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A BLOW AGAINST SOCIAL JUSTICE

Relevant for: Developmental Issues | Topic: Rights & Welfare of STs, SCs, and OBCs - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

The recent verdict of a two-judge Supreme Court Bench on **reservations and Scheduled Caste and Scheduled Tribes promotions** — “that no individual could claim reservation in promotions and that the court could not issue a mandamus directing State governments to provide reservation” — has mainly raised four constitutional questions: Whether reservation in promotions is a fundamental right or not. Whether a court can direct the state to provide reservations. Whether quantifiable data for inadequate representation is a must for giving reservation in promotions. And whether it is the obligation of the state to give reservation.

In the first instance, as this case involves multiple constitutional issues, it should have been dealt with by a larger constitutional bench that included a Scheduled Caste (SC) or Scheduled Tribe (ST) judge. So, it is the moral responsibility of the Union Government to appeal this case and request a constitutional bench hearing. It must be noted that in 2018 a five-judge Constitution bench had denied reservation for SCs and STs who belong to the creamy layer; the Central government has asked for a review by a seven-judge Constitutional bench. This verdict on SCs and STs promotions has affected social justice and the advancement of the under-privileged.

Addressing the first question, the scope for reservation for the Backward Classes is promised in Part III of the Constitution under Fundamental Rights. Articles 16(4) and 16(4A) which empowers the state to provide reservation for SCs and STs are a part of the section, “Equality of opportunity in matters of public employment”. The right to equality is also enshrined in the Preamble of the Constitution. Many construe that the reservation is against Article 16 (Right to equality). But one should understand that the absence of equal opportunities for the Backward Classes due to historic injustice by virtue of birth entails them reservation. In other words, the right to equality is the basis of reservation as there is no level-playing field among castes. Articles 16 (2) and 16(4) are neither contradictory nor mutually exclusive in nature. In fact, they are complementary to each other; even Article 16(4) is not a special provision. Now, another question arises as to whether reservation should be applied in promotions?

The answer is yes, because in India, where there is a peculiar hierarchical arrangement of caste, it is conspicuous that SCs and STs are poorly represented in higher posts. Denying application of reservation in promotions has kept SCs and STs largely confined to lower cadre jobs. This is even seen in the higher judiciary. Hence, providing reservation for promotions is even more justified and appropriate to attain equality. The question of law is not about enabling reservations in promotions or not, but this judgment destabilises the very basis of reservation; when there is no direct recruitment in higher posts, the implementation of reservation is justified at every level to get a reasonable representation. It is not correct to subdivide the scope of reservation at the entry level and in promotions; this delineation will only lead to confusion in the implementation of reservation. Now, by declaring that reservation cannot be claimed as a fundamental right is a dangerous precedent in the history of social justice.

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Can a court issue a mandamus to the state for providing reservation? This is inappropriate because when the court is empowered to pass orders to create extra seats every year for forward-caste students who claim to be affected by reservation, why cannot it direct the state to provide reservation in promotions? The Supreme Court has extraordinary powers under Article

142, which empowers the Court to pass any order necessary for doing “complete justice in any cause or matter pending before it”.

The next question is about the necessity of quantifiable data to show an inadequate representation of reserved category people. This question has been addressed in the Constitution. Article 16(4) reads: “Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”

Here, “in the opinion of State” should not be construed as the discretion of the state to give the reservation or not; on the contrary, if the state feels that SCs and STs are under-represented, then it is in the domain of the state to provide reservation. In the Indra Sawhney vs Union of India case (Mandal Commission) the idea of quantifiable data on inadequate representation was applied for exceeding the 50% cap for reservation; within 50% where the existing quotas for SCs and STs are accommodated were not affected. The responsibility of collecting data on representation by the Backward Classes lies with the state. Pathetically, the last caste-based census was in 1935, and in the pre-Independence era, by the British government. After Independence, no government has had the inclination to conduct a caste-based census due to political reasons. Even if a caste-based census is collected, the population and proportionate representation of SCs and STs will be low. For this reason alone, a proper caste-based census has not been conducted in independent India. Moreover, Article 16(4) clearly mentions that if the state, in its opinion, feels that SCs and STs are not adequately represented, then it can provide reservation for them. There is no mention of “quantifiable data” in the Constitution. Even after 70 years of SC/ST reservation, their representation is as low as 3%.

Finally, if the argument is that it is not binding on the state to give reservation, it must be noted that when reservation rights are in Part III as Fundamental Rights, it is the obligation of the state to ensure reservation to the underprivileged. This judgment has interpreted Articles 16 (4) and 16(4A) only as enabling provisions. Enabling provisions mean that these provisions empower the state to intervene; it does not mean the state is not bound to provide it. Interpreting the Constitution by paraphrasing and selective reading is dangerous.

More importantly, this judgment has raised a new point — that the decision of the State government to provide reservation for SC/STs should not affect the efficiency of administration. This implies that the entry of SC/STs in the job market can reduce the quality of administration; this by itself is discriminatory. There is no evidence that performance in administration is affected on account of caste. There have been many attempts to dilute reservation in the past. But, this judgment appears to be debatable in the larger context and should be challenged in a constitutional bench. In a country of parliamentary democracy, even the Constitution of India can be amended. If the government at the Centre has genuine concern for SC/STs, it can amend the Constitution using its political majority.

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