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A TEST OF LAW AND JUSTICE

Relevant for: Indian Polity | Topic: Indian Constitution - Amendments, Schedules, and Important Articles

Constitutional challenges are often described as hard cases. This is, however, seldom true. Invariably, disputes possess a simple solution. We can debate over what theories of interpretation to apply and over whether the text of a clause needs to be read literally or in light of its historical background, but in most cases, the Supreme Court's own precedent and commonly accepted legal theories provide an easy enough guide to finding a principled answer. The challenges made to the 103rd constitutional amendment, though, which a two-judge bench of the Supreme Court is slated to hear this month, present a rather more difficult test.

The ambiguity of reservations for the poor

Here, the issues involved concern questions both over whether the amendment infringes the extant idea of equality, and over whether that idea is so intrinsic to the Constitution, that departing from it will somehow breach the document's basic structure. The court's answers to these questions will operate not merely within the realm of the law but will also likely have a deep political bearing — for at stake here is the very nature of justice that India's democracy embodies.

The law, which was introduced in January this year, amends Articles 15 and 16 of the Constitution, and grants to government the power to provide for reservation in appointments to posts under the state and in admissions to educational institutions to "economically weaker sections of citizens [EWS]". At first blush, this reservation, which can extend up to 10% of the total seats available, may not appear to impinge on the existing constitutional arrangement. But what it does mandate is a quota that will apply only to citizens other than the classes that are already eligible for reservation. Consequently, persons belonging to Scheduled Castes and Scheduled Tribes and persons who are not part of the creamy layer of the Other Backward Classes will not be eligible to the seats available under the quota.

Quotas and a verdict

According to the petitioners in the Supreme Court, the central hypothesis of the amendment, where reservation is predicated on individual economic status, violates the Constitution's basic structure. In their belief, the law, by providing for affirmative action unmindful of the structural inequalities inherent in India's society, overthrows the prevailing rationale for reservations. In doing so, they argue, the amendment destroys the Constitution's idea of equal opportunity. The Union of India argues that while the Constitution demands equality, it does not confine Parliament to any singular vision. According to it, the power to amend the Constitution must necessarily include a power to decide how to guarantee equal status to all persons.

In some senses, as sociologist Gail Omvedt wrote in these pages ("The purpose of reservation – I", March 24, 2000), "the whole history of the struggle for reservation has also been a debate about its very meaning and purpose". When reservations were first introduced by some of the princely states the policy was seen largely as an alleviative measure. For instance, in the princely State of Mysore, where privileged castes had cornered virtually every post available under the government, a system of reservations was introduced denominating communities as "Backward Classes", and providing for them a larger share in the administration. By the time the Constitution was being drafted as a reading of the Constituent Assembly's debates shows us, the rationale for reservations had broadened. The Constitution's framers saw the measure as a promise against prejudice, as a tool to assimilate deprived groups into public life, and as a

means of reparation, to compensate persons belonging to those groups for the reprehensible acts of discrimination wrought on them through history. Marc Galanter has called this a compensatory discrimination principle.

Is there a problem with the 10% quota?

Yet, despite the expanded justification, the basic foundational logic for reservations was still predicated on a demand for a fairer and more representative share in political administration. This is demonstrated by R.M. Nalavade's comment in the Constituent Assembly. "Our experience in the provinces, though there are provisions for reservation in the services, is bitter," he said. "Even though the depressed classes are educated and qualified, they are not given chances of employment under the Provincial Governments. Now that we have provided for this in the Constitution itself, there is no fear for the Scheduled castes. According to this clause we can be adequately represented in the provincial as well as in the Central services."

By providing for a more proportionate distribution of the share in administration, the programme of reservations, it was believed, would end at least some of caste-based domination of jobs, particularly of employment in the public sector — a domination that was built over thousands of years, where Dalits and Adivasis were denied access to equal status. As Ms. Omvedt has pointed out, the strategy behind reservations could, therefore, never have involved an attack on pure economic backwardness. The idea was always to disavow caste-monopoly in the public sector.

Even when the Constitution's first amendment was introduced in 1951, to allow the state to make special provisions beyond reservations in public employment for "the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and the Scheduled Tribes", the rationale, as the lawyer Malavika Prasad has argued, remained constant. Attempts made at the time to categorise individuals on the basis of economic status were expressly rejected. Behind this thinking was a distinctive theory of justice: that by according a greater share in public life to historically disadvantaged groups the relative position of those groups would stand enhanced. No doubt such a policy would not, in and of itself, help eliminate the various inequalities produced by the caste system, but it was believed it would represent a resolute effort to eliminate at least some of the caste-based domination prevailing in society.

Legitimacy of the basic structure

Indeed, the policy and the idea of justice that undergirds it have been seen as so indispensable to the Constitution's aims and purposes that the Supreme Court in *State of Kerala v. N.M. Thomas* (1975) held that reservations based on social and educational backwardness, far from being an exception ought to be seen as an intrinsic facet of the idea of equality.

It is in departing from this logic that the 103rd amendment unseats the Constitution's code of equality. Pure financial ability is a transient criterion; it doesn't place people into a definite group requiring special privileges. If anything, allowing for reservation on such a principle only further fortifies the ability of powerful castes to retain their positions of authority, by creating an even greater monopolisation of their share in administration. If such an end is indeed the vision, it's difficult to see how the elementary conception of equality guaranteed by the Constitution can continue to survive.

Now, no doubt the Supreme Court may, on the face of things, consider Parliament as possessing the power to altogether dismantle the Constitution's existing idea of equality without simultaneously demolishing the document's basic structure. But, if nothing else, when the court hears the challenges made to the 103rd amendment, it must see the petitioners' arguments as

representing a credibly defensible view. The least the court ought to do, therefore, is to refer the case to a constitution bench, given that Article 145(3) mandates such an enquiry on any issue involving a substantial question of law concerning the Constitution's interpretation, and, in the meantime, stay the operation of the amendment until such a bench hears the case fully. Should the court fail to do so the government will surely one day present to it a cruel fait accompli.

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