Quota questions

Moves for reservations on economic grounds are more about politics than social justice

Rattled by the erosion in upper caste votes in the recent Assembly elections in Rajasthan, Madhya Pradesh and Chhattisgarh, the BJP government has attempted to recover this traditional vote base through an unapologetic political manoeuvre. It has sought to provide a 10% quota for economically weaker sections in public employment and educational institutions. That this is more an election-time signal to upper castes than a genuine attempt to revisit social justice policy is clear for at least two reasons. The 124th Constitution Amendment Bill will have to be passed by two-thirds of the MPs present and voting, and the challenge will be to drum up the numbers in both Houses. And, it is doubtful if it will stand judicial scrutiny. If enacted, the 50% limit on total reservation laid down by the Supreme Court will be breached. (The court did allow for a higher percentage in extraordinary situations, but it does not apply in this case.) Even if it is arguable that such a move will create deserving opportunities to those outside the purview of caste-based reservations, in *Indira Sawhney* a nine-judge bench had struck down a provision that earmarked 10% for the economically backward on the ground that economic criteria cannot be the sole basis to determine backwardness. Any attempt to amend the Constitution to extend what is limited to the "socially and educationally backward" to those economically weak is problematic.

If the amendment is challenged, a question that will arise is whether financial incapacity warrants special treatment. With the income ceiling for eligibility likely to be fixed at ₹8 lakh a year – the same as the 'creamy layer' limit above which OBC candidates now enjoying reservations become ineligible – an uneasy parity has been created between socially and educationally backward classes with limited means and those who are socially and educationally advanced with the same limitation. The other issue that has come up frequently when quotas are increased by State governments is that exceeding the 50% limit offends the equality norm. In *Nagaraj* (2006), a Constitution Bench ruled that equality is part of the basic structure of the Constitution. It said the 50% ceiling, among other things, was a constitutional requirement without which the structure of equality of opportunity would collapse. There has been a string of judgments against reservations that breach the 50% limit. Another issue is whether reservations can go to a section that is already adequately represented in public employment. It is not clear if the government has quantifiable data to show that people from lower income groups are under-represented in its service. Reservations have been traditionally provided to undo historical injustice and social exclusion suffered over a period of time, and the question is whether they should be extended to those with social and educational capital solely on the basis of what they earn.

Reinstated, conditionally

Supreme Court rejects the Centre's contention in the CBI Director's case, but softens the blow

In setting aside the orders divesting Alok Verma of his functions and duties as Director of the CBI, the Supreme Court has strengthened the principle that the head of the agency should be insulated against any form of interference. The court took up the matter in the midst of an unseemly tussle for supremacy between Mr. Verma and Special Director Rakesh Asthana, with corruption charges being traded. However, the court's interim order asking for a time-bound inquiry into the charges against Mr. Verma is now of no avail, as the Bench, headed by Chief Justice Ranjan Gogoi, has chosen to deal only with the major question of law involved. The decision has gone against the government, with the court holding that the action taken against Mr. Verma amounted to a 'transfer', something that cannot be done by any authority except the high-powered selection committee headed by the Prime Minister in terms of the 2003 amendments to the law. It has rejected the government's contention that stripping the CBI Director of his duties did not amount to a transfer, but only a measure to deal with an extraordinary situation. It has gone into the legislative intent behind the amendments to the Central Vigilance Commission Act in 2003, which included changes to the Delhi Special Police Establishment Act before coming up with its finding.

The Bench has noted that the amendments flow from the principles laid down by the Supreme Court in 1997 in *Vineet Narain* to protect the agency, especially its Director, from external interference. As the law is clear that any transfer of the Director can only be made by the selection committee, and there being no provision for any other interim measure, the only way the government can divest the head of the agency of his powers is to let the same committee make the decision. The court has been mindful of the fact that an officer could be stripped of his power without being formally transferred to another position, thereby achieving the objective of interfering with the agency's functioning by oblique means. Its decision will further strengthen the CBI's independence. However, it is intriguing that the court passed a consequential order to the selection committee to meet within a week and consider Mr. Verma's powers and authority. Until then, he has been restrained from making any policy decisions. Having set aside the orders of the government divesting Mr. Verma of his powers, as well as the CVC's order recommending the action, the court could have reinstated him unconditionally. What it has done, instead, is to soften the blow it had dealt the government by giving it an opportunity to achieve through the committee route what it could not do successfully through its midnight 'coup'.

A renewed attack on privacy

The Aadhaar Bill, allowing private bodies to use Aadhaar as a means to authenticate identity, poses huge dangers

SUHRITH PARTHASARATHY

On Friday, the Lok Sabha, without any attendant discussion, passed the Aadhaar and Other Laws (Amendment) Bill, 2018. On any reasonable reading it ought to be plainly apparent that the Bill flagrantly flouts both the Constitution and the Supreme Court's judgment which gave the Aadhaar programme a conditional imprimatur. It is therefore entirely likely that the government is banking on a sense of political fatigue having set in over the project, and perhaps it believes it has made the programme so ubiquitous that a few additional legislative tweaks are unlikely to shock and jolt the dissenters. But the present move is so brazen that we will be failing in our collective duties were we to allow the amendments to be carried out without any debate. For, if enacted, the law will once again allow private corporations, including banks and telecom operators, to use Aadhaar as a means to authenticate identity.

Astonishingly, this change has been proposed despite the government's abject failure to enact comprehensive legislation protecting our data and our privacy. Therefore, unless the Rajya Sabha places a constraint on the government's impudence, the consequences will prove devastating.

Between September and now

There is no doubt the Supreme Court's judgment, delivered last September, enjoined Parliament to make certain specific legislative changes. To that end, some of the court's concerns are addressed by the Bill, such as the inclusion of a clause intended at ensuring that children are not denied benefits on account of a failure to possess Aadhaar. But the essential object of the law is to countermine those portions of the judgment that the regime deems inconvenient. So inconvenient that the Bill was introduced, as the lawyer Vrinda Bhandari has argued in *The Wire*, by altogether overlooking the state's own "pre-legislative consultative policy".

This policy places an onus on the ministry introducing a law to publish the draft of any proposed legislation, together with, among other things, the objectives behind the law and an estimated assessment of the impact that such legislation may have on fundamental rights, and to thereafter invite comments from the public. Yet, here, the Bill, which makes amendments not only to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, but also to the Indian Telegraph Act, 1885, and the Prevention of Money Laundering Act, 2002 (PMLA), was introduced without any prior consultation, leading to a credible belief that the proposed changes are an act of subterfuge.

Originally, Section 57 of the Aadhaar Act allowed both the state and private entities to use the programme to establish an individual's identity pursuant to a law or a contract. It was on this basis that various notifications were issued allowing corporations of different kinds, including telecom operators, e-commerce firms and banks, to use Aadhaar. But when the Supreme Court ruled on the validity of the legislation, although it upheld vast portions of the law through a 4:1 majority, it unanimously struck down Section 57 insofar as it applied to private entities.

Commercial exploitation

Justice A.K. Sikri, in his judgment for the majority, wrote: "Even if we presume that legislature did

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not intend so, the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional."

Although this leaves little room for doubt, the government, for its part, may well defend the Bill by arguing that the majority's judgment nonetheless permits the enactment of a new law allowing the use of Aadhaar by private entities so long as a person voluntarily consents to such authentication. In its aid, the government will likely point to paragraph 367 of Justice Sikri's opinion. "The respondents may be right in their explanation that it is only an enabling provision which entitles Aadhaar number holder to take the help of Aadhaar for the purpose of establishing his/her identity," he wrote. "If such a person [voluntarily] wants to offer Aadhaar card as a proof of his/her identity, there may not be a problem."

But this passage scarcely expresses an opinion on private entities. To the contrary, it merely reaffirms the position that even for the state to utilise Aadhaar, in cases not involving the drawing of subsidies, benefits or services from the Consolidated Fund of India, the authentication must be voluntary and backed by separate legislation. While there are indeed portions of the majority's ruling that are vague and indeterminate, on Section 57 the opinion is unequivocal. Inasmuch as the provision allows private companies the authority to authenticate identity through Aadhaar, even by securing an individual's informed consent, the clause, Justice Sikri held, disproportionately contravened the right to privacy.

Since the Supreme Court has found that the operation of Aadhaar by private entities violates fundamental rights, there is today no avenue available for fresh legislative intervention, unless the government chooses to amend the Constitution. In any event, the proposed legislative amendments virtually seek to impose Aadhaar as a prerequisite for the availing of certain basic services. For example, the amendments proposed to the Telegraph Act and the PMLA state that service providers – telecom companies and banks, respectively, – ought to identify their customers by one of four means: authentication under the Aadhaar Act; offline verification under the Aadhaar Act; use of passport; or the use of any other officially valid document that the government may notify.

Issue of fraud

Therefore, if the government fails to notify any new form of identification, a person's identity will necessarily have to be authenticated through Aadhaar or through her passport. Given that only a peripheral portion of India's population possess passports, Aadhaar is effectively made compulsory. Allowing private corporations to access and commercially exploit the Aadhaar architecture, as we have already seen, comes with disastrous consequences – the evidence of reports of fraud emanating out of seeding Aadhaar with different services is ever-growing. Hence, the amendments not only fly in the face of the Supreme Court's verdict but are also wholly remiss in attending to the dangers both of slapdash data protection and of corruption and scamming.

This move, to restore the use of Aadhaar by telecom companies and banks, however, is not the Bill's only problem. There is a hatful of other concerns, including the re-introduction of a marginally refurbished Section 33(2). In its original form, the clause had allowed an officer of the rank of Joint Secretary to the Government of India to direct disclosure of Aadhaar information in the "interest of national security". The Supreme Court declared the clause unconstitutional and ruled that while disclosure in the interest of national security may be important, such disclosure should spring out of a request of a "higher ranking officer". What is more, in order to avoid any misuse of the provision, requests of this kind, the court held, ought to require separate scrutiny, and, therefore, "a Judicial Officer (preferably a sitting High Court judge) should also be associated with" the process. However, the Bill, merely seeks to substitute the words "Joint Secretary" with "Secretary" in Section 33(2), completely disregarding the Supreme Court's order demanding inquiry by a judge.

Ultimately, the Bill seeks to pave the path for Aadhaar to permeate through every conceivable sphere of human activity, transferring all authority over our bodies, in the process, from the citizen to the state, and, in many cases, from the citizen to private corporations. The Rajya Sabha, therefore, should resist any developing sense of ennui around the programme, and reject this Bill, for the utter contempt of democracy that it represents.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

Staggering backwards

The Modi government's reservation gambit is neither sound policy nor smart politics

SAJJAN KUMAR

India presents a classic case of proto-politics. Nothing that is institutional has an appeal and the insatiable clamour for quick surprises is a constant. While on Sunday at a Bharatiya Janata Party (BJP) event as part of its Dalit outreach, a world record was attempted by cooking 5,000 kg of 'khichdi', on Monday the Central government announced 10% reservation for 'economic backwards' to reach out to upper castes. The announcement is clearly aimed at the 2019 general election. However, it needs to be seen whether playing the reservation card in its inverted form would be a 'zero sum game' or a 'win-win' situation for the BJP?

In the last decade, India has been witnessing the interplay of the agrarian crisis and demands for reservation by dominant peasant castes, Jats in the north, Marathas and Patidars in the west, and Kappus in the south. The resultant political crisis leads to absurd complexities whereby reservation is sought and promised as the remedy for agrarian distress. Similarly, the BJP's recent electoral reverses in three Hindi heartland States signalled that a section of the upper castes, the core support base of the party, had drifted away. This seems to have necessitated the proposed policy-cum-political measure of reserving 10% seats for them to woo them back. However, here too the party may be drawing the wrong inference. A significant section of the Other Backward Classes (OBCs) and Dalits accompanied upper caste voters in moving away from the BJP in Madhya Pradesh, Chhattisgarh and Rajasthan. While, anti-reservation forums like SAPAKS, or Samanya Picchdaa Evam Alpsankhyak Samaj, had campaigned against the BJP on account of controversies related to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, in reality they merely deflected the root cause of the anger due to agrarian and rural distress. The fact that the BJP performed better than the Congress in the Baghelkhand region of Madhya Pradesh, the core region of SAPAKS activity, indicates this.

Subaltern, Hindutva, Bahujan

The key to Prime Minister Narendra Modi's 2014 electoral success lay in meticulously fusing the social support bases of two antagonistic discourses of 1990s emanating from Mandal and Mandir politics. By the early 1990s, Mandal evolved into a Bahujan experiment wherein the 'Other' were the upper castes, while the Hindutva discourse attempted to forge a solid social support base by giving thick political representation to subaltern Hindus to constitute Muslims as the common 'Other'. It succeeded *vis-à-vis* Bahujan discourse on account of the two-fold internal social contradictions: between Dalits and OBCs on the one hand, and between dominant OBCs and lower OBCs on the other.

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In fact, by the late 1990s, the BJP managed to shed its anti-reservation image and emerged as a platform for the lower OBCs, who felt left out from the benefits of Mandal politics. By 2014, Mr. Modi (along with allies) took the logic of subaltern Hindutva to its zenith by winning 73 out of 80 seats in Uttar Pradesh without fielding a single Muslim. Subaltern Hindutva seemed deeply entrenched as lower OBCs got thick political representation out of the seats denied to Muslims besides occupying crucial organisational posts in the BJP and other Hindutva groups. It must be noted that a majority of Dalits and dominant OBCs were less fluid as compared to the lower OBCs, whose political alignment has of late emerged as the determinant of electoral outcomes, especially in the Hindi heartland. It is this section that appeared too to have become the core support base of the BJP with the ascendency of subaltern Hindutva.

However, since the Gorakhpur and Phulpur bypolls in Uttar Pradesh, the original claimants of the Bahujan experiment, the Samajwadi Party and the Bahujan Samaj Party, have tactically revised their approach by giving more representation to lower OBCs, thereby hitting the comfort zone of the BJP.

It is against this backdrop that when the BJP faces the Mahagathbandhan in U.P. and Bihar, its policy priority should be the lower OBCs whose electoral fluidity may stem trouble for the party. Appealing to upper castes through a judicially unviable proposition at this juncture is neither good policy nor smart politics. All it would end up doing is denting the already weakened image of Mr. Modi as a leader of backward sections and giving electoral ammunition in the hands of the Mahagathbandhan, which may not oppose the reservation openly but will position itself to emerge as the beneficiary of the possible reaction by Bahujans.

Judicially unviable

The proposed Bill flies in the face of constitutional provisions and court verdicts. Even if a constitutional amendment inserts 'economic backwardness' as the basis for reservation besides existing social and educational backwardness in Article 15(4), it cannot make a persuasive case to breach the 50% cap for reservations, as the constitutional provision is clear that the scale of reservation under Article 16(4) has to be minority in nature.

This would mean that either the proposed Bill would be nullified, or the 10% reservation would have to be accommodated in the existing 50% cap. Either way it would be a dead-end for the BJP.

Reservation is neither an instrument of poverty-eradication, nor does it have the scale to cope with the agrarian and other economic crises afflicting India today. At a time when a deep institutional response is warranted, going for the easy and lazy measure of earmarking reservation amounts to policy escapism. The trend of making public policies and institutional response subservient to electoral exigencies as a norm is tantamount to treating India as a proto-state. And on a pragmatic note, elections are fought and won by appealing to fence-sitters rather than hypnotising the 'core' again and again, as the BJP now seems to be doing.

Sajjan Kumar is a political analyst. He is associated with Peoples Pulse, a research organisation specialising in fieldwork-based political study

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Quota plan

It is no surprise that there are mixed reactions to the Narendra Modi government's proposal for 10% reservation to economically backward sections in the general category ("Centre plans 10% quota for the poor", January 8). Wasn't the Congress's farmers loan waiver a gimmick? If the Bill is passed, the Modi government will have to make sure that benefits and aid reach those who truly deserve it.

The Opposition has no other option but to ensure its support for the Bill. For those who lament the development, they must understand that a nation like ours is deeply rooted in a caste and religious system. Ours is a society that runs on this "fuel".

M. PRADYU,
Thalikavu, Kannur, Kerala

■ It is clear that the NDA government is desperate to retain power at any cost given the ambivalent and evasive attitude of the Prime Minister over the issue of an ordinance to start construction of a Ram Mandir. The BJP has failed to keep its poll promises of 2014, which is why it is resorting to such gimmicks in order to fool the discerning electorate.

V. PADMANABHAN,
Bengaluru

■ The Indian Railways recently called for applications for about 63,000 vacancies and drew a response of over 1.9 crore people for jobs such as "helper, porter, cleaner, gateman, track maintainer and assistant switchman". In India, the paradox is that though it is one of the fastest growing global economies, it is unable to generate enough jobs, let alone good ones. Right now, demonetisation has created endless problems, and it is all the more important that these are addressed especially with more numbers of educated young people entering the workforce. So how will quotas for the backward or forward classes help? Growth has proved elusive with unemployment, inflation and lower growth rates, however much we may wish to sanitise the facts. Quotas are not the answer.

H.N. RAMAKRISHNA,
Bengaluru

■ What is unfortunate is the way the Centre has demeaned the purpose of affirmative action. Such actions, by different governments, have not only reduced the system of reservation to a mere political tool to appease certain communities but have also undermined the role of the government as just a jobs-haven rather than an able caretaker of the country. Taking into account this proposal along with existing quotas, is this all the value the country gives to merit and talent? It is no wonder that India is a victim of brain-drain.

M.B. BHARGAV,
Bengaluru

Australia win

The Indian cricket team's Australian triumph is a testimony to the squad's unfaltering dedication and hard work. The boys had to overcome a lot of hurdles such as injury-stricken players, struggling openers and a foreign turf. But in the face of such overwhelming odds, the 'Men in Blue' emerged victorious.

KSHITIJ TRIPATHI,
Lucknow

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CORRECTIONS & CLARIFICATIONS:

>>In the report headlined "10% quota Bill may fail legal test" (Jan. 8, 2019), there was an erroneous reference to the *11-judge* Kesavananda Bharati judgment. It was actually a *13-judge* Bench. The report talked about the proposal to bring a 10 % quota for the poor over and above the *7% for SCs and 15% for STs* and 27% for Socially and Educationally Backward Classes. It should have been *15% for Scheduled Castes, 7.5% for Scheduled Tribes* and 27% for Socially and Educationally Backward Classes.

>>In "Navy's new air base in north of Port Blair" (Jan 8, 2019), there was a reference to a runway of about *3,000 metres* which would in phases be extended to *9,000 metres*. It should have been *3,000 ft* and *9,000 ft*.

The Readers' Editor's office can be contacted by Telephone: +91-44-28418297/28576300; E-mail:readerseditor@thehindu.co.in