

Role of Judiciary in interpreting and enforcing the Constitutional mandate of “Protective Discrimination”

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The judiciary had not been lagging behind in removing the atrocities against dalits but had done an immense commendable work through various monumental and celebrated decisions for the uplift of the conditions of these weaker sections. The courts had taken a very serious view in respect of untouchability.

The Judiciary acted as a bastion of freedom and protector of the rights of the people. And law must be capable of expanding the freedom of the people, the legal order must be deployed with utmost equal care to combat a highly inequitable social order. The mandate of the Constitution would be a reality only when law was enforced strictly; the implementation and interpretation was to be measured by the factual improvement in the quality of the life of dalits. In (*Cr. L.R (1993) p. 85*) ‘the Judges, were advised to respond to the human situations to meet the felt necessities of the time and social needs, meaningful right to life and gave effect to the Constitution and the will of the legislature. In interpreting the Act (i.e. Scheduled Castes and Scheduled Tribes Act, 1989) the judge should be cognizant to and always keep at the back of his/her mind the Constitutional goals and the purpose of the Act and interpret the provisions of the Act in the light thus shed to annihilate Untouchability, to accord to the Dalits and the Tribes right to equality, social integration a Fruition and fraternity a reality.’

Judicial Approach in Respect of Constitutional Provisions

The approach towards Dalits, adopted by Supreme Court and High Courts could be discussed under the following heads:

(A) Under Article 17

Article 17 of the Constitution of India, made an epoch making declaration that Untouchability was abolished and its practice in any form was forbidden. The enforcement of any disability arising out of “Untouchability” should be an offence punishable in accordance with law. It was a very important and significant provision from the point of view of equality before law. It guaranteed social justice, (which had now been held by Supreme Court as fundamental Right), in *Ashok Kumar Gupta v. State of U.P.* (1997) 5 SCC 201 (Para 26) and dignity of man, the twin privileges which were denied to a vast section of the Indian society for centuries together.¹

The Supreme Court of India in *State of Karnataka v. Appa Balu Ingale Cr. L.R* (1993) p.72, the first case before it on “Untouchability” held that the purpose of Article 17 of the Constitution, was to establish new ideal for society based on principle of egalitarianism. The thrust of Article 17, was to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base. It sought to establish new ideal for society-equality to the Dalits as par with general public, absence of disabilities, restrictions or prohibitions on grounds of caste or religion, availability of opportunities and a sense of being a participant in the main stream of national life.”

The Supreme Court of India in *People’s Union for Democratic Rights v. Union of India AIR 1982 SC1473* held that the Fundamental Right under Article 17 of the Constitution was available against private individuals also and it was the Constitutional duty of the state to take necessary steps and ensure that this Fundamental Right was not violated. The Allahabad High Court in *State v. Gulab Singh AIR 1954. All 483* punished the Hindus as they compelled the bridegroom of the Scheduled Caste to alight from the *dola-palki* while passing through the village.

On the term of “Untouchability” ‘The Madras High Court in *AIR 1956 Mad. 541* held that the term “Untouchability” included the act of preventing certain classes of Hindus who were once known as “Depressed Classes” from entering a public temple. In *Janki Parsad and Others v.*

State of J&K, AIR 1973 SC.930, the Supreme Court held, 'Where a person was refused admission in a temple on the ground of his being a Harijan, the refusal was to be presumed to be on the ground of untouchability. In *Surya Narayan Chaudhary vs. State of Rajasthan AIR 1989 Raj p.99*, the Rajasthan High Court permitted the entry of Harijans to temple without purification ceremonies, on a Public Interest Petition. The High court disposed off the petition with necessary directions in favour of Harijans. It had a duty to prevent hostile discrimination and ruled that every devotee, including the Harijan who wanted to enter the temple, should be permitted to do so in accordance with the general practice. Harijans should not be subjected to additional conditions. The purification ceremonies should be discontinued as it violated Articles 14, 15 and 17 of the Constitution. These views of Supreme Court were required to be transformed by Hindu society for establishing a society of equals based on fraternity.

Article 14 - Right to Equality

The idea of equality expressed in the Preamble of the Constitution had been embodied under Article 14 of the Constitution in the sense to have a society of equals. The Supreme Court of India in *Dalmia Cement (Bharat) Ltd. v. Union of India (1996) 10 SCC 104 (Para 15)* held that the concept of equality and equal protection of laws guaranteed by Article 14 in its proper spectrum encompassed social and economic justice in a political democracy and equality before law was co-relative to the concept of rule of law for all around evaluation of healthy social order. A basic postulate of the rule of law was that 'Justice should not only be done but it must also be seemed to be done. The healthy social order was only possible in India, if the members of Scheduled Castes and Scheduled Tribes brought at par with other members of Indian communities.

So as to give justice to Dalits, Article 14 permitted reasonable classification based on intelligible differentia having a rational relation with the object sought to be achieved. The Courts were of the view that Article 14 of the Constitution also permitted special treatment, which was authorized by other provisions of the Constitution. But that treatment must be within reasonable limits and should not be so excessive as to render nugatory the general principle of equality professed to the members of all communities by Article 14. Hence, the special provisions for the advancement of backward classes of Scheduled Castes and

Scheduled Tribes under Article 15(4) or reservation of posts for backward classes under Article 16(4) would be unconstitutional because of contravention of Article 14, if it carried to an unreasonable extent i.e. more than 50 percent (*Balaji M.R v. State of Mysore AIR 1963 SC649.*)

In *Indra Sawhney v. Union of India AIR 1993 SC477*, the Supreme Court was of the view that the doctrine of equality enshrined under Article 14 was a dynamic and evolving concept and it had many facets. It included in itself the equalities provided under Articles 15-18 as well as in Articles 38,39, 39A, 41 and 46 of part IV of the Indian Constitution. The object of all those provisions was to attain justice social, economic and political which was indicated in the Preamble and which was sum total of the aspirations incorporated in Part IV of the Constitution.²

In *Arti Gupta v. State of Punjab AIR 1988 SC 481* the Supreme Court held that reduction of minimum qualifying marks from 35 percent to 25 percent in order to accommodate more candidates of Scheduled Castes and Scheduled Tribes to fulfill the reserved quota was not arbitrary and violative of Article 14 of the Constitution.

Articles 15 and 29

Article 15(1) and (2)

The abolition of Untouchability was the arch of the Constitution to made its preamble meaningful and to integrate the Dalits in the national mainstream. With this object Article 15 (2) removed disabilities and provided that no Citizen should, on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 15(2) read with Article 17 protected an individual from discriminatory conduct not only on the part of the state but even on the part of private persons in certain situations. In *State of Karanataka vs. Appa Balu Ingale and others Cr. L.R (SC)(1993)p.72* , the Supreme Court of India considered the act of respondent party of forcibly restraining complainant party, Harijans, from taking water from newly dug up bore well as an act of untouchability offending Article 17 read with Article 15(2). The Supreme Court stated that whenever a fundamental right was violated by private individual, it was the Constitutional

obligation of the state to take necessary steps to interdict such violation and ensure observance of the fundamental right by the private individual, who was the victim of transgression. The Madras High court in *Banalidas v. Pakhu Bhandari AIR 1951 Cal 167* held that the word shop in this Article was used in a generic sense and would include any premises where goods were sold either by retail or whole-sale or both and would include a laundry, haircutting saloon or such other places where services were rendered to the customers. So, the refusal of a barber to shave a cobbler in public saloon was rightly considered as offending Article 15(2).

Article 15(4) and Article 29 (2)

Before the first amendment of the Constitution there was no provision under part III of the Constitution for preferential treatment to be given to the members of Scheduled Castes and Scheduled Tribes in respect of education who were far behind in education as compared to other persons. Mere removal of discrimination was not enough because they could not come to equal status with other superior persons. As Supreme Court in *State of Madras V Champakam Darairajan. AIR 1954SC226* held the Communal Government Order with regard to the reservation of seats in Medical and Engineering colleges in the state of Madras as violative of Articles 15(1) and 29 (2) of the Constitution.

Article 15(4) was added by the Constitution (First Amendment) Act, 1951 by making discriminatory provisions in their favour. The very object of the newly introduced clause (4) to Article 15 was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 of the Constitution to make it Constitutionally valid for the state to reserve seats for backward classes of citizens, Scheduled Castes and Scheduled Tribes in public educational institutions as well to make other special provisions as might be necessary for their advancement.³

If there was no reservation for those under-privileged, it would amount to treating the disadvantageous people uniformly with advantageous people thus perpetuating the disadvantage for eternity.

Venugopal observed, “unless adventitious aids were given to the underprivileged people it would be impossible to suggest that they had equal opportunities with the more advanced people. This was the reason and the justification for the demand of social justice that the under privileged citizens of the country should be given a preferential treatment in order to give them an equal opportunity with other more advanced sections of the community.”⁴

The Supreme Court in *Dr. Preeti Srivastava and Others v. State of Madhya Pradesh and others AIR 1999 SC 2894* held that the object of Article 15(4) was to enable the Scheduled Castes and Scheduled Tribes to develop themselves in such a manner conducive to the ultimate building up of an egalitarian non-discriminatory society. Therefore, programmes and policies of compensatory discriminations under Article 15(4) had to be designed and pursued to achieve this ultimate national interest. Article 15(4) did not impose any obligations on the state to take special action under it. It merely conferred a discretion to act, if necessary by way of making special provision for backward classes. The Court struck down the order of the Government of Mysore reserving 68 percent of posts in the Engineering and Medical colleges as unreasonable.

When a candidate of Scheduled Castes or Scheduled Tribes got selected for admission to a course on the basis of merit as a general candidate then he should not be treated as a reserved candidate and ceiling of 50 percent of reservation would not be applicable in his/her case. The Supreme Court in *Ritesh R. Sah v. Y.L. Yamul (Dr) (1996)3 SCC 253 (Para .17) AIR 1996 SC 1378* and in *P.G.I. Medical Education and Research v. K.L. Narasimhan (1997) 4 SCC 271 “(Paras 6,7,8) AIR 1997 SC 2046* had held that the candidates of reserved category admitted to medical courses on the basis of open merit should be treated as open category candidates for the purpose of computing the percentage of reservation, but they should be given option for admission to graduate or post graduate course in the colleges where seats were kept reserved for reserved category and thereafter less meritorious reserved category candidates should be considered for admission in whichever colleges reserved seats were available and be entitled to all the benefits, concessions or Scholarships under the rules. Under Article

15(4) the state was obliged to do everything possible for the uplift of the members of Scheduled Castes and Scheduled Tribes and other backward communities and was entitled to make reservations for them in the matter of admission to medical and other technical institutions. In the absence of any law to the contrary, it was open to the Government to impose such conditions as would make the reservation effective. In any particular situation taking into consideration the realities and circumstances prevailing in the state the Government was entitled to vary and modify the conditions regarding selection for admission. If such modification was necessary for achieving the purpose of reservation. The relaxation made by the government in favour of candidates of Scheduled Castes and Scheduled Tribes for admission into medical colleges could not be said to be unreasonable and violative of Article 15(4).

The benefits of reservation under Articles 15(4) and 16(4) were available only to those persons of Scheduled Castes and Scheduled Tribes who were born in those Castes or Tribes and not to those persons who were transplanted or married into Scheduled Castes or Tribes. Acquisition of the status of Scheduled Castes etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign Constitutional Policy under Articles 15(4) and 16(4).

As a result of this Constitutional Amendment and active and positive role of courts, many people of the socially backward communities and members belonging to Scheduled Castes and Scheduled Tribes entered the portals of professional colleges and qualified themselves as Doctors, Engineers, Professors and Scientists and had entered government services in large numbers.

Articles 16 and 335: Employment opportunities

The equal opportunities in respect of public employment had been extended to all the citizens of India through Article 16(1) &(2). But this, was not enough for Dalits because of their backwardness, they could not compete with other citizens.

The Constitution had given special preference to those persons in respect of employment by way of the provisions for reservations concessions and relaxations.

Article 16(4) was an enabling provision and conferred a discretionary power on the state to make reservation of appointment in favour of backward classes of citizens which were not adequately represented either numerically or qualitatively in the services of the state. Though Article 16(4) did not confer any fundamental right upon any individual but it enjoined the state to take positive action to alleviate inequality

Clause (4) of the Article 16 was very wide and it included not only reservation but it also included relaxation of standard at competitive examinations for members of Backward Classes, (*Comptroller and Auditor General vs. Jagganathan K. S* (1986) 2 SCC 679: AIR 1987 SC 687.) or preferences or exemptions which might be regarded as ancillary to reservation.⁵

In *Chitralakha R. Vs. State of Mysore* AIR 1964 SC 1823 the Supreme Court held, “though Scheduled Castes and Scheduled Tribes were not separately mentioned in Article 16(4) as in Article 15(4) yet they were entitled to be treated as a “Backward classes and accordingly they were entitled for all benefits of reservation, relaxation of service condition or for appointment or promotions.”

The controversy of "Carry forward Rule," which was laid down by Supreme Court in *Devadasan V Union of India* AIR 1964 SC 179 followed in *A.B.S.K. Sangh (Rly) v. Union of India* AIR 1981 SC 298 had now been set at rest by inserting clause (4-B) to Article 16 (Vide Constitution (81st Amendment) Act 2000.) by treating the unfilled vacancies as a separate class.

Thus in the interests of the backward class of citizens, the state should not reserve all the appointments under the state or even the majority of them. In same case, Supreme Court further held that there should be no reservation in promotion. But unfortunately the Parliament had it done away through the insertion of Article 16 (4A). (Inserted by the Constitution (77th Amendment) Act 1995) which provided : “Nothing in the Article should prevent the state

from making any provision for reservation in matters of promotions to any class or classes of posts in the services under the state in favour of Scheduled Castes and Scheduled Tribes which, in the opinion of the state, were not adequately represented in the services under the state.

The judiciary really intended to give the benefits of reservation to the descendants of those who had suffered atrocities from centuries. That was why the Supreme Court in *Valsainma Paul vs. Cochin University, (1996)3 SCC 545 (Para 34): AIR 1996 SC 1011* disallowed the benefit to those who acquired the status of Scheduled Castes or Scheduled Tribes by conversion, marriage or adoption and held that acquisition of status of Scheduled Caste etc. by voluntary mobility into those categories would play fraud on the Constitution and would frustrate the benign Constitutional policy under Articles 15(4) and 16(4).

The policy of reservation had created a wide gap among various sections (Castes) of Hindus instead to bridge it up. The benefits of reservation had not reached to those persons who were really entitled to get it. Now the problem before us was that how we could remove this gap between untouchables and other Castes of - Hindus and in what manner we should promote the interests of these untouchables so that they could adequately represent in the services and could improve their social and economic status in the society. For this purpose, it might be suggested that the provisions of the Constitution relating to reservation should be amended and be based on the criteria of social and economic backwardness instead of social and educational backwardness.

Equal justice and free Legal Aid to Dalits

The members of Scheduled Castes and Scheduled Tribes were mostly down-trodden and poor. In case of violation of their legal rights, they were unable to knock the doors of court so as to get justice. Whereas, in a democratic welfare state, the natural growth and development of all citizens, as a whole, was essential. The forty-second Amendment Act, 1976 of the Constitution of India through Article 39-A explicitly proclaimed the need of legal aid to the poor. In India, the High Courts and the Supreme Court had played a dominant role in spreading the concept of legal aid and enabling the poor and the weaker

sections of the society to have access to courts. In *Maneka Gandhi v Union of India AIR 1978 SC 597* the Supreme Court held that the ‘procedure established by law’ under Article 21 of the Constitution should be just, fair and reasonable’. This verdict of the Supreme Court created far reaching impact in subsequent cases in the area of Legal aid. In *M.H. Hoskot v State of Maharashtra AIR 1978 SC 1548* the Supreme Court held that the right to legal aid was one of the ingredient of fair justice. In *Khatris v. State of Bihar AIR 1981 SC 928* the Supreme Court held that the right to free legal service was implicit in the guarantee of Article 21 and the state was bound to provide free legal services to an indigent accused person and could not take plea of financial and administrative inability. This case led the Supreme Court to voice for the promotion of legal literacy as an important issue of the Legal Aid Movement.

The Legal Aid Movement was not only confined itself in providing free legal aid to poor but it had also included in its ambit the Public interest Litigation. The Indian judiciary thus made use of the Constitutional provisions to bring justice to Dalits and deprived classes,

Judiciary and Laws Prohibiting Untouchability

There were two Acts, namely Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 dealing with the offences of atrocities against the members of Scheduled Castes and Scheduled Tribes: But not so much cases under these two legislations had come to High courts and Supreme Court. Let us see what approach of judicial pronouncements had been under these Acts.

Judiciary and Protection of Civil Rights Act, 1955

After 73 years of the making of the Constitution, as well as after 65 years of the enforcement of Protection of Civil Rights Act, 1955, the first case that came up before the Supreme Court that of *State of Karnataka V Appa Balu Ingale and others. Cr.L.R (SC) 1993 p.72*, in which Appa Balu Ingale and four others were tried for the offences under sections 4 and 7 of the Protection of Civil Right Act, 1955 on the charges that they restrained the Complainant party who were Harijans, by show of force from taking water

from a newly dug up borewell, on the ground that they were untouchables. The trial court convicted all of them under Section 4 of the Act. The Court held that the object of Article 17 was to be liberate the society from blind and ritualistic adherence and traditional belief, which had lost all legal or moral base.

Judiciary and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Courts, which were already having thousands of pending cases, were unable to cope up with the cases. The number of atrocities were not decreasing against untouchables under the effect of Protection of Civil Right Act, 1955. To deal with these problems effectively Parliament enacted Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. For the first time, this Act was challenged before Rajasthan High court in *Jai Singh v. Union of India AIR 1993 Raj 177*. The Rajasthan High Court upheld the validity of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and pointed out that the Act attempted to abolish untouchability and caste differences in tune with the Constitutional mandate of Article 17 of the Constitution of India. The Supreme Court on the question of validity of Section 18 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 denying the application of Section 438 on Cr. P. C (Anticipatory bail) pointed out in *State of M.P. and others v. Ram Krishna Balodia AIR 1998 SC 1198* that offences under the Act formed distinct class by themselves and could not be compared with other offences the Court held “There was very likelihood that the persons committing offences under Section 301 the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 might use their liberty while on anticipatory bail to terrorize their victims and to prevent a proper investigation. Hence, Section 18 of the Act denying application of Section 438 Cr. P.C to these offences was-not violative of Article 21 of the Constitution. Despite of stringent provisions of the laws dealing with the prohibition of untouchability as well as the hard attitudes of the Courts against untouchability, the atrocities against untouchables even continued in all states. Offences like murder, gang rape, public auction of women, urinating in the mouth of women,

compelling boys to eat night soil, parading naked women in the village, mass killings and destroying of houses and other properties went on unabated.

End Notes

1. Lai, Shyam and Saxena, K.S; *Ambedkar and Nation Building* , New Delhi, Rawat Publications, 1998, p.259
2. D. D. Basu; *Shorter Constitution of India*, Wadhwa Publication, Nagpur, edition XIII, 2001, p. 100.
3. Jitendra Mishra; *Equality Verses Justice* ,New Delhi, Deep & Deep Publications, p.117.
4. P. Venugopal; *Social Justice And Reservation*, Emerald publications, 1998, p.45.
5. *Indra Sawhney v. Union of India AIR 1993 SC 477.*

