

Marginalized and Human Rights

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Abstract

This research paper is a doctrinal research that aims to address the main issue of the very existence of minorities, denial of their human rights. It questions the very basis of segregation of society which identifies scheduled caste, schedule tribes and Dalits as the marginalized sections of the Indian society. The scope of this research paper is limited to the legislations formulated within India only. Acknowledging the systems and laws that impart social justice to the weaker sections of society, it includes the critical analysis of the criteria to recognize a person as one from a marginalized class. It also looks into the predicament of how the enactments which are meant to secure basic human rights of backwards and minorities, hinder the growth of the middle class general merit. That is, how more than 50% reservation for the socially and educationally backward classes in states like Tamil Nadu with 69%, Maharashtra with 52% reservation has in turn posed a threat to the progress of the general merit. Further, in this paper, stress will be laid on providing reservation only on financial basis and not on caste basis. The word social justice here implies distribution of wealth, opportunities and privileges in the society. Here the focus will be more on Dalit women because in addition to being the weaker section of the society, they also have to bear the stigma of the caste they are born in. Even though men face such caste based discrimination too, it is more among women because of their gender.

Keywords: caste based discrimination, Dalits, marginalized, reservation

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Introduction

India presents endless varieties of physical features and cultural patterns. It is only in India people profess all the major religions of the world. In short, India is “the epitome of the world”. According to 2011 census, out of 1.2 billion people in India, 79.8% are Hindus, 14.23% are Muslims, 2.3% Christians, 1.72% Sikhs, 0.70% Buddhists and 0.37% Jains. While accommodating such a diverse bunch of communities, the nation failed to keep a check on the violation of the human rights of the communities who were weak in monetary terms and societal standing. Some minority groups claimed that equal justice under the law does not apply to them, there are dual standards of enforcement for these groups and other majority groups, the police are prejudiced, their complaints against the police are not processed impartially, and that the role of the police is to maintain the status quo. The caste system forms the kernel or the “steel frame” of religions³.

The caste system with its numerous sub-castes within a particular caste encouraged rivalry to the extent which, in many cases, surpassed the intensity noticed in even the inter-caste and inter-communal rivalry. Millions of scheduled castes (Hereafter referred to as SCs). since centuries have been living in complete isolation, utter poverty, ignorance and serfdom⁴. Millions of Scheduled Tribes (Hereafter referred to as STs) have been exploited for centuries by traders and are living in hilly area, totally cut off from the outside world, doing menial jobs. In many of these areas, innocent lives were lost, year after year. To cope up with this entire crisis, the government came up with the system of caste-based reservation. What should be done instead is that reservation should be made on an economic basis, rather than on the basis of caste. By doing so, rather than the opulent backward classed, only the genuine group of backward people will be able to avail the benefits of reservation.

Moving on to Dalits, Dalits have had lowest social status in the traditional Hindu social structure and in other religions as well. When we talk about India, we can observe that Dalit communities exist across India and comprise 16.6% of the country's population, according to the 2011 Census of India⁵. Uttar Pradesh accounts for 21% of country's total Dalit population, West Bengal 11%, Bihar 8% and Tamil Nadu 7%. So the issue here is that already in these states, people are suffering due to human rights violation because of the fact

³Ghosh S K, *Protection of Minorities and scheduled castes*, Ashish Publishing house 1984.

⁴*Id.*

⁵ 2011 Census, National Sample Survey Office.

that by virtue of their caste, they are made to do menial jobs. So, what can be the quality of justice which is available to Dalit women in these areas? It is not that Dalit men are to be excluded, it is just that already women are considered a weaker section of the society, they are subject to various inhumane crimes such as physical and sexual assault, rape, dowry demands, etc. and on top of all this they also have to bear the stigma of the caste they are born in.

They are denied of the wealth they are entitled to, the opportunities meant for them and no privileges are given to them in the society. Although, in some urban and developed areas, Dalit women have started fighting for their rights and can be seen working in every sector which contributes to their, as well as India's economic development, there are still some left out backward villages where women have to live according to the whims and fancies of the stronger sections due to the orthodox and conservative rule prevailing there.

Criteria to Recognize Communities as Scheduled Castes and Scheduled Tribes and the issues faced by Dalit women

The foundations of untouchability were laid in ancient times. Aryans considered themselves superior to the non-Aryan dark people who were considered non-humans or amunshya.⁶ Segregation on the basis of caste that is Varna system has been explained in the Rig-Veda as a system that vouches for the establishment of Aryan supremacy. The Upanishadic thought is quite different in its spirit from the Vedas. As a matter of fact, there was implicit in it a revolt against the Varna hierarchy and also the development of a parallel non-orthodox stream of thought in the eastern parts of India posed a challenge to the Brahmanical Order.

Now, jumping to the colonial era in India, we can see that the 'malaise' of caste reservation and its recent manifestation in the form of the Mandal Commission⁷, can be traced to the colonial method of mapping the Indian populace according to their caste identities in the government censuses and gazetteers. That such a colonialization had a role to play in the emergence of various caste associations and caste-based politics in the early decades of this century is not to be denied⁸. Coming to the present day India, there are certain parameters which recognize certain communities as SCs and STs. In a layman's language, SCs are those

⁶MICHAEL S.M., DALITS IN MODERN INDIA, 1999, Vistaar Publications.

⁷IndraSawhney v. Union of India AIR 1993 S.C. 477.

⁸Gavaskar Mahesh, *Colonialism within colonialism: Phule's Critique of Brahmin Power*, Dalits in Modern India, 1995, pg. 85.

living in complete isolation, utter poverty, ignorance and serfdom for centuries⁹. The government of India Act, 1935 called the most 'depressed' classes as SCs. The Act introduced reservation of seats for these classes in the self-ruling government in the year 1937. It accompanied a list of these castes, which had all those communities of the society that were kept below the appropriate levels of human dignity and hence had suffered a lot due to neglect and lack of opportunities.

The Act introduced the term 'Scheduled castes', defining the group as "such castes, races or tribes or parts of groups within castes, races or tribes, which appear to his Majesty in Council to correspond to the classes of persons formerly known as the 'Depressed Classes', as his Majesty in Council may prefer"¹⁰. After independence the Constituent Assembly decided to continue the prevailing definitions of SCs and STs. Thus, it ordered the president of India and governors of the states to compile a full listing of castes and tribes. This was made via two orders: The Constitution (Scheduled Castes) Order, 1950 and The Constitution (Scheduled Tribes) Order, 1950, respectively. Article 341 of the constitution of India defines as to who would be SCs and with respect to states and Union Territories. Article 341(1) empowers the president to specify the castes, races or tribes or parts of or groups to be SCs in relation to a particular state or Union Territory after consultation with the respective governor. Article 341(2), empowers the parliament to include or exclude from the list, any other caste, race or tribe which it deems appropriate to be categorized as SCs, only by way of notification. So these were the parameters or the requirements which one needs to qualify in order to be categorized as one belonging to a STs.

However, if one considers the case of STs, there is no official definition of a Scheduled Tribe. There has always been confusion regarding difference between backward caste and backward tribe¹¹. Unlike in the case of SC, where certain definite criteria have been adopted for determining the official status of a community as SC, there is no such officially defined criteria in the case of a tribal community included in the Schedule.

Although the constitution of India, by way of articles 341(1), 341(2) provide for the recognition of scheduled tribes, it is not sufficient till any particular definition is accorded to it by any statutory authority. Only the list of STs and Scheduled Areas was declared on

⁹*Supra Note 1.*

¹⁰"Scheduled Communities: A social Development profile of SC/ST's (Bihar, Jharkhand & W.B)", www.planningcommission.nic.in.

¹¹*State of Karnataka v. M.P. Shylaja, A.I.R. 1982 Karnataka 40.*

September 6, 1950 which was notified by way of first presidential order. According to the order a ST is one which is included in the Schedule proclaimed through this order.

Once the list is declared even the president cannot modify it. It is clearly laid down in the Constitution that any changes in the list after its promulgation can be made only by an act of the parliament¹². So, per se there is no clear cut definition of a ST. This anomaly is taking a violent form now. On November 23 about 25,000 people belonging to the Gowari tribe in Maharashtra staged a morcha at Nagpur to demand the inclusion of the tribe in the STs. More than 125 persons including many women and children died in the stampede when the mob tried to break the blockade and the police resorted to a lathi-charge. Most of the leaders who organise such morchas do not know how the list of STs was prepared and the procedure for amending the same. State ministers promise sympathetic consideration without knowing or explaining the procedure for amending the list¹³. In *TanujaRajpal v. State of Maharashtra*, a nomadic tribe from Sindh was not to be included in Maharashtra's list of STs¹⁴. Apart from this there are certain indirect ways to get the status of a ST. For example marriage with a tribal grants ST status¹⁵.

Analysing articles 341 and 342, we can say that they just empower the President of India to draw up a list of castes and tribes. The Constitution per se does not define as to who are the persons belonging to SCs and STs. Also, since after the declaration of the list not even president can modify it without an act of Parliament, the probability of undeserving communities being included in the list meant for SCs, STs is reduced. In addition to this, the list proclaimed in one state is not valid in other¹⁶. This serves dual purpose. It upholds the unique diversity of each and every state and at the same time makes sure that the residents of a state do not have to suffer in case of bulk migration of people to their state.

Moving on to Dalits, 'Dalit' is not a new word. It was used in the 1930s as a Hindi and Marathi translation of 'Depressed Classes'. The British used this word for the people whom we now call the SCs. The following section aims to deal just with the problems faced by Dalits, specifically, the womenfolk in the Dalit community. The Dalits in India seem to be facing different kinds of marginalisation and the most important among them is political

¹²INDIA CONST. art. 342 (2).

¹³KulkarniSharda, *Identifying Scheduled Tribes: The Gowari Tragedy*, Economic and Political Weekly, Vol. 29, No. 49 (Dec. 3, 1994), pp. 3073-3074.

¹⁴*TanujaRajpal v. State of Maharashtra*, A.I.R. 1989 Bom. 101.

¹⁵*N.E. Horo v. Smt. JahanAra*, A.I.R. 1973 SC 930.

¹⁶*K. AppaRao v. Director of P & T*, A.I.R. 1969 Orissa 220.

marginalisation. Dalit issues make only a token appearance in the election manifestos of leading political parties. When a Dalit gets inducted into the political hierarchy, he is given an unimportant portfolio. Even in educational institutions, Dalit students are normally assigned to Dalit guides. In this case, both the guide and the student get ghettoised through mutual bracketing.

This bracketing is done with the intention of demoralising the Dalit student as well as the Dalit teacher¹⁷. Dalit symbols are restricted to relatively insignificant spaces. Ambedkar's statue is shunted to some remote corner of a street or his name is given to a lane in an obscure area. In the electronic media, Dalits make only guest appearances on certain occasions like the 14th of October, the anniversary day of Buddhist conversions. In the field of information technology, Dalits appear on the websites of other people as objects of hatred and ridicule and they do not have their own websites.

A website requires a huge investment and since the Dalits lack resources, they get marginalized. Also, Dalits have no other option, but to face marginalization in the material realm. For instance, consider a vegetable market where all the fresh vegetables which are costly are sold at the beginning, only because certain classes can afford them. However, due to lack of money, the Dalits are forced to consume the poor quality vegetables which become relatively cheaper by evening. Dalits cannot aspire for securing respectable jobs. The Dalits are overwhelmingly found in the sanitary section of Indian society. In terms of space, the Dalits, both from the urban as well as the rural centres are also physically pushed to the margin. Dalits do not have access to quality education. They cannot afford to go for the core courses. They continue to lack theoretical training, and are denied access to abstract theoretical thinking. This theoretical understanding becomes the exclusive domain of the high caste academic.

While it is true that Dalits in general are oppressed, Dalit women bear a disproportionately higher share of this burden. Given the division of labour within the household, women have to suffer more from the lack of access to water, fuel sources, and sanitation facilities, exposing them to humiliation and violence. Dalit women face discrimination in access to a dignified life, to legal address to claim what is theirs in principle, to equal wages, to the decision-making process, and to benefits from government initiated programmes targeted at

¹⁷Guru Gopal, *Dalits from margin to margin*, India International Centre Quarterly, Vol. 27, No. 2, marginalised (summer 2000), pp. 111-116.

their welfare. Issues of childcare and health are relegated to the background in a struggle for subsistence. The problem of being marginalised and therefore discriminated against is worsened by the practice of untouchability. The grim reality of untouchability appears inescapable. It is there in schools, in tea shops, while working¹⁸, while walking on public roads. The fear of indignity, humiliation and rape is always present¹⁹.

Dalit women are keenly aware that caste pollution, by either presence or touch, operates very strongly in the case of conflict over public resources. When it comes to taking water from a hand pump, notions of ritual purity are invoked, when it comes to the extraction of labour in the field, it does not matter at all that the seed is planted, the crop tended and the grain harvested by the same untouchable. The same applies in the case of rape as social revenge, punishment or coercion. By a curious quirk, the untouchable becomes socially touchable in more ways than one²⁰. The powerful classes use Dalit women for their benefit. So these were the problems faced by Dalit women which the human rights organizations need to address in order to move towards the upliftment of the Dalit community, especially the Dalit women.

Laws and Legislations

Post-independence, various legislations were enacted in the constitution under the chairmanship of Dr. B.R. Ambedkar. The preamble of the constitution depicts the very objective of a sovereign, socialist, secular, democratic, republic India that secures and protects the rights of all its citizens²¹. All the legislations guarantee fundamental rights to the citizen irrespective of their caste and religion, along with which the Drafting Committee has incorporated several such legislations in the constitution that upholds and protects the rights of marginalized sections of society.

The fundamental rights provide right to equality, freedom, education to all the citizens that includes schedule castes, schedule tribes and other backward classes. The two major fundamental rights that outline the major issues of the marginalized section are acknowledged hereafter. Article 17²² elucidates the most crucial issue of untouchability and not only abolishes untouchability but also states that any disability arising out of the practice of

¹⁸Vishaka v. State of Rajasthan A.I.R. 1997 S.C. 3011.

¹⁹ Malik Bela, *Untouchability and Dalit Women's Oppression*, Economic and Political Weekly, Vol. 34, No. 6 (Feb. 6-12, 1999), pp. 323-324.

¹⁹*Id.* At 34.

²⁰*Id.*

²¹The Constitution of India, 26 January 1950.

²²PM BAKSHI, THE CONSTITUTION OF INDIA, *Universal Law Publishing Co. Pvt. Ltd.*, 12th edition, 2013

untouchability would amount to an offence punishable under law and Article 30²³ provides rights to minorities to establish and administer educational institutions. Article 46²⁴ of the Directive Principles of State Policy makes the provision for the promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections. Part XVI provides for the special provisions relating to certain classes.

Article 330 to 333 provides for the reservation and representation of the schedule caste, schedule tribes, Anglo Indian community in the house of parliament and legislative assembly. Under article 338 and 338(A) there is a national commission established for SC and ST respectively. Article 243D²⁵ reserves seats for the SCs and STs in panchayats whereas article 243T²⁶ reserves seats for them in municipalities. Article 244²⁷ gives provisions for the administration of scheduled areas and tribal areas which exclude the states of Assam, Meghalaya, Tripura and Mizoram. Article 244 A²⁸ seeks for the formation of autonomous state comprising certain tribal areas in Assam and creation of local legislature or council of ministers or both there for. Article 341 and 342 leaves to the discretion of president to specify by public notification the individuals and groups for the purpose of constitution that who shall be deemed as SC and ST respectively.

The very spring of marginalized sections has its origin in the caste system. The caste system which is believed to be the very reason for the atrocities committed by the so called upper class on the so called lower class was abolished in state of *Uttar Pradesh v Ram Sajivan*²⁹ where the Supreme Court held that it is absolutely imperative to abolish caste system as expeditiously as possible for the smooth functioning of rule of law and democracy in India. Article 15³⁰ provides for the prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth. Most of the articles in the constitution contain a provision which confers powers on the state to create provisions for the benefits of weaker and marginalized sections. Article 15(3) explicitly mentions that nothing in the present article shall prevent the state from making any special provisions for women and children. Clause 4 states that nothing shall prevent the state from making any special provisions for the advancement of

²³*Id.*21

²⁴*Id.*21.

²⁵*Id.*21.

²⁶*Id.*21.

²⁷*Id.*21.

²⁸*Supra Note*21.

²⁹*Ibid.*

³⁰*Ibid*

any socially and educationally backward classes of citizens or for the SCs and the STs. On one hand article 15 prohibits discrimination and on the other hand the various clauses of article 15 favours individuals who have the history of being discriminated. This system of positive discrimination contradicts the very objective of equality. Reservation on the basis of domicile is not impermissible in terms of clause (1) of article 15. Reservation of certain posts exclusively for women is valid under article 15(3).

It can be interpreted that this provision was incorporated with a view of providing social justice to women who are deprived of education, employment and various other rights on the very basis of their sex. We can even agree to the fact that the gender based problems and atrocities on women are solved by these enactments favouring women. But this creates a new predicament of bias against men who may be veritably much more deserving and eligible than those women who have acquired the post on the base of reservation. This is clear deprivation of rights of men. These provisions are again a big question mark on the gender neutrality and calls for the need of amendment. Article 340 appoints a commission to investigate the conditions of backward classes but fails to add a provision that could probably look in to their current social and financial status and come out with a report that could assess the actual need of uplifting the profoundly economic backward classes through which many of the so called labelled backward classes are excluded from the benefits and the negative externality of positive discrimination is reduced.

Speaking on positive discrimination the same issue is with article 16(1) that provides equality of opportunity to all its citizens relating to the matters of employment, whereas article 16(4) allows the state to make provisions for reservation of appointments or posts in favour of any backward class of citizen and there is an amendment required where this section needs to be eliminated from the constitution. If appointments in employments are made on the basis of reservation, the economic efficiency would definitely see a fall where opportunities are associated with caste. Instead there is no special requirement of article 16(4) to nourish their requirements as 16(1) implicitly prohibits discrimination and denial of rights of the marginalized or backward classes in the employment sector. The issues with article 16(4) were given justice to an extent when the concept of creamy layer³¹ was introduced by the government.

³¹*Supra Note 8.*

Apart from the constitutional legislations there are many laws passed for the welfare of the marginalized section of the society. Untouchability (Offences) Act 1955, 'Protection of Civil Rights Act, 1955', 'Scheduled Castes, Scheduled Tribes (Prevention of Atrocities) Act, 1989', National Commission for Backward Classes Act, 1993, National Commission for SafaiKaramcharis Act 1993, SC and ST (Prevention of Atrocities) Rules 1995, The scheduled tribes and other traditional forest dwellers (recognition of forest rights) act 2006/ tribal rights act, scheme of MANREGA, minimum wages act, labour laws.

Conflict of categorizing

Taking the history and the background of marginalized section in to consideration, there was imminent necessity for considering and recognizing certain sections of the societies to curb discrimination, dominance and violence against them. Earlier meant for social upliftment of the backward people, now policies and provisions like reservation has become a way of grabbing the best opportunities by virtue of caste. In certain states like Tamil Nadu and Maharashtra, more than 50% reservation has hampered the development of the students belonging to the general category. Legislations are to be made to ensure that the marginalized sections of the society acquire jobs and receive education on the basis of their proficiency and skills just like every other citizen of the country. Provisions are supposed to ensure that there is no caste based exploitation or oppression and the weaker sections of the society are given access to schools, jobs, transport and various other areas of life rather than specially reserving posts or seats on the basis of caste. Rights come alive when claimed and they can be claimed when guaranteed³². Fundamental rights enshrined in constitution are not to homogenize cultural and religious diversities but rather to protect individuals from violations wherever they came from, including their own communities. An affirmation of minority rights must be within a quest for justice that must respect two constraints which are that the minority rights should not allow one group to dominate other groups and equality between groups, freedom and equality within groups³³.

The practice of marginalizing people as well as providing preferential treatment, both result in social conflicts segregating the society in to upper class, lower class and reservationists and anti-reservationists. The membership of marginalized in India is determined exclusively

³²RUDOLF C HEREDIA, *Quotas and Minority Rights: Recapturing the Constitutional Vision*, Economic and Political Weekly, Vol. 46, No. 30 (JULY 23-29, 2011), pp. 62-70.

³³*Id.* At 31.

not by ones economic position but generally on the basis of birth and caste by the states³⁴. There still exist grievous problems in urban and rural parts of north India where Dalit women are deprived of water sources and they have to beg for it³⁵. They have to face humiliation³⁶ and discrimination in almost all aspects of life because the upper class assumes the privilege of being the dominant group. The laws and legislations should be framed and enacted in such a way that they provide the marginalized weaker sections equal treatment rather than preferential treatment so that the actual deprived class are not denied of their rights.

The practice of positive discrimination not only generates complications to general category (chapter 3) but also promotes atrocities by the recognized marginalized class itself. In the *Deepa EV v Union of India*³⁷, Supreme Court held that, the candidate who has applied for a post and attend the interview under OBC category and has been aided by age relaxation factor cannot claim a right to be appointed in general category. In this case the petitioner had applied for a post in Export Inspection Council of India where no candidate from general category class had scored minimum cut off marks that was required for the post. The petitioner who had applied under OBC category later requested the authorities to be accommodated under the general category and her request was denied.

The High court dismissed the case and the Supreme Court held the aforementioned judgment. Here we can relate the denial of right to the very legislations that segregates the candidates for posts on the basis of caste or reserved seats. Government's main contention should be economic growth as well as individual development which can be achieved through providing jobs and seats in institutions for higher education purely based on an individual's skills, potential, willingness to perform hard work and also experience if required. It is also obligatory to acknowledge that caste bases reservations were held invalid in *MR Balaji v State of Mysore*³⁸ and *DesuRayudu v State of Andhra Pradesh PSC*³⁹ and also *State of A.Pv P Sagar*⁴⁰ where list of backward classes based on caste was held violative of Article 15 of the Constitution of India.

³⁴Rajendra Pandey, *Minorities in India- Protection and Welfare*, APH Publishing Corporation, 1997.

³⁵Bela Malik, *Untouchability and Dalit Women's Oppression*, Economic and Political Weekly, Vol. 34, No. 6 (Feb. 6-12, 1999), pp. 323-324.

³⁶*Id.*34.

³⁷*Deepa EV v Union of India*, Civil Appeal No.3609 of 2017.

³⁸*MR Balaji v State of Mysore*, A.I.R. 1963 S.C. 649.

³⁹*Desu Rayudu v State of Andhra Pradesh PSC*, A.I.R. 1967 A.P. 353.

⁴⁰*State of A. Pv P Sagar*, A.I.R. 1968 S.C. 1379.

Conclusion

There has to be certain legislations to improve the conditions of SCs, STs, Dalits, etc. because of the atrocities faced by them in certain parts of India. However, reservation is not the solution to the same. When reservation came into force, the backward classes were the most oppressed ones. They did not have access to any resources nor were they allowed to compete with the higher classes. However, the current scenario has changed quite a lot. Now, SCs, STs and other backward classes have more resources than the general class of people. These classes are no longer educationally and socially backward classes. Their position in the society has changed. With ideology of multiculturalism developing more and more, people have started accepting these classes as ones belonging to the mainstream society. So, now it means that there is no need of caste-based reservation. Instead, reservation based on economic condition should be advocated more and more. Also, reservation is not the only means for uplifting of these classes. If the government improves the living conditions and provide resources to those who are in genuine need of help, then that is quite sufficient for a person to develop by self-sustenance. The crux being, criteria for recognizing or defining marginalized section should be purely based on statistics on their current economic and social status brought out through proper and accurate researches. If this happens then the paradoxical laws shall no longer hamper justice or contradict the very idea of equality. So, we can conclude that it is high time for the society now to thwart prejudices, intolerance or discrimination on the basis of caste, race or sex. We do not say that reservation system should be completely done away with. Instead, it should be reduced and should be made on the basis of economic status rather than caste. Otherwise, it will divert from the initial purpose for which it was started and a time will come when even the general class will be in dire need of reservation.