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STRIKING A BLOW AGAINST AFFIRMATIVE ACTION IN AMERICA

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‘The Indian and U.S. Constitutions are poles apart on how they treat affirmative action’ | Photo Credit: AFP

In a ground-breaking decision, on June 29, 2023, in Students for Fair Admissions vs Harvard, the United States Supreme Court (SCOTUS) deemed the race-conscious admission policies at Harvard and the University of North Carolina (UNC) as unconstitutional and violative of the Equal Protection Clause in the Fourteenth Amendment.

As Chief Justice John Roberts stated, “Eliminating racial discrimination means eliminating all of it.” This ruling profoundly impacts affirmative action programmes, where ‘race’ has historically been a factor to foster diversity in college admissions, such as in Texas and Michigan. Many believe that the Harvard judgment now makes affirmative action nearly impossible in the U.S.

SCOTUS underpinned its verdict with four reasons. First, it emphasised that the equal protection clause is colour-blind, and the term “equal protection” means identical treatment. Thus, race-based affirmative action contravenes this promise. Second, it affirmed that any such contravention could only be justified if the state has a compelling goal, and affirmative action is absolutely necessary to attain it. The state must articulate this goal clearly to enable judicial scrutiny. The court found Harvard and the UNC’s objectives, such as “training future leaders”, as commendable but vague. Third, the Court reiterated an earlier ruling that affirmative action policies should have a ‘sunset clause’. However, both Harvard and the UNC lacked this. Lastly, the court held that affirmative action should not rely on racial stereotypes or disadvantage anyone based on race — two aspects it identified as problematic in this case.

With Indian courts often drawing upon U.S. judgments, and given shared histories of discrimination based on caste and race (India and the U.S.), it is pertinent to examine the implications of this decision for India. Can this lead to ‘reservations’ being either curtailed or considerably diluted?

The Indian and U.S. Constitutions are poles apart on how they treat affirmative action. The U.S. Constitution is silent on it, prohibiting only the denial of “equal protection”, leading to varied interpretations of this amorphous phrase depending on the sitting Justices. To today’s majority, it means exactly what it meant in the 19th century: colour-blindness. To the dissent, it means

consciously treating historically-oppressed races differently.

The Indian Constitution is more clear, thanks to its framers. It expressly allows affirmative action in favour of backward classes in matters of education (Article 15) and jobs (Article 16). Article 16 expressly permits “reservations” in jobs, something that is unique to the Indian Constitution. In fact, this reservation provision was part of the original Constitution as enacted on January 26, 1950, unlike affirmative action in education which was introduced the next year through the First Amendment. India’s courts routinely debate the granular questions: what percentage of seats or posts can the state reserve? How should the beneficiary classes be identified? Unlike the U.S., however, India’s courts do not debate as to whether affirmative action is fundamentally permissible, for the Constitution conclusively answers that question.

Another distinction is the notion of equality that lays the foundation for affirmative action in both jurisdictions. The U.S. seeks to eliminate all distinctions based on race universally, the reason being equality cannot mean different things for different individuals. This applies even for affirmative action that may be justified to undo the historic discrimination faced by African Americans or Hispanics (or other groups). Thus, measures which treat one race as distinct from another in any manner, including a preference in education, are viewed strictly and against equality. This narrow view of equality is called a formal equality and prevents U.S. courts from allowing broad-based race conscious measures.

India, on the other hand, does not treat all distinctions of race or caste alike. Certain classes such as the Scheduled Castes, Scheduled Tribes and Backward Classes who have faced discrimination in the past are not considered on a level field with others. To help them to achieve equal opportunities it is imperative that they have access to reservation. As Justice K.K. Mathew explained in 1976, “the notion of equality of opportunity has meaning only when a limited good or, in the present context, a limited number of posts, should be allocated on grounds which do not a priori exclude any section of citizens of those that desire it.” Thus, reservation is not antithetical to equality, but a tool that furthers equality. This is called a substantive notion of equality and facilitates Indian Courts to pass pro-reservation judgments, in sync with the constitutional mandate. In this context, a decision such as the Harvard University case is unimaginable for Indian courts.

Further, the test to determine whether affirmative action or reservation is constitutional also varies substantially. The U.S. has strict scrutiny of all measures that create distinctions based on race. This means a measure is constitutionally permissible only if it furthers a compelling state interest and is narrowly tailored to achieve such interest. The only permissible state interest in the U.S. is the need for a diverse student body. Once this is established, it must be proved that the measure closely correlates to diversity. This is a high standard that makes it extremely difficult for universities to devise admission programmes that are favourable to the minority race. Any broad measures are viewed with great caution so that non-minority candidates are not disadvantaged at the cost of minority.

In stark contrast, Indian courts have a very different standard to meet under Articles 15 and 16 of the Constitution. ‘Education’ and ‘public employment’ are already enshrined in the Constitution as legitimate goals for reservation. Thus, the standard adopted by courts focuses on whether the class seeking reservation is socially and educationally backward, and inadequately represented. In employment, this requires proof of quantifiable data from the state. If these two criteria are met, even broad reservation measures are constitutional and the interests of the non-minority are instead taken care of by capping reservations at 50%.

Given India’s constitutional mandate that champions substantive equality and adopts a more reasonable test, Indian courts are unlikely to align with the SCOTUS’s Harvard ruling. Courts

have repeatedly sounded caution that foreign decisions should not be relied on without a proper appreciation of the context in which they were rendered. However, the emphasis on a sunset clause, akin to the Indian Supreme Court's suggestion in the Economically Weaker Section (EWS) Reservations case, could potentially resonate. Parliament's receptiveness to this idea remains to be seen.

Shivani Vij and Shrutanjaya Bhardwaj are lawyers in the Supreme Court of India