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RESERVATION PLICIES FOR WEAKER SECTION ENACTED BY THE GOVERNEMNT IN CONTEXT OF JUDICIARY

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Abstract:

The judges in India have fortunately a most potent judicial power in their hands, namely, the power of judicial review[1]. In democratic countries, the judiciary is given a place of great significance. The primary function of the courts is to settle disputes and dispense justice between one citizen and another, but courts also resolve disputes between one citizen and the state and the various organs of the state itself.

In many countries with written constitution, there prevails the doctrine of judicial review. It means that the constitution is the supreme law of the land and any law inconsistent there with is void. In this way the judiciary function not only to interpret constitution, but also uphold constitution. So, it has power of judicial review. The courts act as the protector and guardian of the supremacy of the constitution by keeping all authorities legislative, executive, administrative, judicial, or quasi-within legal bounds.

Keywords: Judicial, Review, Law, Power

Introduction:

Judicial Review has acquired a variety of meanings. First, from the point of view of the degrees and extent of its operation, a distinction is made between 'federal' Judicial Review and 'national' judicial review. While the former means the right of the courts, in a federal state, to scrutinize the laws enacted by the component units of the federation on the touchstone of their compatibility with national law, i.e., law passed by the national legislature (e.g., in Switzerland), the latter, which is more common and more comprehensive, implies the power to test "national" laws themselves in regard to their conformity to the higher law, i.e., the constitution (e.g. in the U.S.A), second, as stated as earlier, judicial review implies an examination of the administrative decree and order passed under the authority of law, as distinguished from the review of the law itself-a recent development. Third, within the broad meaning of the constitutionality of laws, a fundamental distinction may be made between 'formal' judicial review, to indicate 'procedural' or 'extrinsic' examination of the validity of laws (e.g., in India), and 'material' judicial review, to denote the 'substantive' or 'intrinsic' examination of the content and spirit of the law on the touchstone of the letter and spirit of the constitution[2] (e.g. in the U.S.A)

Judicial Review is the authority of the courts to declare null and void acts of the legislative and executive branches of government held to conflict with the constitution. It is sometimes called judicial veto, because the courts have the power to say, 'no'. A less accurate designation is judicial supremacy. This latter term creates the impression, however, that the courts hold an authority equivalent to the British Parliament. This is not the case because judicial review is a negative power. Courts cannot enact legislation, levy, and collect taxes, or command the military establishment."[3]
It is generally assumed that the institution of judicial review originated only in the U.S.A, through the exercise of such power by the American Supreme Court. This notion is true in a very limited sense but is otherwise disapproved of by the facts of history. Historically speaking, the origin of this institution can be traced to the earliest period of English legal history; the idea of a 'fundamental' or 'higher' law was, in the main, identified with the system of common law and with the recognized rights of the Englishmen. Judicial review in England rests upon a mass of case laws stretching from decisions on procedures long obsolete down to the present day and illustrates the way in which common law adopts itself to new needs[4] The basic idea underlying judicial review is generally considered to stem from these pronouncements[5] which show how deeply the American plan of judicial review was rooted in the English legal tradition[6].

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Article 13 under constitution of India provides teeth to the fundamental rights[7]. Article 13, in fact, provides for the judicial review of all laws, whether past or future. This power is exercisable by the Supreme Court as well as by the High Courts under article 32 and 226, respectively. The courts can declare a law unconstitutional if it is inconsistent with the rights conferred by Part III of the constitution. this power of judicial review over legislative action has been declared to be an integral and essential feature, constituting part of basic structure of the constitution[8]. To this effect clause (1) of article 13 provides:

All laws in force in the territory of India immediately before the commencement of this constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

And clause 2 of article 13 says:

The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the constitution, be void.

Further article 32 (1) provides for the right to move the supreme court by appropriate proceedings for the enforcement of the rights conferred by part III of the constitution. the high courts have also been authorized to issue various kinds of writs for the purpose of enforcing rights of citizens.

Regarding article 226, under which the high courts are empowered to issue directions order writs for enforcement of fundamental rights and for any other purpose. This power should be confined to the enforcement of fundamental rights only. By the extension of this power to convey any other purpose the high courts have been given extraordinary jurisdiction which even the Supreme Court does not have. It may be noted here, however, that the Supreme Court is so situated that an aggrieved party in any part of the country would not be able to be conveniently situated for the purpose.

The researcher in this Article intends to examine the various interpretation given by the high courts and the supreme court on several aspects of reservation policy. Also, the problems faced by the judiciary in dealing with reservation policy is also examined.

The Supreme Court was brought into the picture for the first time to play its role in the famous case **Champakam Dorairajan v/s State of Madras[9].** The madras government brought about a communal government order with the intention of providing representation to various communities in educational institutions and jobs. Even the Brahmins who constituted 3% of the population were allotted 15% of the vacancies. This government order was challenged before the madras high court on the grounds as being ultra vires of the constitution of India and contrary to the principles of fundamental rights. The madras high court annulled the government order, and the government went in appeal before the Supreme Court. The Supreme Court pointed out that reservations in appointments or posts could be made in favour of any backward classes of citizens, which are not adequately represented in the services under article 16(4) by the state, but the omission of such an express provision from article 29 cannot be regarded as significant. “It may be well that the intention of the constitution was not to introduce at all communal consideration in matters of admission into the educational institution maintained by the state funds”. On these grounds the Supreme Court dismissed the madras government appeal.

In pursuance of this decision the government prevented intervention by the courts on reservation brought in the first constitutional amendment incorporating article 15(4) into the constitution.

The raging controversy about reservation policy is on two grounds i.e., it takes castes as a criterion, and it equates caste with class. The controversy has gained in strength with the allegation being leveled that by taking caste as a criterion would only foster casteism and cause sectarianism in the country. The courts have generally allowed fixing caste as a criterion in determining backwardness. It has also on numerous occasions allowed equating caste with class[10].

Hence in **Balaji v/s State of Mysore[11]** the court laid down educational backwardness while also as a criterion for determining backwardness while at the same time objecting to caste backwardness while at the same time objecting to caste backwardness alone as a criterion. The court took strenuous objection to exclusive reliance of Mysore on caste and noted that occupation and place of habitation are also relevant to determination of the backwardness of “a community of persons”. it is for the attainment of social and economic justice that article 15(4) authorizes the making of special provision for the advancement of the communities there contemplated even if such provisions may be consistent with the fundamental rights guaranteed under article 15 or 29 (2). The court concluded that “only those communities which are well below the state average can properly be regarded as educationally backward classes of citizens”[12]. it was also held that the total reservation for backward classes, scheduled castes and scheduled tribes should not ordinarily exceed 50% of the available seats.

Reservation policy is envisaged and implemented with the intention of alleviating various social, economic and educational deprivations undergone by a person right from his birth. Hence when a person belonging to an upper caste is adopted by a lower caste person at a later stage, he has not undergone the deprivation underwent by a lower caste person. Neither the adopted nor his natural father were victims of elements of social deprivation of caste disabilities which reservation policy intended to erase off. Hence a person so adopted is not eligible for benefits accruing out of reservation policy.

The Mysore High Court gave incisive solution to the adoption problem in S**hantha Kumar v/s State of Mysore**[13] Shantha Kumar the son of a supervisor in the national extension service was given in adoption to a coolie. The adoption supposedly took place three years earlier when the boy was 16, but the deed of adoption was executed just three months of the application to the medical college. The selection committee refused to regard him as a member of the backward class and the petitioned the high court to overturn that decision. The court observed that the rationale for reservation for backward classes was to offset the unfavorable environmental conditions of such persons. But the applicant had not suffered any environmental disadvantages while living with his natural father for his first sixteen years, "cannot be said to destroy or nullify the advantage[14]" conferred by his earlier upbringing. In the case of a late adoptee who "had all the while imbibed the environmental advantage of his natural father's income and occupation". It is the income and occupation of natural father than of the adoptive father that is relevant in determining eligibility for benefits for the backward classes, otherwise, adoption could be used to divert benefits from the intended beneficiaries.

The court has once again upheld its view that a person should have undergone the disabilities and deprivations of backward classes before getting entitled to reservation benefits. In the case of a marriage between an upper caste person and a backward class person, the former would never be eligible for reservation benefits since he has not undergone or was subject to social or educational backwardness.

In **Dr. Neelima v/s Dean of P.G. Studies A.P. Agriculture University, Hyderbad,**[15] it has been held that a high caste girl marrying a boy belonging to scheduled tribe is not entitled to the benefit of reservation available to scheduled tribes. The appellant was born in Reddy caste which is forward class and married to an Erukala tribe boy one of the schedule tribes in the state of Andhra Pradesh. After Marriage she sought admission to M.sc course in Agriculture University, Hyderabad under reservation quota for scheduled tribes. The court held that she was not entitled to get the benefit of reservation available to the scheduled tribes.

Similarly, in **Meera Kanwaria v/s Sunita**[16] it has been held that if a female of high caste Hindu marries a person belonging to scheduled caste, she is not entitled to take the benefit of reservation under article 15(4) and 16 (4) of the constitution. In this case, a upper caste Hindu girl married a person belonging to scheduled caste. The marriage was performed as per Vedic rites. Her marriage had been accepted by her Biradari, i.e., husband's family one. She has not been accepted by the community of her husband. Therefore, it was held that she could not acquire the status of scheduled caste and could not contest election on a seat reserved for scheduled caste. Mere acceptance of family of husband is not sufficient. Strict proof of acceptance of the community of husband is necessary.

Other than caste, educational backwardness has been fixed as a criteria for determining backwardness. This acquires immense significance as a person even though belongs to backward caste has to attain the minimum prescribed educational qualifications before getting entitled to reservation benefits, like securing admission to a professional college or even a job. Three indicators have been chosen by various state governments in determining educational backwardness i.e. literacy rate, access to a educational facilities, mental attitude towards education. A caste, if it is to deem as educationally backward should be well below the state average of literacy fixed by the state.

In S**tate of U.P. v/s Pradip Tondon**[17] the Supreme Court held that while "lack of educational institutions and educational aids" might be one factor in the educational backwardness of an area, the court put the stress on attitude towards education that on absence of facilities: "traditional apathy for education on account of social and environment conditions of occupational handicaps.
This ingrained apathy principle had been elaborated by a constitutional bench in Janaki Prasad, as a test which seems to measure both the social and educational backwardness referred to in article 15(4).

In Janaki Prasad v/s State of Jammu and Kashmir[18] the court remarks that the spread of facilities for education into rural areas and growing sector of the village population, which has embraced education as a means of social advancement. However, there remains "sectors of the population which show extreme apathy towards education due to age-old customs and habits of living fostered by poverty, ignorance, superstitions and prolonged social suppression". While other sectors in the rural areas deserve encouragement by the state these apathetic sections "require to be goaded into the social stream by positive efforts of the state"

The one and most popular and widely acclaimed alternative to caste criterion suggested is economic criterion. It has according to proponents the advantage of eliminating the affluent sections among backward classes from the list of beneficiaries of reservation policy and also of benefiting the genuinely poorer sections of society regardless of caste or religion. Reservation policy in its present pattern would only benefit individuals belonging to certain castes of the Hindu religion, as the caste system is peculiar only to the former. Hence it ignores members of other religion whose socio economic and educational plight is similar if not worse that backward classes. The court has on several occasion taken cognizance of this emerging opinion. However, it has refused to grant priority to such considerations after overruling or rejecting all other criterion. The main reason attributed by the court in rejecting this view is that there can be no shared traits of economic disadvantage and hence no homogeneity exists for a class to be designated as backward based on economic criteria. There is no assurance that entire members of a family would be pursuing their traditional

occupation designated as backward. Such variations in occupations in occupation and thereby in income would make it extremely difficult in classifying a society into backward and forward based on economic criterion.
The court[19] held the view that the affluent sections among the backward classes should be excluded from the benefits of reservation policy. Such members of backward classes who are advanced socially, economically, and educationally were referred to as "creamy layer". But in gauging backwardness economic criterion alone should not be considered. Social and educational status should not be considered. Social and educational status should also be considered. In the Mandal case the majority opinion pointed out that such exclusion should not merely be on economic grounds unless economic advancement was so high that it necessarily meant social advancement.

Some of the difficulties that one encounters in implementing the means test may be noted. Real incomes are often suppressed, certificates are often issued without verification, and certificates are frequently submitted. The court directed the government of India to specify the basis of exclusion- whether on the basis, extend of holding otherwise of creamy layers with n the period of four months. The Office Memorandum of 1990 (directing the implementation of Mandal Commission's recommendations) would be operative only subject to such specification[20]

Justice Mathew in **N. M.Thomas v/s State of Kerala**[21] was of the opinion that reservations are based on proportional equality. This is done by considering the disadvantage suffered and making the distribution dependent upon proportion of various caste in the population.

This theory also has disadvantages particularly since it benefits only certain caste groups and hence ignore the poor among forward castes and of other religions like Islam and Hinduism. Moreover, caste cannot be considered a criterion as it is a prohibited criteria under the constitution. In the case **Hindustan Zinc v/s A.P. State Electricity Board**[22] the court held that The action of the government in making provision for the reservation of appointments or posts in favour of any 'Backward Class of Citizens' is a matter of policy of the government. What is best for the 'backward class' and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservation is a matter for decision exclusively within the province of the government and such matter do not ordinarily attract the power of judicial review or judicial interference expect on the grounds which are well settled by a catena of decisions of this court.
Dr. Sadhna Devi & Ors. Vs. **State of U.P. & Ors**[23] the court made it clear that The candidates belonging even to special categories were required to secure the minimum qualifying marks in the admission tests to gain admission to postgraduate medical courses and in the even of their failing to do so the vacant seats should be made available to general category candidates; else it will be a national loss.

In **Mohan Bir Singh Chawla v/s Panjab University Chandigarh & Anr**[24] this court having reviewed the judicial opinion declared the rule - "the higher you go, in any disciplinant lesser should be the reservation - of whatever kind" and added "in the larger interest of the nation, it is dangerous to depreciate merit and excellence in any field."

Dr. Preeti Srivastava & Anr. Vs. **State of M.P. & Ors**[25] is a landmark decision of recent times delivered by a Constitution Bench.

There cannot be dilution of minimum qualifying marks for such reserved category candidates up to almost a vanishing point. What would be a reasonable extent? His Lordship held that maximum dilution could be up to 50% of the minimum qualifying marks prescribed for the general category candidates and any dilution below this rock bottom would not be permissible under Article 15(4) of the Constitution of India.

The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive, and the legislature. For example, the judicial pronouncements in property relations, legislative privileges, and constitutional amendments have been controversial and have been led to several Constitutional amendments which were undertaken to undo or dilute judicial rulings which the governments did not like. Efforts have been made to curtail the scope of judicial review in some constitutional areas. Cases like Golak Nath, Bank Nationalization or Kesavananda Bharti have raised passionate controversies in India. The law minister in the central government once stated in parliament that the courts had, through their Exercise of power of judicial review, retarded the process of socio-economic development of the country and therefore, he justified certain restrictions on the powers of the courts to declare laws unconstitutional[26]

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