being promoted to the Supreme Court till date. A researcher who leads India for Diversity (IDF) initiative stated that “India’s judiciary is dominated by upper castes and out the 28 SC judges of the supreme court, 9 are relatives [of judges or legal luminaries]. This promotes favoritism and nepotism.” (Shinde, 2018) It has also been observed that the lower conviction for crimes against lower caste is due to the upper-caste judges in the courts who do not consider such acts as violent or oppressive. The law ministry with the help of the judiciary is trying to address this issue of domination of certain male upper class in the judiciary only which has been highlighted by the Hon’ble President of India. (Shinde, 2018)

IV. A POSSIBLE WAY AHEAD FOR BETTER TOMORROW

It is very evident from above, that caste bias plays an important role and has been embedded deeply in our judiciary. It is also very evident how upper-caste male judges dominate the Indian judiciary and try to support their caste either in the judiciary or through the justice delivery system. There have been various researches done to ensure an equal amount of representation and status to lower caste especially women in every ambit including the judiciary. Some researchers argue that “self-correction by the judiciary is the only recourse to counter biases and prejudice based on caste, class, gender and sexual orientation.” (Fayiz, 2019) An example of self-correction can be seen in the ambit of the Prevention of Atrocities Act, 1989. The Supreme Court bench of 2 upper-caste male judges in an order in 2018 declared that the said act was being misused by the lower caste people to take revenge from upper caste people and it is adversary affecting our constitutional values. (Bhaskar, 2020) This clearly shows what does the upper caste male judges think about the social protection they are being given by the government. Such order added a stereotype that it is only being misused and providing benefits to the lower class is useless. After continuous protest by lower caste people on this order of the Supreme Court, it recalled its own order in 2019 by stating that "It would be against the basic human dignity to treat all of them (SC/ST members) as a liar or as a crook person and cannot look at every complaint by such

complainant with a doubt." (Press Trust of India, 2019) Therefore, self-correction has been seen to counter prejudice based on caste, sex, etc.

It is also suggested that a possible way to end such inequality is to have a reservation for under-represented communities in the judiciary and they should also be given cases to judge which involve dispute relating to their community. Justice Balakrishnan who was a Dalit Judge, also pointed out that "It is an unfortunate situation. When I was CJI, we did try to elevate a Scheduled Caste HC CJ (P D Dinakaran), but due to the controversy, it was stalled. I don't know if any names have been considered thereafter. There must be representation from the weaker sections, the caveat being that only the deserving should be brought." (Chhibber, 2016) Justice Balakrishnan became a judge of the Supreme Court after receiving the assent of India's first Dalit President Shri K.R. Narayan, who was of the view that there should be lower caste and women representation in the judiciary. It was also pointed out in the report of the National Commission for Scheduled Caste (NCSC) in 2011, which recommended that a minimum reservation should be followed for different groups in the Judiciary and a National Judicial Commission should be formed to perform that task. This issue of under-representation of lower castes in the judiciary has also been brought up in the parliament various times. The National Commission also stated that reservation in the judiciary is the only remedy and the stand which government takes for no reservation does not hold good as providing reservation doesn't violate the Indian Constitution. (Ministry of Law, Justice and Company Affairs, 2000) Even though there has been an on-going debate on lowering the merit standards if a reservation has been given to backward classes, but such a concept is dubious. Indian Constitution's preamble explicitly says that India is a secular country, hence, it should respect representation from all sections of society. This aim of providing reservation is possible when an All India Judicial Service exam is conducted by the UPSC which had a separate reservation for SC, ST, OBC, and women. Such an attempt will ensure the creation of trained judges which will ensure equality, irrespective of their background.

V. CONCLUSION

It has been observed for a very long time that the members of backward classes along with women have suffered a lot. Domination of the upper male caste has been there since the formation of a newly independent India. It has also been observed that upper caste males try to support their caste in every system to maintain their power and domination in that field. In February 2019, the Supreme Court held that even if there are inadequacies in representation

in service, there are no restrictions for the government to provide reservations. The Supreme Court has been talking in both ways, wherein one situation they ask the government to remove the creamy layer from the society and ensure equality to lower class, but on another side, the empowers the government that it is not necessary to provide reservations. (Press Trust of India, 2019) Therefore, the need for today is to provide adequate representation of judges from lower-class including women in the judiciary either through the current system or through the National Judicial Appointment Commission. The law minister also suggested that an All-Indian examination for judiciary should be considered, but such should also ensure proper representation of the under-represented communities including women.

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