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Reservation vis-a-vis Representation: Analysis of B.R. Ambedkar

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ABSTRACT

"Reservation is not a fundamental right", the Supreme Court held while refusing to accept a series of pleas demanding the enforcement of a 50 per cent reservation for "Other Backward Classes (OBCs)" for state-funded seats in the all-India quota for U.G. and P.G. medical courses in Tamil Nadu. In the series of judgments this year, the Apex Court held many times that Reservation is not a fundamental right.

Article 16(4) and 16(4-A) are in the form of "enabling provisions", which, if situations so warrant, grant the State Government discretion to consider making reservations. It is settled legislation that the State Government cannot be directed to make a reservation about appointments to public posts. Likewise, the State is not required to make quotas in favour of S.C. and S.T. in terms of promotions. But this is creating ambiguity as to the main purpose of Article 15(4) and 16(4) is to create special provisions for the upliftment of the downtrodden class of the society.

The Court in the present case had clarified some of the grey areas, but states should not misuse the judgment as it is well established that the Government cannot grant reservations without quantifiable data that shows inadequate representation.

I. INTRODUCTION

"Reservation is not a fundamental right", the Supreme Court held while refusing to accept a series of pleas demanding the enforcement of a 50 per cent reservation for "Other Backward Classes (OBCs)" for state-funded seats in the all-India quota for U.G. and P.G. medical courses in Tamil Nadu. In the series of judgments this year, the Apex Court held many times that Reservation is not a fundamental right.

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The Court in the present case had clarified some of the grey areas, but states should not misuse the judgment as it is well established that the Government cannot grant reservations without quantifiable data that shows inadequate representation.

II. SETTLED POSITION OF LAW

- It is a settled position of law decided *recently* that the Government is not obligated to collect quantifiable data showing a community is inadequately represented in public services, as required by Article 16(4A), it has to be the sole discretion of the State Government to take the final call regarding the same. But if it has to provide Reservation, it must collect quantifiable data to represent their backwardness. But there lies a grey area regarding the insistence on quantifiable data, as evident in the Nagaraj, Jarnail Singh or Indira Sawhney Judgment, which shall be dealt with later on.
- There are several major Supreme Court judgments that have, in the past, ruled that Articles 15(4) and 16(4) do not provide a fundamental right per se.

III. RECENT APEX COURT RULING ON RESERVATION

In the recent case of *"Dravida Munnetra Kazhagam v. Union of India and Ors"*, the Apex Court held that "Reservation is not a fundamental right". In this case, the plea was filed by DMK against the Centre's refusal to implement 50 per cent "OBC reservation (Other Backward Classes)" in "Tamil Nadu' share of All India Quota seats (other than in Central Institutions)" in "U.G., P.G. and Diploma Medical and Dental" courses. In Tamil Nadu, according to the "Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Headquarters in Educational Institutions and State Service Appointments or Posts) Act, 1993", about 50% of the quota must be reserved for B.C.s and OBCs. Finally, the petition was withdrawn by the political parties in the Apex Court since the Apex Court declared Reservation is not a Fundamental Right, so a petition under Article 32 is not considered until and unless there is a breach of Fundamental Rights.

In the case of "*Mukesh Kumar v. the State of Uttarakhand*", in accordance with Articles 16(4) and 16(4A) of the Constitution, the Supreme Court has decided that there is no fundamental right to have a reservation in "appointments and promotions" in public services. The Supreme Court reversed an order of the Uttarakhand High Court last year, ordering the state government to gather data on the lack of representation of members of the S.C. and S.T. groups in public services. The Uttarakhand High Court in the case of "*Gyan Chand v. State of Uttarakhand and Ors*", the 2012 order of the state government which had prevented departments from offering reservations in promotions to S.C. and S.T. employees in Uttarakhand. Guidance has been given by the High Court that a quota in favour of the S.C. and S.T. can be rendered by the State Government without quantifiable evidence respecting the backwardness of these communities or the adequacy of their inclusion in the Government Services.

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The Supreme Court states that Article 16(4) is only enabling, and states may or may not make a reservation. It cited a case of *C.A. Rajendran v. Union of India* to bolster its declaration. The State may establish its own opinion based on the data which it already has in its possession, or it may collect such data through a Tribunal, official or authority. All that is needed is that the opinions are based on certain materials. However, if the State seeks to exercise its discretion and to make such a provision, it must collect quantifiable data demonstrating the ineptness of the representation of that class in government services. It added that if the decision of the State authorities to implement reservations in respect of promotion is confronted, the State concerned must submit the required quantifiable data to the Court and satisfy the Court that such reservations have become essential. It should be taken into consideration the ineptness of the presence of S.C.s and S.T.s in a specific position or position of positions without impacting the general quality of administration as required by Article 335 of the Constitution.

Existing ambiguities

As we have discussed the settled position of law regarding Reservation in employment or promotion, let us focus on the existing anomalies in this branch of constitutional law. Further, the subsequent anomalies that may arise in light of this judgment shall also be discussed.

Clause 16(4): an exception or an extension.

In this recent judgment, the Court has treated Article 16(4) as an exception to Article 16(1), thereby leaving room for the play of discretion in this regard by the authorities. But if we look into various scholarly interpretations besides the landmark B K Pavitra Judgment and the Constituent Assembly Debates, it is evident that 16(4) is to be treated as an extension and not an exception to 16(1). This is done to ensure that people historically oppressed and excluded need a special push, and they must be provided so without any scope of whimsy discrimination or arbitrariness by the Government. It is still not a settled position in the law regarding the correct interpretation of Article 16(4) vis-à-vis Article 16(1), but given the dismal statistics of the S.C., S.T. and OBC representation, the clause should be treated as an extension and not an exception.

Dismal representation

It is held in the judgment that the inadequacy of the representation is a subjective matter of the states, and no generalized views can be taken by the Courts. Thereby, the Court concluded having no conclusive idea of the lack of representation; the Courts cannot treat this provision as a mandatory one. Thus, it must be construed that the lack of unavailability of statistics regarding the representation of the S.C., S.T. and OBC population in the Government job sector is one of the primary reasons for not mandating Reservation. But, this reasoning seems to be flawed as there is adequate data available which shows the dismal state of S.C., S.T. and OBC presence in Government Jobs, especially at higher posts, making it clear once more the need to make a reservation at job promotion mandatory. As per recent data published by the Union Government, of the 89 secretary-level officers on its rolls, only four were from the SC/ST community. Out of 93 additional

secretaries, only 11 were; there are no OBCs of this rank. This clearly shows that the real cause behind the Affirmative Action seems to be lost, and only mandating the provision would be of some help.

IV. Article 335 of the Constitution of India

Inconsistencies in judgments

There have been three landmark judgments on the Reservation on job and promotion, and a messy jurisprudence exists concerning them. The 2006 Constitutional Bench judgment of the Supreme Court in the case *M. Nagaraj v. Union of India* extended reservation in promotions for S.C., S.T. and OBC but with three riders. It mandated the State to provide proof of the backwardness of the class and its inadequate representation in the position/service. Further, it imposed an onus to show how Reservation in promotions would ensure administrative efficiency.

But, in the case of *Jarnail Singh v. Lachhmi Narain Gupta*, the aforementioned judgment was declared bad in law because of its insistence on the collection of quantifiable data on the backwardness of the S.C.s and S.T.s, which is contrary to *Indira Sawhney v. Union of India* judgment.

Now, the question arises to what extent the Court can insist on the collection of quantifiable data as a measure of backwardness. It further raises the query of whether the insistence of the courts on quantifiable data can be legally sound or not. It is also paramount to determine the liability of the Government to conduct surveys and whether it is valid on their part to base their decisions only on the basis of such surveys.

B K Pavitra (II) Judgment

A division bench judgment not followed in this instant matter- A Division Bench comprising Justice DY Chandrachud and Justice UU Lalit have been instrumental in resolving the issues of insisting on providing Reservation only after collection of quantifiable data. It clarified that no such mandatory pre-requirement is to be there, and it has to be provided by the Central/State Government as a measure to uplift the historically oppressed.

On the grounds of administrative efficiency, it made it very clear that "Administrative efficiency is an outcome of the actions taken by officials after they have been appointed or promoted and is not tied to the selection method itself**".**

Thus, it can be safely concluded that the selection process must fulfil the constitutional goals of uplifting the members of the S.C.s and S.T.s and ensuring a diverse and representative administer-ation, and the administrative efficiency has to be judged by the actions taken thereof.

With all these anomalies at the core development, M Nagaraj has been considered the binding precedent which insisted on the collection of quantifiable data, as in the current State. But, as Nagaraj Judgment has been declared bad in law, in the instant matter, principles of B K Pavitra (II) judgment should have been applied, which instils on making the Reservation as a fundamental right to fulfil the

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constitutional goals and doesn't set collection of quantifiable data as a mandatory prerequisite.

V. The way forward

After the judgment, there had been a few flouting suggestions made to address the situation. Let us discuss all of them and discuss their relevance.

Constitutional Amendment to make Reservation a Fundamental Right

There has been a demand to make Reservation a Fundamental Right. The researchers, though, feel that this solution is not practically possible owing to two possible reasons. To begin with, this is an enabling provision and not a basic natural right, and thus it is not constitutionally prudent to turn it into a fundamental right. Further, the Constitution Assembly Debates the various Constitutional law judgments and opinions of scholars clearly point out that it is an exception and to make an exception as a right defeats the purpose of the provision itself.

To place reservation provisions under the Ninth Schedule like Tamil Nadu

This provision would save the reservation provisions from judicial scrutiny. But, this too seems to be an unlikely provision because it would lead to a stage of permanent stagnancy defeating the purpose of a living or transformative 'organic constitution'.

Regular assessment committee

There should be a committee by joint assistance of the States and the Central Government under Judicial Supervision to ensure neutrality. It shall assess the social and economic differences, and then the Government must bear the onus to provide suitable affirmative action to them. This should be a Five Year Plan, and the Government must be obligated to work as per their findings.

VI. Conclusion

This is also well known that without quantifiable data showing insufficient representation, the Government cannot award reservations. Here, the Court has further stressed that the Government is not under a comparable obligation to collect data when agreeing not to enforce Reservation. Essentially, when the Government chooses not to exercise discretionary power, the Court has exonerated the Government of any accountability.

It is the very established rule of law that the capricious exercise of discretionary power is not possible. Merely because the exercise of power is optional for the Government, it doesn't imply that it can be invoked in a quirky manner. The courts are therefore obligated to assess whether discretionary powers have been exerted judiciously or not. Article 14 of the Indian Constitution was perceived as prohibiting all sorts of unilateral government decisions. The Court's ruling not to do anything was tantamount to a failure to make a decision. This misinterpretation can prove to be highly troublesome if it is pursued by the High Courts across the nation.

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