



Managing perceptions

From the viewpoint of pragmatism, the Centre had no choice but to amend the SC/ST Act

If we accept that politics is about pragmatism, about managing perceptions, about defusing difficult situations, and keeping a sharp eye out on the prevailing political winds, then the Union Cabinet’s decision to amend the provisions of the SC/ST (Prevention of Atrocities) Act appears both reasonable and unavoidable. It is arguable that no dispensation at the Centre could have ignored the massive Scheduled Caste protests against the Supreme Court verdict that was perceived as diluting the provisions of the 1989 law. With the call for a nationwide shutdown on August 9, one that an NDA constituent, the Lok Janshakti Party led by Ram Vilas Paswan, had threatened to join, the Centre was goaded into acting quickly. The proposed amendments are aimed at undoing three new rules laid down by the court: that the bar on anticipatory bail under the Act need not prevent courts from granting advance bail if there is no merit in a complaint; that there can be an arrest only if the appointing authority (in the case of public servants) or the district superintendent of police (in the case of others) approves such arrest; and that there should be a preliminary inquiry into complaints. What they do is state that the bar on anticipatory bail will remain “notwithstanding any judgment or order of any court”, that there will be no need for a preliminary inquiry before an FIR is registered and that no approval is required before someone is arrested under the Act.

From the very beginning it was clear that the entire issue had less to do with the correctness of the Supreme Court judgment and more to do with the way it was interpreted, and sometimes deliberately misinterpreted. The judgment had not altered or read down any of the key provisions of the Act. The Court was at pains to emphasise that it was only seeking to protect the innocent against arbitrary arrest and that there should be no denial of relief and compensation to SCs and STs, whose rights should be protected. While no one can object to procedural safeguards against false accusations, it is possible that the Court’s concerns about what it saw as misuse of the Act resulted in the perception that it was introducing norms to prevent quick action on complaints. It is arguably much more likely that such perceptions consolidate at a time when the conviction rate under the Act is dismally low and atrocities against Dalits are a disturbing reality. It is vital that any law that is founded on punishing social ostracisation maintains a fine balance between protecting the rights of the individual to a fair trial and enforcing not only the letter but also the spirit of a legislation that was introduced to protect the dignity of the disadvantaged, who have suffered unspeakably as a result of the abhorrent practice of social discrimination.

Discounting logic

The draft e-commerce policy has too many echoes from the licence-raj era

The process of putting together a regulatory framework for electronic commerce in the country is finally speeding up. A task force of the Union Commerce Ministry has submitted the draft National Policy on Electronic Commerce, which will now be studied by a 70-member think tank chaired by Suresh Prabhu, the Union Commerce, Industry and Civil Aviation Minister. India’s e-tail business, estimated to be worth around \$25 billion, is still a fraction of the overall retail sector in the country, but it has been witness to some frenetic activity of late, including the merger between home-grown, but Singapore-based, Flipkart and global giant Walmart. Over the coming decade, the e-commerce pie is expected to swell to \$200 billion, fuelled by smartphones, cheaper data access and growing spends. The draft policy proposes the creation of a single national regulator to oversee the entire industry, although operationalising its different features would require action from multiple Ministries and regulators. This would also need amendments to existing legislation and rule-books. Consumer protection norms to guard online shoppers from possible frauds too are overdue. As per data available for the first eight months of 2017-18, over 50,000 e-commerce grievances were made to the Consumer Affairs Ministry helpline. Traditional retailers too have voiced concerns about large e-tail players with deep pockets pricing them out of the market, and have been seeking a level playing field.

Much work, however, remains to be done to forge a cohesive framework from the draft. Among the ideas in the draft policy are a sunset clause on discounts that can be offered by e-commerce firms and restrictions on sellers backed by marketplace operators. The aim may be to prevent large players from pricing out the competition though unfair practices, but taken too far such licensing and price controls can depress the sector. To give the government a say on who can offer how much discount and for how long, instead of letting consumers exercise informed choices, would be a regressive step for the economy. Foreign direct investment restrictions on players who can hold their own inventory are sought to be lifted, but there must be a majority Indian partner and all products have to be made in India. This seems like a leaf out of India’s retail FDI policy that has similar procurement diktats that are not easy to meet or monitor. E-tailer costs are also likely to rise on account of proposed norms on storing and processing data locally, while consumers and firms could both question the plan to stipulate payments via Rupay cards. The proposed e-commerce policy could drive away those planning online retail forays – and the opportunity to create jobs and benefit consumers would be lost.

A basis for Opposition unity

Why Rahul Gandhi should withdraw from the PM race and build on a Karnataka-style alliance



G. SAMPATH

When the Congress’s newly reconstituted Working Committee, which met for the first time on July 22, announced its intent to pitch Rahul Gandhi as the Opposition’s prime ministerial face, it got a reality check from one of its most steadfast allies, the Rashtriya Janata Dal (RJD). The RJD scion, Tejashwi Yadav, declared that Opposition parties will decide on this collectively.

Shortly after Mr. Yadav’s statement, the Congress too clarified that it was not averse to anyone else becoming Prime Minister so long as it’s not someone backed by the Sangh Parivar. This marks a significant shift, with implications for Opposition unity.

Optimists versus sceptics

There are two streams of opinion on Opposition unity: the optimists and the sceptics. The optimists believe that given the imminent danger of India becoming a Hindu Rashtra where the space for democratic politics would be all but extinguished, Opposition unity is inevitable because it is a matter of political survival for every party that is not the BJP.

The sceptics, however, are convinced that attempts at Opposition unity are doomed to collapse under the weight of political contradictions and colliding ambitions. What’s more, the weakest link of any such anti-BJP front, they point out, would be the Congress itself, which has so far failed to offer a meaningful alternative to the ideological challenge posed by the BJP.

The sceptics have a point. Opposition unity as an electoral tactic may work up to a point. But without a coherent political proposition, there is nothing to distinguish it from mere opportunism. And so far, the Congress has failed to offer anything more than opportunistic attacks on Prime Minister Narendra Modi’s various blunders – from demonetisation to the implementation of the Goods and Services Tax, and the Rafale deal. The idea seems to be to hammer away at his failures and hope that anti-incumbency does the rest.

A material basis for unity

Mere anti-BJP-ism or anti-Modism is just not good enough – either to hold the Opposition together, or to defeat the BJP in 2019. To stand a fighting chance of achieving either, the alliance must address a genuine political need gap, and in the current juncture, the most obvious one is the absence of a platform at the national level for constituencies whose interests cannot be seriously represented by the BJP, given the constraints of the politics it espouses. These constituencies are the social and geographical inverse of the BJP’s core electoral base, which consists of the savarnas (forward castes) and the urban middle and upper classes, primarily from the Hindi-speaking belt.

Assuming that the base of material interests and social stratification determine the superstructure of democratic politics, an oppositional front capable of challenging the BJP-RSS combine – without ending up in the cul de sac of soft Hindutva – would have to be a coalition that brings together two related but distinct constellations: parties that represent non-savarna communities (Dalit-Bahujan-Adi-vasis), and regionalist parties.



Traditionally, India’s Hindi-speaking savarna elite have either directed or demarcated the politics of the national parties, including the Left Front. But its hegemonic relationship with non-savarna and regional interests has so far been tempered by the Constitution, the very document that is now in danger of being undermined. The Constitution offers two principles for navigating this hegemony democratically – social justice and federalism – both of which the Modi government has observed more in the breach, as evidenced by the disaffection among its allies.

While the Lok Janshakti Party had threatened to join the anti-government Dalit protests scheduled for August 9, the Telugu Desam Party (TDP) and the Peoples Democratic Party are already out of the NDA. Another regional ally, the Shiv Sena, has threatened to go it alone in 2019. Clearly, there are limits to how much the BJP can accommodate non-savarna and regional interests at the national level.

The Congress, too, suffers from the same limitation, and this is one of the factors behind its interminable decline. The savarnas have historically had the biggest stakes in the national project and the Indian state, and have also been its biggest beneficiaries. It is thus no coincidence that not a single one

of the non-savarna parties – including those that have a national status, such as the Bahujan Samaj Party – have a national footprint. Nor is it accidental that only the regionalist parties could resist the BJP juggernaut in 2014. And again, it is not surprising that four years of Mr. Modi’s rule have seen a steady shift in the balance of power between the Centre and the States in favour of the former. Every regional party knows that this shift will get institutionalised if the current regime remains in power.

Opting out

In this scenario, the question of who would be the Opposition’s prime ministerial face has given the Congress an ideal opening to present itself as the only platform where regional and non-savarna agendas can be credibly articulated at the national level. In fact, if Mr. Gandhi were to proactively withdraw from the prime ministerial race, it could help in three ways. First, it would prove wrong Mr. Modi’s contention that Mr. Gandhi is in a tearing hurry to occupy the Prime Minister’s chair. Apart from blunting the usual barbs about dynastic politics, it would lend credibility to Mr. Gandhi’s image of a reluctant politician whose decision to enter the electoral fray is rooted not in a lust for power but in idealism.

Second, it would create a welcoming space in the alliance for parties that dislike the BJP but would rather go it alone than play second fiddle in someone else’s pre-poll orchestra.

Third, from a long-term perspective, this is the only viable strategy for a Congress revival at a time when it’s getting squeezed out in State after State. In a way, this entails a return to the template of the old ‘Congress system’,

in which conflicting interests were accommodated under a capacious pluralistic umbrella. But unlike in the past, this time around ‘the Congress system’ would need to break free of the savarna elite that still controls the party. It needs to mould itself into a national pivot for non-savarna and regional interests that now feel compelled to ally with whichever party is in power at the Centre – regardless of how repugnant they may find its politics – if they wish to secure even their basic entitlements. Some, like the TDP, which seems to have recently discovered that even this doesn’t work, are sure to be interested in alternatives.

Mr. Gandhi, who has shown sympathy for both social justice and federalism, would do well to develop this realignment into something more – perhaps a fresh political vision for the Congress. We saw its potential in Karnataka, where the Congress, despite winning more than double the number of Assembly seats the Janata Dal (S) did, gave the chief minister-ship to the regional player.

Conceding space

The onus is on Mr. Gandhi to refine this ‘Karnataka model’, as it were, for the national stage. This model of politics requires the Congress to concede more space to smaller parties and take a long-term view of alliances. In contrast, the currently dominant Gujarat model is a ruthlessly homogenising force where one party calls the shots.

The 2019 elections may thus see a contest between the Gujarat model and the Karnataka model. It is up to the Opposition parties, and the Congress in particular, to ensure that it is not a one-sided one.

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Data localisation is no solution

The data protection bill is an opportunity for India to be a partner under the CLOUD Act



MADHULIKA SRIKUMAR & BEDAVYASA MOHANTY

Calls for data localisation are not new. It has been a mainstay of Indian policymakers’ demands from foreign technology companies. The Justice Srikrishna Committee in its report accompanying the draft Personal Data Protection Bill released on July 27 notes that eight of the top 10 most accessed websites in India are owned by U.S. entities. This reality has often hindered Indian law enforcement agencies when investigating routine crimes or crimes with a cyber element. Police officials are forced to rely on a long and arduous bilateral process with the U.S. government to obtain electronic evidence from U.S. communication providers. The committee seeks to correct this.

User data

The Bill calls for a copy of user data to be mandatorily localised in India, believing that it will “boost” law enforcement efforts to access data necessary for investigation and prosecution of crimes. If passed in this form, however, the law will be counterproductive,

hurting law enforcement efforts and undermining user rights in the process.

The last few months have witnessed an amplification in data localisation demands, with the Reserve Bank of India, to take one example, calling for local storage of financial data.

A fundamental error that the Srikrishna Committee seems to have made is in its belief that the location of data should determine who has access to it. The reason that Indian law enforcement relies on an outdated Mutual Legal Assistance Treaty (MLAT) process to obtain data stored by U.S. companies is because the U.S. law effectively bars these companies from disclosing user data to foreign law enforcement authorities. Technology companies are allowed to share data such as content of an email or message only upon receiving a federal warrant from U.S. authorities. This scenario will not change even after technology companies relocate Indian data to India.

The committee too acknowledges that data localisation is not a perfect solution. Its decision is borne out of hope that when questions of data access are determined, their storage here will give rise to a strong Indian claim. This is not an unreasonable expectation, albeit a weak one.

Even if Indian authorities force compliance from U.S. companies,



it will only solve a part of the problem. The draft bill mandates local storage of data relating to Indian citizens only. Localisation can provide data only for crimes that have been committed in India, where both the perpetrator and victim are situated in India. Prevalent concerns around transnational terrorism, cyber crimes and money laundering that the committee rightly highlights will often involve individuals and accounts that are not Indian, and therefore will not be stored in India. For investigations into such crimes, Indian law enforcement will have to continue relying on cooperative models like the MLAT process.

Questions around whether access to data is determined by the location of the user, location of data or the place of incorporation of the service provider have become central considerations for governments seeking to solve the cross-border data sharing conundrum. The Clarifying Lawful Overseas Use of Data (CLOUD) Act, passed by the U.S. Congress earlier this

year, seeks to de-monopolise control over data from U.S. authorities. The law will for the first time allow tech companies to share data directly with certain foreign governments. This, however, requires an executive agreement between the U.S. and the foreign country certifying that the state has robust privacy protections, and respect for due process and the rule of law.

On procedural questions of law enforcement access, the draft Bill falls very short. Even if it were to be passed, legacy provisions such as Section 91 of the Code of Criminal Procedure (empowering police to access any “document or thing”) will continue to apply – bereft of review or oversight by a judicial or independent authority. The Committee, while imposing data localisation, should have also necessarily tackled how this data will be obtained by police authorities – whether within its mandate or not.

The CLOUD Act creates a potential mechanism through which countries such as India can request data not just for crimes committed within their borders but also for transnational crimes involving their state interests. Access to data would be determined by where the user is located and the reasonableness of claim that a country has in seeking her data. The draft Bill was an opportunity to update India’s data protection

regime to qualify for the CLOUD Act. The Bill, while recognising principles of legality, “necessity and proportionality” for data processing in the interest of national security and investigation of crimes, fails to etch out the procedural rules necessary for actualising these principles. Even rudimentary requirements such as a time limit for which data can be stored by law enforcement are missing from the Bill.

Onus on Parliament

In other words, the Committee has sought to localise data for law enforcement but categorically refused to afford this data any procedural protection. The Committee has instead placed the onus on Parliament to enact another comprehensive legislation for surveillance reform.

With the highest number of users of American technology offerings and a high number of user data requests, second only to the U.S., India is a clear contender for a partnership under the CLOUD Act. If New Delhi recognises this opportunity and reforms laws around government access to data, both the Indian user and law enforcement will be better served in the long run.

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LETTERS TO THE EDITOR

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Preparing for 2019

If we go by previous examples of such talks, West Bengal Chief Minister Mamata Banerjee’s daylong deliberations with Opposition leaders will turn out to be a storm in a teacup (“Our first aim is to oust the BJP: Mamata”, August 2). The Opposition has a huge mountain to climb in order to get the better of the BJP, and it doesn’t seem to have a plan yet. Ms. Banerjee may say that all the Opposition leaders are kings but she, like many others in the Opposition, is known to be nursing prime ministerial ambitions. How the Opposition decides a prime ministerial candidate will be interesting to watch.

C.G. KURIAKOSE, Kothamangalam

The Opposition seems confused. On the one hand, Ms. Banerjee says the Opposition is united in its aim to defeat the BJP; on the other, it has not presented any alternative agenda. Time is running out for the Opposition to come up with concrete ideas as the BJP is busy making calculated moves before 2019, such as taking up the National Register of Citizens.

N. NAGARAJAN, Secunderabad

The BJP has failed to live up to our expectations. With both the Congress and the BJP failing to keep their promises, it is up to regional parties to shoulder the responsibility of protecting the interests of the nation. Regional parties

need to do a balancing act: they have to fulfil their regional agendas and also adopt a broader outlook to emerge as an alternative to the BJP in 2019. We have many experienced leaders in regional parties. If unity is achieved among them, the election may look different.

KSHIRASAGARA BALAJI RAO, Hyderabad

Except for the Congress, which still prides itself as a pan-India party, the rest of the Opposition parties are more or less confined to their own turf, including the Trinamool Congress. These regional leaders cannot nurse ambitions of becoming prime ministerial candidates as they would have to stave off opposition from within the Opposition.

So, the only way out is to keep the prime minister question in abeyance for now. One significant difference from previous talks about alliances is that the Congress has shown that it is ready to play second fiddle.

C.V. ARAVIND, Chennai

Uproar over NRC

West Bengal Chief Minister Mamata Banerjee’s statement is condemnable since it could provoke violence (“Mamata in contempt of court: Assam”, August 2). The NRC exercise is not arbitrary; it is being monitored by the Supreme Court. The Finance Minister tweeted that Ms. Banerjee had raised the issue of “infiltration” in her State, in 2005 in the Lok

Sabha. Today, she seems to have taken a U-turn. Ms. Banerjee must explain the change in her stance.

P. ARIHANTH, Secunderabad

The NRC exercise is a well-intended one. It is alarming that about 40 lakh people do not find their names in the second draft. A big chunk of them may not find their names in the final draft either and will become stateless. In such a case, India’s humanitarianism will be tested but it is also important for the nation to consider the national interest. The approach towards the exercise should be earnest and unbiased so that all criticisms can be refuted properly. Citizens should not get affected for no fault of theirs. Further,

what is the guarantee that those whose names are missing in the list will not move to adjacent States, burdening them in the process? The exercise is long and complicated and each problem and solution should be well-thought-out.

D. SETHURAMAN, Chennai

The Central and Assam governments over the years could have controlled the influx of immigrants from Bangladesh, but they failed. After years of these immigrants settling in India, it seems unfair to suddenly say that they are not citizens and render them stateless.

VIMAL VASUDEVAN, Palakkad

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