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RESERVATION AS RIGHT: ON SUPREME COURT JUDGMENT

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

It is quite understandable that a recent Supreme Court judgment, that there is no fundamental right to claim reservation in promotions, has caused some political alarm. The received wisdom in affirmative action jurisprudence is that a series of Constitution amendments and judgments have created a sound legal framework for reservation in public employment, subject to the fulfilment of certain constitutional requirements. And that it has solidified into an entitlement for the backward classes, including the SCs and STs. However, the latest judgment is a reminder that affirmative action programmes allowed in the Constitution flow from “enabling provisions” and are not rights as such. This legal position is not new. Major judgments — these include those by Constitution Benches — note that Article 16(4), on reservation in posts, is enabling in nature. In other words, the state is not bound to provide reservations, but if it does so, it must be in favour of sections that are backward and inadequately represented in the services based on quantifiable data. Thus, the Court is not wrong in setting aside an Uttarakhand High Court order directing data collection on the adequacy or inadequacy of representation of SC/ST candidates in the State’s services. Its reasoning is that once there is a decision not to extend reservation — in this case, in promotions — to the section, the question whether its representation in the services is inadequate is irrelevant.

The root of the current issue lies in the then Congress government’s decision to give up SC/ST quotas in promotions in Uttarakhand. The present BJP regime also shares responsibility as it argued in the Court that there is neither a basic right to reservations nor a duty by the State government to provide it. The idea that reservation is not a right may be in consonance with the Constitution allowing it as an option, but a larger question looms: Is there no government obligation to continue with affirmative action if the social situation that keeps some sections backward and at the receiving end of discrimination persists? Reservation is no more seen by the Supreme Court as an exception to the equality rule; rather, it is a facet of equality. The terms “proportionate equality” and “substantive equality” have been used to show that the equality norm acquires completion only when the marginalised are given a legal leg-up. Some may even read into this an inescapable state obligation to extend reservation to those who need it, lest its absence render the entire system unequal. For instance, if no quotas are implemented and no study on backwardness and extent of representation is done, it may result in a perceptible imbalance in social representation in public services. Will the courts still say a direction cannot be given to gather data and provide quotas to those with inadequate representation?

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