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Reservation and Judicial Interpretation towards the Minorities of India

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ABSTRACT

In fact, reservation is a bridge to join the inherent gap found in Indian caste ridden society; it is an instrument to achieve social justice. In consequence it provides space to the marginalized section in power spectrum of the state, which was denied for them for centuries together. Reservation has been resisted by upper caste dominant privileged section by challenging it in the court. Therefore, role of judiciary became of extreme importance. Judicial pronouncements are proved to be nothing but causative factors for restricting the scope and ambit of provision regarding reservation in the constitution. Judicial pronouncements in majority have drawn negative inference and contributed for making the application of provisions regarding reservation ineffective. Courts have gone to the extent to interpret reservation is neither right nor is it binding on the State, means, position of innocent masses in the domain of welfare state is as good as orphan. In the presence of express provision in the constitution meant for providing space in public life, judiciary has made them only paper piece and eye wash for SCs/STs.

Keywords: *Reservation, Social justice, Equality, Interpretation, Judiciary.*

I. INTRODUCTION

Making first amendment is an outcome of the judicial verdict. Since inception of the Constitution, it aims at doing social justice to marginalized section of the society. As of constitutional objective, the policy of reservation and government action pertaining thereto has become subject matter of the judicial scrutiny. Upon meticulous perusal of plethora of verdicts, it is stated that, majority of the judgments are compilation of negative interpretation. They have resulted into making the express constitutional provision ineffective, rather driven the innocent masses in to valley of disappointment. On one or other pretext reservation provision and policy of the government are restricted by the judicial decision though it is categorized as 'social justice'. in recent verdict the Supreme Court has sanctified reservation in promotion is neither fundamental right nor State is bound to provide it. In result it may allow to bring back the

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situation when majority of the posts were occupied by dominant upper castes though it was inconsistent with their ratio of population. This paper analyses governmental attitude to make provision for reservation and judicial decisions pertaining thereto. Judiciary is a place of aspiration where poor masses expect to get justice; hence this paper scrutinizes the role of judiciary in protecting reservation for masses vis-à-vis social justice.

II. RESERVATION VIS-À-VIS SOCIAL-LEGAL STEPS FOR EMANCIPATION OF SC/ST

Reservation for SCs/STs is a social justice, which was denied to them by the Indian society. It encompasses political representations, participations in government employment, and admission in higher educational institutions. Reservation has been chosen to be an instrument to remove the black stigma of untouchability which they carry from birth till death. Reservation promotes the participation of depressed people in democratic institutions, and strengthened the realistic approach of democratization of government. Therefore, reservation for present Scheduled Castes and Scheduled Tribes is compensatory remedy made by the State for their tyranny, denial and isolation; it is also called as "reservations signify compensatory discrimination"[3]

History reveals a noble contribution in this cause has been made by Princely States of Baroda and Travancore during 1880's, a self-explanatory example is of Dr. B. R. Ambedkar, he got benefited with scholarship sponsored by Maharaja Sayajirao Gaikwad of Baroda for pursuing his higher education. Maharaja Chhatrapati Shehu of Kolhapur was pioneer of eradication of *untouchability* and uplifting untouchables. He did so by establishing special boarding houses and granting scholarships. Shehu Maharaj was philanthropic enough to raise social strata of untouchables that he personally took tea at hotel run by untouchable so as to encourage others to leave practice of *untouchability* with depressed classes. He therefore become founder of reservation in India, he implemented it on July 26, 1902. Officially order was passed in the Kolhapur State Gazette granting 50% reservations for backward classes. Of course, this decision has generated shock waves in the British India also. Later on "on the basis of Miller Committee Report, the Government of Mysore issued orders in 1921 extending special facilities to the Depressed Communities with regard to education and recruitment in State Services"[4]. These all were the efforts to be called for their emancipation.

[3] Marc Galanter, 'Untouchability and the Law' in Michel Mahar (ed), The Untouchables inContemporary India (University of Arizona Press 1972)

[4] D.N. Sandanshiv, *Reservation for Social Justice A Socio-constitutional Approach* (Current LawPublishers 1986)

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III. RESERVATIONS GRANTED BY PROVINCIAL GOVERNMENTS IS FOR JOINING MAIN STREAM

Reservation is neither a poverty elevation program not it is mean of bread and butter, but it is an instrument to get participation in political space where decision for deciding destiny is taken. There is gigantic significance to the reservations of SCs/STs as it provides space for them in politics and administration. Roots of reservations are visible, when the first step for uplifting of depressed classes students was taken by Madras Provincial Government as it had framed Grant-in-Aid Code in 1885 aiming at facilitating financial assistance to educational institutes. Further, in 1921 Madras Government took a bold step by opening avenues of government services for non-Brahmins. This decision was reviewed in 1927 and all the communities in the State were divided into five categories and separate quota for each of them was earmarked.

This step of Madras Government was further followed by the Government of Bombay. In 1928 it formed a committee headed by Mr. O. H. B. Starte for identification of depressed classes and suggests measures for their advancement. The committee recommended for giving special educational facilities and recruitment to depressed classes in government services.

The quota of reservation was decided to be in proportionate with population of particular section. It remained enforceable either in politics, higher education or in government services. The discriminative practice of antipathy and antagonistic approach of upper castes denying them space in public sphere, "it is telling comment on our unequal society that till the introduction of reservation of seats for Scheduled Castes and Scheduled Tribes, nearly 90 percent of higher posts under State and seats in medical and engineering colleges were filled by candidates from about 18 per cent of the higher castes"[5]. To diminish monopoly of few and to ensure access to depressed classes the quota system was positively implemented by the princely states before independence. The reservation for depressed classes in services was introduced in July 1934 in absence of quota. However, quota of reservation was earmarked for Scheduled Castes in the year 1943, which in due course of time varied with changed ratio of population, pertinently the scheduled castes converted to Buddhism got benefit in 1971. The long-standing struggle has brought in to reality the reservation of Scheduled Castes after span of hundred years. At present 59 castes are covered in the category of Scheduled Castes in the State of Maharashtra to whom 13% reservation is granted, and 47 tribes covered under Scheduled Tribes to which 7%. Upon recapitulation of this series of developments of granting reservation to Scheduled Castes it could be proper to say that, "in case of India of 1947 one

[5] Govt. of India, *Report of the Backward Classes Commission (*First Part Vol. I&II 1980) p 24.

can assert that the political decisions taken by the political leadership comprised of Indian political leaders and British political leaders determined the ultimate outcome of India to Hindus, Pakistan to Muslims and reservations to the Scheduled Castes and Scheduled Tribes"[6]

Significance of reservation of Scheduled castes and Scheduled Tribes is drawn as, it attributes human identity and other it ensures place in employment, education, and political institutions. Cynic says while criticizing reservation to SCs/STs as it is a threat to merit by relying on marks. SCs/STs candidates are viewed as in efficient in performance. Military services, judicial services, isolated positions and field where high excellence requires are kept away from application of reservation policy, despite these are under the umbrella of public services. But this argument is a great fallacy.

IV. JUDICIAL PRONOUNCEMENT AND RESERVATION

As on today, reservation for SCs/STs is a constitutional dictum, aiming at eradication of inequality and brings about equality. The necessity of incorporating such scheme in the Indian constitution has been correctly explained by Dr. Babasaheb Ambedkar, in his book titled "Mr. Gandhi and Emancipation of the Untouchables", particularly in chapter titled as "Caste and Constitution". He says "why it is necessary that in the Indian Constitution the Communal Scheme must find its place and why in the Public Services for the Untouchables should be specified and should be assigned to them as their separate possession. The justification for these demands is easy and obvious. It arises from the undeniable fact that what divides the Untouchables from the Hindus is not mere matter of difference on non-essentials. It is a case of fundamental antagonism and antipathy. No evidence of this antipathy and antagonism is necessary. The system of Untouchability is enough evidence of the inherent antagonism between the Hindus and the Untouchables. Given this antagonism it is simply impossible to ask the Untouchable to depend upon and trust the Hindus to do them justice when the Hindu gets their freedom and independence from the British. Who can say that the Untouchable is not right in saying that he will not trust the Hindu? The Hindu is as alien to him as a European is and what is worse the European alien is neutral but the Hindu is most shamefully partial to his own class and antagonistic to the Untouchables. There can be no doubt that the Hindus have all these ages despised, disregarded and disowned the Untouchables as belonging to a different and contemptible stratum of society if not different race. The only safety against such people is to have the political rights which the Untouchables claim as safeguards against the tyranny

[6] D.N. Sandanshiv, *Reservation for Social Justice A Socio-constitutional Approach* (Current Law Publishers 1986)

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of the Hindu Majority defined in the Constitution."[7] But upon perusal of the plethora of judgments of the courts in India, it seems that, though the speaking provisions are stipulated in the Constitution but the spirit of them has been taken out totally, and remained as ineffective.

"*State of Madras v. Champakam Dorairajan*"

Let us recapitulate the judicial pronouncements which are ever delivered by the court keeping reservation of SCs/STs at the center point. Upon considering exorbitant presence of the Brahmin in education and employment, the Madras government issued order providing reservation to non-Brahmin community in professional college and employment. But few Brahmin candidates, who could not get opportunity, challenged this government order in the court. **"*State of Madras v. Champakam Dorairajan*"**[8]. It is known as first major challenge posed to the reservation policy in India. The Supreme Court struck down the Communal G. O. laying that the classification was made on the basis of religion, race, caste, and opined it to be contrary to Article 29 (2). However, the Government argued that, this classification was based on article 46 which enjoined upon State to promote the educational and economic interest of weaker sections, but court did not consider it. The verdict in this case gave rise to make first amendment in the Constitution. The Constitution (First Amendment) Bill 1951 incorporated clause (4) in Article 15 as, "Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".[9] This express provision made to provide thereby constitutional instrument for advancement of socially and educationally Backward Classes of citizens or for the Scheduled Castes and Scheduled Tribes.

Let us come to Article 16 (4) it provides that, "nothing in this article shall prevent the State from making any provision for the reservation of the appointments or posts in favor of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State".[10] Making such speaking provisions providing thereby reservations and special treatment for advancement the backward classes consider them as 'charter of rights' but upper castes felt annoyed, and posed themselves to be an aggrieved, with this feeling challenged the provisions by filing petitions in various High Courts and Supreme Court from time to time. In the long span of time there is plethora of verdicts available on this

[7] Dr. Babasaheb Ambedkar Writings and Speeches Vol.9 p. 425.
[8] AIR 1951 SC 226
[9] Narendra Kumar, Constitutional Law of India, Allahabad law agency, Delhi 2008
[10] Pande, G.S. Constitutional Law of India, Allahabad Law Agency 2000, P.98.

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issue. few of them are discussed under.

'M. R. Balaji v. State of Mysore[11]' in this case the Karnataka Government had passed an order to keep the 50% seats reserved for other backward classes, in addition to 15% for Scheduled Castes and 3% for Scheduled Tribes, it goes to 68% in total. This order was passed on the report of Nagnna Gowda Committee 1962. One among the other, the observation of the court which is relevant to mention here is regarding quantum of reservation. Court observed that, "speaking generally and in a broad way, a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case". Further court observed that, clause (4) of Article 15 is an exception to clause (1). Hence the order of the government was struck down. This is widely used citation in court matters.

"R. Chitralekha v. State of Mysore"[12] it is sequel to the verdict in Balaji's case.

The elitist classes of upper castes have relentlessly waged a war against reservation policy by way of challenging it in the court. Therefore, courts have created considerable complexity in regard to reservation. In addition to the above-mentioned cases, 'Triloknath v. State of J&K'[13], 'Rajendran v. State of Madras'[14], 'State of A.P. v. Balaram'[15], 'Janki Prasad v. State of J&K'[16], 'State of U. P. v. Pradeep Tondon'[17], 'Vishwanath Kumar v. State of Karnatka'[18]. Though these all cases are refereed here, but courts have done in them very little regarding reservation for SCs/STs. Majority concern of these verdicts is pertaining to reservation of OBCs, and prime observations of the courts are pertaining to parameters of backwardness, and percentage of reservation.

"Indra Sawhney and others v. Union of India and others

The serious concern so far shown by the judiciary it seems to be in post Mandal Commission's implementation period. In the regime of Prime Minister, V. P. Singh the long lingering issue of implementation of recommendation of Mandal Commission was solved, as he declared its implementation officially. No doubt, it became cause for exposure to annoyance by the upper caste elitist of Indian society, who felt to be in danger as their age-old monopoly of capturing power was under threat due to opening of avenues for the OBCs. Hence, widespread agitations were organized posing damage to public and private properties. This resistance did not remain

[11] AIR1963, SC, 649.
[12] AIR. 1964 SC. 1823
[13] AIR 1967 SC 1283
[14] AIR 1968 SC 1012.
[15] AIR 1972 SC 1375.
[16] AIR 1973 SC 930.
[17] AIR 1975 SC 163.
[18] 1985 Supp. SCC. 467

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limited to road exhibition but, judicial war was also waged. The case was filed by Supreme Court Bar Association which later on called as ***"Indra Sawhney and others v. Union of India and others"***[19] it is popularly known as "Mandal Commission Case". All the points and questions were come to be considered by nine judges' bench of the Supreme Court of India. Apart from other observations few are relevant to present issue namely, "they refuse to accept the myth that reservation was always and inevitably anti merit. They reiterated that Article 16 (4) was not in the nature of an exception to Article 16 (1). It was emphatic way of stating what was implicit in Article 16 (1)"[20]. The paramount feature of this land mark judgment is it created one exclusionary rule namely "creamy layer", but, "it was also observed that this exclusionary rule was to be applied to Backward Classes only and not to the Scheduled Tribes and the Scheduled Castes". Further, the court held that, "the rule of reservation should not be applied to promotional posts but confined their ruling to Backward Classes only and not to Scheduled Castes". This observation proved to be detrimental in the course of time to SCs/STs, as the forthcoming verdicts have considered it to be equally applicable to them. This judgment became most celebrated in deciding upcoming cases pertaining to reservation.

V. RESERVATION OF SCS/STS IN PROMOTION

"M. Nagaraj and others v. Union of India and others"

As discussed earlier, the question was posed to the reservation in promotion, though it was restricted initially to the OBCs but it paved way for posing threat to the reservation of SCs/STs as well. In case of ***"M. Nagaraj and others v. Union of India and others"***[21] a Constitution Bench has upheld 77th (Constitution Amendment) Act, 1995, 81st (Constitution Amendment) Act, 2000, 82nd (Constitution Amendment) Act, 2001, and 85th (Constitution Amendment) Act, 2001. However, court has posed most potential threat to the reservation of SCs/STs by observing that, expression Backward Classes mentioned under Article 16(4) covers SCs/STs also. In paragraph 121, the court observed that, "these impugned amendments are confined only to SCs/STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on the one hand and SCs and STs on the other hand as held in Indira Shawney's, the concept of post-based roster with inbuilt concept of replacement as held in R. K. Sabharwal". Outstanding feature of this judgment is that the court has considered

[19] AIR 1993 SC 467.
[20] O. Chinnappa Reddy, The Court and the Constitution of India Summits and Shallow OUP NewDelhi 2008 p.104.
[21] 2006, 8 SCC 212.

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OBCs and SCs/STs on equal footing and applied all parameters equally to them.

Further in paragraph 123, "as stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters in promotions. However, if they wish to exercise their discretion and make such provision the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335". This verdict is nothing but an alternate name of denial of constitutional protection to the SCs/STs which they have ever gained and enjoyed. The court in this verdict has defused whole substance of reservation provided under the constitutional provisions pertaining to reservation for SCs/STs. The court has laid down that, it is not binding on the state to provide reservation to the SCs/STs in the promotion. This provision is called as "enabling provisions" the implementation is within the domain of State. It became binding precedent and referred to in series of subsequent cases.

'Suresh Chand Gautam v. State of U. P. and others'[22]

One among the other points, the court was prayed to reflect on "even if it is assumed, as interpreted in M. Nagraj, Articles 16 (4A) and 16 (4B) are enabling constitutional provisions, the concept of power coupled with duty requires the authorities to perform the duty and they are obliged to collect the quantifiable data to enable them to take a decision of reservation in promotion. Hence a mandamus should be issued to all authorities to carry out the constitutional command".

However, the court laid down that in paragraph no. 50, "we have referred to the said authority as the court has clearly held that it neither legislates nor does it issue a mandamus to legislate. The relief in the present case, when appositely appreciated, tantamount to a prayer for issue of a mandamus to take a step towards framing of a rule or a regulation for the purpose of reservation for Scheduled Castes and Scheduled Tribes in matters of promotions. In our considered opinion a writ of mandamus of such a nature cannot be issued". This judgment has made it vividly clear that, reservation is not right of SCs/STs, and no constitutional remedy is available to be used on the eventuality of failure of the State.

'Mukesh Kumar and Others v. The State of Uttarakhand and Others'[23]

This recent verdict is nothing but a replica of the earlier judgments. Categorically the Supreme Court has observed in para. 16 that," the direction that was issued to the State Government to collect quantifiable data pertaining to the adequacy or inadequacy of representation of persons

[22] (2016) 11 SCC 113.
[23] Civil Appeal No. 1226 of 2020 (arising out of SLP (Civil No. 23701 of 2019) dated 7th February2020.

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belonging to Scheduled Castes and Scheduled Tribes in Government services is the subject matter of challenge in some appeals before us. In view of the law laid down by this court, there is no doubt that the State Government is not bound to make reservations". This direction of the High Court held the State Government harnessed with 'compelling reasons' to provide reservation to SCs/STs in public services, which learned judges of the Supreme Court have discarded in totality. In dealing with cause of feelings of 'meeting with an injustice' the attitude of the court particularly of Apex Court expected to be such that "scrupulous regard must be shown to the interest of weakest sections of the society".

The court in paragraph number 16 observed that, "not being bound to provide reservations in promotions, the State is not required to justify its decision on the basis of quantifiable data, showing that there is adequate representation of members of the Scheduled Castes and Scheduled Tribes in State services. Even if the underrepresentation of Scheduled castes and scheduled tribes in public services is brought to the notice of this court, no mandamus can be issued by this court to the State Government to provide reservation in the light of the law laid down in C. A. Rajendran and Suresh Chand Gautam". This decision is containing such astonishing observation not in the absence of the constitutional provisions but in the presence of the express constitutional provisions. Finally, court laid down that, reservation in promotion to the SCs/STs is not a fundamental right, and State is not bound to provide it.

VI. CONCLUSION

Judiciary being protector of constitution has acted in such a way that it has every now and then harnessed the constitutional provision pertaining to reservation. These provisions are aiming at two things one to establish social justice and other to bring about equality in most unequal Indian society. As in the reference stated above, necessity of constitutional provisions was pointed out by Dr. Babasaheb Ambedkar, for safeguarding interests of Scheduled Castes and Scheduled Tribes. Today situation of SCs/STs has been made extremely funky in presence of constitutional provisions, simply by interpreting provisions conveniently in negative manner. Now if government is reluctant to employ candidates of SCs/STs though it may be because of caste based hatred way is quite clear, as plethora of judgments has made it permissible. Facts prove themselves, in span of seventy years of republic government very negligible number of persons belonging to SCs/STs could become Chief Ministers or Prime Ministers; their political representation is restricted to the quota of reservation allocated to them, which is ineffective to create positive influence in decision making process. Consequently, people of these categories have to be dependent upon the whim and desire of upper castes. Judicial interpretation has now

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made free from constitutional accountability to upper caste dominated government. Therefore, provisions relating to reservations are proved to be eye wash and paper piece. Whole exercise of aspirations to get social justice on the one hand and equality of opportunity on the other hand has become fact of remote possibility for SCs/STs.

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