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# The Scheduled Caste and Scheduled Tribe Atrocity Law: Judgements, Amendment and Contradiction

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## Abstract

The paper makes the analysis of the recent Supreme Court verdict pertaining to the Law on Atrocities which has remained the bone of contention for some time now and which has erupted a renewed debate and subsequent protests in India. The argument that this paper wants to make is that the Judgment in Subhash Kashinath Mahajan Case which prompted the widespread criticism as well as protest appears to be a misplaced application of the law and that it raises genuine questions relating to the application of the Scheduled Caste and Scheduled Tribe Atrocities Act and the judicial protection of these communities.

**Keywords**: Atrocity, scheduled Caste, Scheduled Tribes, Supreme Court, untouchability.

## Introduction

The laws on Atrocities have always remained in contestation since its very inception. The contention has been on both the side of the social spectrum. From the side of those against whom the law seem to act have argued of the misuse of the Act and the draconian provisions it has which are against the fundamental rights of the citizens. The Scheduled Caste and the Scheduled Tribe for whose protection the law have come into existence have argued that there is a necessity of a strong law given the level of violence and the capacity of the upper castes to manipulate the circumstances. They also argued that there is a very low conviction rate and that the law does not

seem to have been implemented in its spirit. The laws relating the protection of Scheduled Casts and the Scheduled Tribes find their expression from the Constitutional Provision of Article 17 which abolishes the practice of untouchability in any form and provides for penal action against such practice. The Parliament of India has enacted laws to provide effect to Article 17 in the form of the Untouchability Offences Act (1955) later amended by the Untouchability (Offences) Amendment Act, 1976. The Act now is renamed as the Protection of Civil Rights Act, 1955. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocity) Act 1989, along with the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995. The Act was amended again in 2015.

The recent amendment to the law has been propelled from the judgment in the case of Dr. Shubhash Kashinath Mahajan v The State Maharashtra which had provided directions in the nature of law, which had been contested as diluting the provisions of the laws on Atrocities instigating a large scale public protest all over India.

On 20th March 2018, the Supreme Court of India in Dr. Shubhash Kashinath Mahajan v The State Maharashtra (herein after called as the Mahajan case) gave a judgment which became the centre of controversy, criticism and large scale public protest. The judgement in effect was criticized for diluting some of the provisions of the Scheduled Caste/Scheduled Tribe Prevention of Atrocity Act, 1989 (herein after referred as the atrocity act). The double bench court comprised of Adarsh Kumar Goel J. and Justice Uday Umesh Lalit. While writing the judgement it was contended by the Judges that there is a rampant misuse of the Law of atrocity and that checks need to be put to discourage the blackmail of the innocent citizens and public servants and that the law contrary to the intention that it will help erase caste divide was reinforcing these and was even helping perpetuate casteism. The court decided thus laying down directions literally in the form of legislations:

“i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D Suthar (supra) and Dr. N.T. Desai (supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);

iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt."[i]

A review petition was filed by the Union of India against the Judgement which was presided over by a three-judge bench comprising Justices Arun Mishra, M.R. Shah, and B.R. Gavai. On 1 October 2019, a 3-judge Supreme Court Bench comprising Justices Arun Mishra, M.R. Shah and B.R. Gavai passed its judgment in the review petitions.[ii]

Through its judgment, the Court has now recalled these directions. In doing so, it noted that the directions created an unequal legal regime by making it more onerous to register FIRs and effect arrests for offences against the Scheduled Caste and Scheduled Tribe communities. Other than the inequality perpetuated by the directions, the judgment also pointed out that the directions transgressed into the realm of policy making. Given the lack of ambiguity in the provisions of the Act, the invocation of extraordinary powers under Article 142 by the court in Subhash Kashinath Mahajan to issue the directions were uncalled for, observed the Court.

Following are the directions which have been rendered invalid by the Bench:

- "Arrest of a public servant can only be effected after acquiring the approval of the appointing authority
- Arrest of a non-public servant can only be carried out after acquiring the approval of Superintendent of Police
- In giving such approval, the approving authorities have to record reasons for the same
- Such recorded reasons must be scrutinized by the Magistrate for permitting further detention
- A preliminary enquiry must be carried out before the registration of FIRs under the Act by Dy.S.P. level officers of police to ascertain whether the allegations are frivolous or motivated"[iii]

However, even before the Judgement was delivered over the review petition, An amendment in the law was initiated in the parliament and came into force on 17th August 2018 adding Sec.18A[iv] to the effect of nullifying the supreme court's judgement in Mahajan's case. The amendment was now challenged through a writ petition in the case of Prithviraj Chauhan v. Union of India.[v] The petitioners in this case questioned the insertion of Section 18 (A) in the Act and challenged the validity of the amendment. Later, this petition was clubbed with the review petition of the Union on January 25, 2019. The supreme court in the three judge bench comprising of Arun Mishra J., Vineet Saran J., and S.Ravindra Bhat J., upheld the constitutional validity of the amendment made by the parliament in the atrocity act in its decision on 10th of February 2020. In the unanimous verdict, Justice Mishra penned the opinion for himself and Justice Saran whereas Justice Bhat wrote a separate but concurring opinion.

Lets us now try and see the rationale that the courts have provided first in the Mahajan case in which the court laid down the directives and in a literal sense diluted the provisions of the atrocity

act. We will then take the arguments build against this case in the review petition filed by the union which tries to restore the original position. And lastly, the Prathvi Raj Chauhan case which challenged the validity of the amendment to the law on the atrocity inserting sec. 18A to the act.

## Facts of the Case

This appeal has been preferred against the order dated 5 May, 2017 of the High Court of Judicature at Bombay.. It states certain adverse remarks were recorded against respondent no. 2-Bhaskar Karbhari Gaidwad by the Principal and Head of the Department of the College of Pharmacy where respondent no. 2 was employed. Respondent No. 2 sought sanction for his prosecution under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and for certain other connected offences. The said matter was dealt with by the petitioner and sanction was declined. This led to another complaint by the respondent no.2 against the petitioner under the said provisions. The quashing of the said complaint has been declined by the High Court.

The court however lent up this observation- 'The question which has arisen in the course of consideration of this matter is whether any unilateral allegation of mala fide can be ground to prosecute officers who dealt with the matter in official capacity and if such allegation is falsely made what is protection available against such abuse.' The court was referring to the question of liberty of individual and particularly of the officials which is jeopardized by the said provision of the law and therefore the subsequent question of judicial safeguards for the same...The appellant, after he was granted anticipatory bail, applied to the High Court under Section 482 Cr.P.C. for quashing the proceedings on the ground that he had merely passed a bonafide administrative order in his official capacity. His action in doing so cannot amount to an offence, even if the order was erroneous. The High Court rejected the petition.

The High Court observed that no public servant or reviewing authority need to apprehend any action by way of false or frivolous prosecution but the penal provisions of the Atrocities Act could not be faulted merely because of possibility of abuse.

The court in the present case dealt the following questions of the case.

1. Does the court have the power to issue directions to protect fundamental right under article 21 against uncalled or false implication and arrest?

On this the court observed that-

> 'Jurisdiction of this court to issue appropriate orders or directions for enforcement of fundamental rights is a basic feature of the constitution. Right to equality and right to liberty have to be protected against any unreasonable procedure, even if it is enacted by the legislature. The substantive as well as procedural laws must confirm to articles 14 and 21. Any abrogation of the said rights has to be nullified by this court by appropriate orders or directions. Power of the legislature has to be exercised consistent with the fundamental rights. Enforcement of legislation has also to be consistent with the fundamental rights. Undoubtedly this court has jurisdiction to enforce the fundamental rights of life and liberty against any executive or legislative

action....and it is just too late to admit the objection that the court may not issue any direction which may perceived to be of legislative nature'

2. On the question of the potential impact of working of atrocities act on spreading casteism.

On this point the court observed that-

> 'It is necessary to express concern that working of the atrocities act should not result in perpetuating casteism which can have an adverse impact on integration of the society and the constitutional values....we are thus of the view that interpretation of the atrocities act shoud promote constitutional values of fraternity and integration of the society. This may require false implication of innocent citizens on caste lines.'

3. On the question of the issue of anticipatory bail- the court observed,

> '...whether there is an absolute bar to the grant of anticipatory bail...exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny...There seems to be no logical rationale behind this situation of putting a fetter on grant of anticipatory bail whereas there is no such prohibition in any way for grant of regular bail. Exclusion of provision for anticipatory bail cannot possibly by any reasonable interpretation be treated as applicable when no case is made out or allegations are patently false or motivated. We hold that the exclusion of section 438 Cr.pc applies when a prima facie case of commission of offence under the atrocities act is made. On the other if it can be shown that the allegations are prima facie motivated and false such exclusion will not apply.'

It further reiterated that-

> 'The legislature could not have intended that any unilateral version should be treated as conclusive and the person making such allegation should be the sole judge of its correctness to the exclusion of judicial function of courts of assessing the truth or otherwise of the rival contentions before personal liberty of a person is adversely affected.'

4. On the question of the issue of safeguards against arrest and false implications

The court based upon the reasoning on the above three issues approached this fourth issue on the matter of what kind of directions could be given for the safeguard against arrest and false implication. It observed that-

> '...the said act cannot be converted into a charter for exploitation or oppression by any unscrupulous person or by police for extraneous reasons against other citizens as has been found on several occasions.' It further stated 'even if preliminary inquiry is held and case is registered, arrest is not a must'. Accordingly it directed that '..in respect of offences under the atrocities act no arrest may be effected if an accused person is a

public servant, without written permission of the appointing authority and if such a person is not a public servant without written permission of the senior superintendent of Police of the district.....To avoid false implication, before FIR is registered, preliminary enquiry may be made whether the case falls in the parameters of the atrocities act and is not frivolous or motivated.'

While giving its own opinion the Supreme Court relied on the views taken by the High court of Gujarat and also relied upon in Pankaj D Suthar v. State of Gujarat [vi] and Dr. N.T. Desai V. State of Gujarat[vii] and clarified the judgments of this Court in State of M.P. v. Ram Krishna Balothia[viii] and Manju Devi v. Onkarjit Singh Ahluvalia[ix].'

## The Review Petition

In the review petition filed by the Union of India before the Supreme Court against the above observation and order of the court, the three judge bench of Arun Mishra J., M.R.Shah and B.R.Gavai and authored by Arun Mishra j., the bench recalled the courts directions in the Mahajan case with regards to the matter of arrest and registration of the FIR. It maintained that as far as the grant of anticipatory bails for offences under the act, adequate safeguards were already in place and that where no prima facie case is made out the relevant provision in the law will not be attracted in terms of granting anticipatory bail. The court observed that if the above mention directions of the court were to be implemented as worded then the very purpose of the Act will be frustrated. In that the court relied upon the decision given in the judgement of State of Madhya Pradesh v. R.K Balothia.[x]

The court provided three important reasons as to why it is a fit case for a recall.

One, the Court did not had the power to issue direction: The directions in the Mahajan's case were issued under Court's extraordinary powers under article 142, which is to be exercised only when there is a legislative vacuum or lack of clarity in the existing provisions of legislation. Which means that no law exists on the subject or there is a lack of clarity on what the law is. The court in the Mahajan case was not confronted with any such kind of a situation. There was neither a legal vacuum nor any ambiguity and that the directions intruded into the sphere of policy making which is beyond the powers of the court.

Second, the Directions treated the SC/ST community unequally: The directions in the Mahajan case introduced new fetters on registration of FIRs and making arrests under the act. Such fetters were even more onerous and burdensome than those found under the general law ie., the code of Criminal Procedure, 1973. This amounted to unequal treatment of the members of the Scheduled Caste and Scheduled Tribe communities creating an unequal legal regime perpetuating further inequality.

Lastly, most of the directions were impractical. For instance, if a public servant has to be arrested the approval of the appointing authority has to be obtained first, this will unduly delay the arrest. Moreover the approving authority would not in most cases be fully informed of the facts of the case to provide a reasoned opinion on whether or not the arrest has to be made.

In this recall judgement the Supreme Court maintained that the permission criterion laid down by the Mahajan judgement is not at all statutorily envisaged; it is encroaching on a field which is reserved for the legislature. The direction amounts to a mandate having legislative colour which is a field not earmarked for the courts. The judgement was against the concept of protective discrimination in favour of the downtrodden classes.

## The Prathvi Raj Chavhan Case

The parliament came up with an amendment soon after the Mahajan judgement to nullify its effect and restore the original act on 17th of August 2018. The amendment was made to sec. 18 in which section 18A was added with the following provisions-

18A. (1) For the purpose of this act-

a. Preliminary enquiry shall not be required for registration of a First Information Report against any person; or

b. The investigating officer shall not require approval for the arrest, if necessary, of any person,, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The Provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any court.[xi]

The petitioner had challenged the section inserted through 18A by the amendment to the Atrocity Act.

Justice Arun Mishra wrote the judgment for himself and for Justice Vineet Saran. The court admitted the petition but also maintained that the decisions and the directions of the Mahajan case has already been recalled in the judgement given in the review petition filed by the Union of India. The Petition the judgement said now holds an academic importance as the position has already been restored in the act. He quoted in length the experts of the decisions laid down by the court in the review petition which has been mentioned above.

S. Ravindra Bhat J. delivering a separate judgment while adopting the judgment of Mishra J. observed that 'while considering any application seeking pre-arrest bail, the High Court has to balance the two interests ie., that the power is not so used as to convert the jurisdiction into that under sec. 438 of the criminal procedure code, but that it is used sparingly and such orders made in very exceptional cases where o prima facie offence is made out as whown in the FIR .....a liberal use of the power to grant pre-arrest bail would defeat the intention of the Parliament.'

Since the matter has been dealt with in the review petition to the effect of recalling all the directions given by the court in the Mahajan case, the court in this case upheld the constitutional validity of the inclusion of Sec. 18A to the Atrocity Act. The court disposed of the petition observing that the challenge to the provisions has been rendered academic.

## Conclusion

To sum up, the Mahajan Case seem to have appeared from nowhere (since by the time this case was instituted the accused was provided bail), dispelling the established notions of the rule of law and the jurisprudence laid down in the earlier judgments of the Supreme court. It appears on the plain reading of all the judgments including the Mahajan case and the subsequent review petition as well as the Prathviraj Chavhan case which emerged post the Mahajan judgement that there was clearly a wrong application of the law of the Atrocity Act and the jurisprudence on the law of Atrocity that has been developed by the courts in the due course. The following points remain worth mentioning and due consideration with this respect.

1. The law on the Atrocity is a special law with an absolutely clear intention of protecting the Scheduled Castes and the Scheduled Tribes from the atrocities of the castes not belonging to these. Given the growth of the criminal jurisprudence that have developed in Indian courts on the matters of arrest and bail through the various landmark judgment protecting the liberties and equality of the people of India the legislature with utmost wisdom have provided for unambiguous provisions relating to arrest and bail of the accused. This insertion of the provision in the law of the atrocity was with a clear understanding of the conditions of the SC/ST, their extreme marginalization, discrimination, powerlessness, the kind of exploitation and violence they face on the daily basis etc., which require the scales to be even on their sides given the odds against which they stand. The inclusion of such provision in the law is thus to substantiate and complement the criminal jurisprudence system of the land in specific conditions by providing it the tool to reach out to the specified sections of the society and provide them a protective cover against the powerful and therefore does not violate the principles of natural justice or violates the provisions of freedoms and equality of the citizens of India.

2. The Mahajan case squarely put a blame over the law on Atrocity for creating a draconian provision that violates the fundamental right of liberty to the innocent citizen of India and also blames the SC/ ST communities for instituting false cases against the innocent people for monetary benefits and extraneous considerations, thus putting a blame on the Law as well as the intention of the Parliament on the one hand as well as castigating the SC/ST communities as bad in intent and overestimates their capacity to manipulate the law against the powerful 'innocent' people of India. The case thus puts in bad light both the parliamentary intention as well as the SC/ST communities. This it does on the bases of certain cases that have appeared before the courts and the subsequent decisions by them. It is to be noted that the justice process remains in the ability of garnering adequate resources with the intention to attain desired results in the courts. The cases that appear before the courts and their eventual disposal not leading to conviction does not mean that the cases were altogether false. The reporting process, the registering of the FIR, the eventual presentation before the court and the resources garnered to produce the evidences are all involved in this which if not in right earnest can be twisted and manipulated by powerful to their benefit. Given the conditions of the SC/ST communities it needs to be sensitively considered. The data of the National Crime Records Bureau on this is a clear testimony of the crimes that are committed against these communities. 'The low conviction rate is a

failure of the complete criminal justice system and not the abuse of the law as the court have observed.'[xii]

3. The Mahajan case is overzealous in its determination to provide for the directions when there was a no need for one. The petitioner who was the accused in the case was already on bail and there was no reason why the court should have entertained the petition. As have been observed by the court in both the review petition and the Prathvi Raj Chavhan case, the court used its extraordinary powers to lay down directions where the law was absolutely unambiguous and clear about the procedure of law as well as the position of the law has been settled and clarified through the subsequent judicial pronouncements as has been mentioned above. It would have been enough for the court to provide for the judgement in the instance of the petitioner than for creating a general direction which adds further complications to the procedure of the law, dilutes its provisions and subsequently the intent and erroneously puts additional burden of onus, destabilizes the scale in the favour of the so called upper castes and treats the SC/ST unequally as well as castigates and puts in bad light those communities for whose protection this law has come into existence. As the court rightly points out in the Prathvi Raj case that ' a case registered under Cr.pc. by an upper caste to be unconditional whereas in the Atrocity Act it will be conditional for the SC/ST is discriminatory and unequal criminal jurisprudence'.

4. The Mahajan judgment when makes the observations on the issue of casteism and blames the act for the spread of it does not reflect upon the sociology of Caste and the vast sociological literature available in the academic domain. Caste is not the product of the SC/ST communities and they do not have any interest in perpetuating it. On the contrary, it is in the interest of these communities to do away with the institutions of caste and its attendant structure of benefit and burden of which they have been the sufferers throughout the ages and still continue to bear the same. To blame the Atrocity Act and the SC/ST communities in spreading casteism is to put the cart before the horse. The opinion of the judges appear to be impressionist than informed about the sociology of caste in India on which rich literature of theoretical and empirical value is available as well as years of long battles of the anti-caste social movement stand testimony to the horrors of the entrenched social system. The onus is upon the so called upper castes to remove the caste system they have created from their mind and their actions. The act only furthers this objective and provides the chance to purge the system from the horrors of the system of caste and the violence it can produce.

5. Finally, as can be noted from the above description of the case laws that have appeared recently on the atrocity law in which two different and contradictory opinions have emerged from the very same apex judicial institution. Despite the fact that it is a known understanding that the judges differ in their opinion and the courts themselves are open arenas of democratic argumentation and divergent viewpoints, the latitude with which the opinions differed in the present instance remains overtly noticeable.

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