



Polls and polarisation

There is very little for the BJP to cheer in the latest round of by-elections, and a lot to learn

Of all the Lok Sabha by-elections in this round, Kairana in Uttar Pradesh evoked special interest because of the coming together of the opposition parties against the Bharatiya Janata Party. The candidate of the Rashtriya Lok Dal, a party with a base consisting largely of the Jats, was a Muslim woman, Tabassum Hasan, and she won as a representative of a broad-based coalition, which included the Samajwadi Party, the Bahujan Samaj Party and the Congress. That the RLD chose a Muslim candidate was significant as the party had suffered an erosion in its support base after the Muzaffarnagar riots of 2013 involving Jats and Muslims. To try to win back his core constituency of Jats with a Muslim candidate was a bold strategy, but RLD leader Ajit Singh was encouraged not only by the process of rapprochement on the ground over the last few months, but also by the backing of the three major opposition parties in U.P. Mr. Singh knew he needed the support of all the anti-BJP votes, and a Muslim candidate must have seemed the best bet. The BJP retained its core base, but this was never going to be enough in western U.P. — just as it was not against the SP-BSP alliance in Gorakhpur and Phulpur in March. The Noida Assembly by-election stayed with the same trend, with the SP winning it back from the BJP. What should worry the BJP is what this portends for the 2019 Lok Sabha election. Instead of a communal polarisation, the BJP is faced with a political polarisation. The BJP's very success in the first-past-the-post system appears to have created the conditions for its defeat: a forced coming-together of disparate parties. With less than a year to go for the big election, this rainbow coalition is likely to stay the course. Nothing succeeds like success.

In Maharashtra the results were mixed. The party that gave the BJP the chase in the Palghar Lok Sabha seat was its own ally in government, the Shiv Sena. In Bhandara-Gondia, the Nationalist Congress Party wrested the seat from the BJP. To add to the cheer in the opposition camp, the Assembly seat of Palus-Kadegaon was retained by the Congress. The other Lok Sabha seat at stake, Nagaland, went the NDA way, and the BJP won an Assembly by-election in Uttarakhand. But elsewhere, the BJP and the NDA had little cause for celebration. The Janata Dal (United), the BJP's current ally in Bihar, lost to the Rashtriya Janata Dal, signalling some erosion in the support base of Chief Minister Nitish Kumar. To no one's surprise, the Assembly seats in Punjab, Karnataka and Meghalaya went to the Congress, and the Left Democratic Front retained its seat in Kerala. Likewise, the JMM retained its two seats in Jharkhand, and the Trinamool held Maheshtala. Overall, the main message from these results from different parts of the country is far from comforting for the BJP.

Guarding the peso

President Macri's reformist credentials are on the line as Argentina faces economic crisis

Argentina is not alone among major emerging economies in trying to weather the current run on currencies due to the rallying U.S. dollar and rising interest rates. But with a history of recurrent defaults and devaluation of the peso, Buenos Aires has greater cause for concern. President Mauricio Macri, whose market-friendly image ensured Argentina's return to the global capital markets in 2016 after a decade, has a special stake in ensuring that his reforms remain on track. Following a record sovereign debt issue that year, Argentina became the second Latin American state after Mexico to launch a 100-year maturity bond in 2017. The new optimistic narrative was based on the former businessman's commitment to reducing the fiscal deficit, building on the prevailing reasonable ratio of public borrowing to GDP. Nevertheless, Mr. Macri's poll promise to make Argentina a "normal country" has been put to the test mid-way through his term. In early May, the currency tumbled to a record low against the greenback, forcing the central bank to raise key interest rates thrice within a week to 40% to shore it up. Mr. Macri even sought a multi-billion loan from the IMF, a deeply sensitive move given the once-hostile relations with the lender and a public apprehensive about the institution's overall mission. The most recent crisis in Latin America's third largest economy — the 2001-02 default to the tune of \$95 billion, the largest in the world — had unleashed hyperinflation, social unrest and political instability. When the then socialist President, Néstor Kirchner, took an aggressive stance vis-à-vis investors, the country was effectively closed from global money markets for a prolonged period. Then, at the height of its economic collapse earlier this decade, Mr. Kirchner's wife and successor, Cristina Fernández, lapped the hedge funds, which held out against the country's debt restructuring terms, as "vultures". Now the situation has raised questions about the sustainability of Mr. Macri's so-called gradualist reforms, which were dubbed neo-Keynesian rather than neoliberal.

With the treasury minister recently hinting at further fiscal tightening, there are signs of a shift in tone, if not the overall policy. Conversely, Mr. Macri has been prudent to promise continuity with his cautious approach to regulate subsidies and to legislate tax and pension reforms. The era of economic profligacy that was propped up by the commodities boom in the last decade is probably history now. At the same time, no price is too high to avert a repeat of the horrors of the social upheavals of more recent years. Occupying a centrist platform, Mr. Macri is, however, better placed than most other politicians in the country to negotiate a path ahead to balance conflicting interests.

What will the caretaker take care of?

The question before Pakistan is whether the caretaker PM can maintain his writ over the judiciary and the military



S. AKBAR ZAIDI

In a country which has had three-decade-long military dictatorships, interim caretaker governments are somewhat of a novelty. For whenever the military takes over, it changes the pattern and rules of political transition, with the preference to transfer power to one of its own. Yet, it is also surprising that Pakistan has had as many as 10 general elections since 1970. Except for those in 1970, 2008 and 2013, all the others have been neither free nor fair, with the military's imprint on most of them. It is in the most recent of civilian transitions, following Pakistan's longest democratic journey, of a decade, that Pakistan's seventh caretaker government since 1990 takes over today, ostensibly for a two-month period.

Emblematic choice

Of the previous caretaker Prime Ministers, five have been politicians with little following or standing, and one economist lent to Pakistan by the World Bank. This is the first time that a retired judge of the Supreme Court — a retired Chief Justice of Pakistan (CJP), no less — has been chosen by the previous leaders in Parliament to be the bridge between elected governments. The selection of a former CJP is clearly emblematic of the rise of Pakistan's superior judiciary as one of the two institutions now dominating political discourse and political outcomes in Pakistan.

Of the three institutions — the military, judiciary and Parliament

— for five decades from 1958 to 2008, the military dominated, barring a few short years in the early 1970s. The judiciary had been a constitutional ally of the military throughout this period, defending the military's need to intervene in the civilian domain under a supposed 'doctrine of necessity'. A shared vision of society and power kept both entwined in subverting any semblance of civilian political agency. However, this bonhomie between the military and judiciary changed in March 2007, when a sitting military dictator-president asked the CJP to resign, something that the latter refused to do.

The Lawyers' Movement of 2007 against the pressure put by General Pervez Musharraf on the CJP was a key catalyst in bringing back democracy to Pakistan in 2008, after nine years of yet another military dictatorship. The Lawyers' Movement became one of the few popular movements against military rule and saw the superior judiciary taking on an independent and, for a change, pro-democratic, position, defending the electoral process against military hegemony. At a time when the media was coming of age as another independent institution a decade ago, the judiciary finally gained respect for its independence.

Just as the military lost some of its power after 2007, the judiciary was seen to emerge as a free and independent force, defending the Constitution. A decade later, today as Pakistan prepares to go to elections in a few weeks, the superior judiciary is being castigated for overstepping its role of playing fair and becoming a handmaiden to the military, the other dominant un-elected and unaccountable institution. Despite the covert censorship imposed on the media,



newspaper editorials have gone as far as calling the Supreme Court "self-righteous" and suggesting that it is overstepping its writ of interpreting the Constitution by meddling in administrative and political affairs. Today, the threat to democratic politics in Pakistan comes not just from the military as it has for decades — the judiciary is being perceived as being partial to certain individuals and institutions, with the Supreme Court sending home two elected Prime Ministers, one for contempt of court and the other for not being a sagacious and righteous Muslim. Following the 2007 Lawyers' Movement, the term which became popular in the public sphere with regard to the judiciary was 'judicial activism'. In 2018, 'judicial martial law' and 'judicial imperialism' have now become part of Pakistan's public lexicon.

The military's mind

Numerous independent newspapers and research organisations, as well as many journalists, have been talking about a process of prepol rigging and political engineering under way in Pakistan for many months now, so that the results of the July 2018 election could bring about 'positive results' for the military, with no single party winning an absolute majority. This started with the dismissal of Nawaz Sharif as Prime Minister in

June 2017, followed by him being barred from public office for life, both decisions taken by the Supreme Court rather than by the military. Mr. Sharif's party, the Pakistan Muslim League (Nawaz), or PML(N), was expected to win again in the next elections, and by ending his political career, an attempt has been made to create divisions within the party. Moreover, numerous other measures have also been taken which would suggest that at least one 'hidden hand' is involved in ensuring that certain groups and individuals do not contest elections from the ticket of the PML(N), with defections taking place to strengthen the military establishment's favourite candidate, Imran Khan.

Over the last few months, much evidence has emerged in the public domain showing that Pakistan's army played an active role in destabilising Mr. Sharif's government over the last few years. Mr. Sharif has said this was on account of him bringing a former Chief of Army Staff, General Musharraf, to trial for treason. While the military and its institutions have been active in imposing severe controls on the media, which many journalists say are far worse than those imposed by General Zia-ul-Haq in the 1980s, the judiciary has been seen to be the military's active partner, imposing its judicial writ where necessary.

On Justice Mulk's watch

It is against this background that a former CJP, Nasirul Mulk, has become Pakistan's caretaker Prime Minister. Perhaps it might not be inconsequential to mention that it was when he was on the Bench of the Supreme Court of Pakistan in 2012 that proceedings for contempt of court were initiated against the incumbent Prime Mi-

nister, Yousuf Raza Gilani, who was eventually disqualified.

In the many months leading up to the end of the tenure of the government that was elected in 2013 and to the appointment of the caretaker Prime Minister, there have been widespread accusations, most backed up with much evidence, that Pakistan's military has been undertaking prepol rigging and electoral engineering, to ensure that the candidates of the PML(N) do not win, and that there is a hung Parliament. Moreover, the press has been stifled, media houses reprimanded, and dissent strangled in what once was a very vibrant media landscape, even in the times of General Musharraf. At the end of 10 years of a democratic government, the judiciary and the military are perceived to be in cahoots with each other, ensuring the domination of both non-elected and unaccountable institutions over Parliament.

For a former CJP, who seems to have considerable respect amongst analysts and lawyers for being non-partial, heading a government for two months leading up to Pakistan's 11th general election since 1970, the key question is whether a supposedly independent individual can maintain his writ over that of two institutions which are hell-bent on having their own way. Elected governments have been cut down to size and the bar has been lowered to such an extent that perhaps the only thing the caretakers could do is to ensure that elections are held on time. Ensuring that they are fair and free may no longer be in their jurisdiction.

S. Akbar Zaidi is a political economist based in Karachi. He also teaches at Columbia University in New York, and at the IBA in Karachi

Settling disputes out of court

Pre-litigation mediation is an important step to improve the ease of doing business



CHITRA NARAYAN

Mandatory pre-litigation mediation in commercial disputes has been introduced by the recent Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, which amends the Commercial Courts Act of 2015. This amendment is expected to alter parties' sense of responsibility in resolving disputes. Mandatory pre-litigation mediation puts the ball in the court of the parties involved, rather than looking at external agencies like courts, and urges them to engage with and resolve disputes.

The meaning of mediation

The Commercial Courts Act was legislated to improve the enforcement of contracts, as part of improving the ease of doing business. The law defines "commercial disputes" to include regular commercial and business contracts, construction contracts, shareholder agreements, licensing agreements, etc. The law makes changes for reduction of timelines, tightening processes and designat-

ing special commercial courts and commercial divisions to deal with these disputes, among others.

The ordinance stipulates that no suits concerning commercial disputes will be filed under this Act unless the person filing the suit exhausts the remedy of pre-litigation mediation. If an urgent interim relief is required, this pre-litigation mediation can be dispensed with. However, in all other cases, the mediation is mandatory and will be conducted within a period of three months (extendable by another two months with the consent of the parties). Any settlement arrived at through mediation will have the status of an arbitral award on agreed terms and be enforceable like a decree of court. Importantly, the time limits for filing cases will pause during the time the pre-litigation mediation is underway.

Mediation is a process of resolution of disputes by the parties to them. It involves discussion of the conflicts, moving out of the loop of allegations and counter-allegations, and assessing where interests lie in resolving the disputes. Options for settlement are explored and a settlement is worked out through joint evaluation. The process is managed by a neutral person called the mediator, who may evaluate the disputes and weigh in on options for settlement (a variant called conciliation) but

has no authority to impose a settlement. The participation of the disputants is voluntary. The terms of settlement, if the parties do settle, are decided by the parties. The discussions are confidential.

Mediation, and mandatory mediation specifically, is not new in India. The Arbitration and Conciliation Act, 1996, makes a settlement arrived at through conciliation enforceable like a court decree. Under the Code of Civil Procedure, judges can refer cases to mediation. The Micro, Small and Medium Enterprises (MSME) Development Act, 2006, mandates conciliation when disputes arise on payments to MSMEs.

While the ordinance is an attempt to make parties evaluate and utilise mediation, some questions arise. One of the advantages of mediation is its voluntary nature; how does this reconcile with the mandatory nature of pre-litigation mediation? Will a pre-existing mediation agreement be enforced? What will be the status of cross-border mediation?

The Italian case

Mediation policies in other countries mandate mediations through various mechanisms, with good effect. They show that mandatory mediation does not mean a compulsion to mediate and offer policy choices under the amendment. Italy, which faces a high rate of



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pendency of cases, has adopted what is referred to as 'opt out' mandatory mediation. In 2010 and 2013, it introduced a law for pre-litigation mediation. Attempts to mediate were made mandatory for certain disputes (like partition and joint ownership of property) before a case was filed in court.

This law reconciles the voluntary nature of the process, while mandating mediation. All disputants are required to attend, with their lawyers, one session of mediation. After this session, any or all the disputants can choose to opt out of mediation and the disputants can proceed with their case in court. Parties who mediate and settle get tax credits.

The outcome of this policy is encouraging. Disputants have found mediation worthwhile and continued with the process towards resolution. This has resulted from the opportunity of understanding the process in the mandatory first session. Italy has seen almost 200,000 cases going in for mediation until 2017. After

trying out one session of mediation, when parties continued with the mediation, almost 50% of those cases were settled. More strikingly, Italy has seen a drop of 30-60% in the filings of certain categories of cases covered for mandatory mediation.

Another approach to mediation policy has been to impose costs on disputants refusing to mediate, as is done in the U.K.

What lies ahead

The ordinance is an important step in mainstreaming mediation, but it is not enough. Most disputes seek urgent orders for preservation of status quo or restraint orders on filing. With such an application, pre-litigation mediation could effectively be given a go-by. There is a need for a comprehensive policy on mediation, rather than the abbreviated and disconnected steps so far. This policy would encapsulate the process, the role and professional responsibilities of mediators, the rights and obligations of parties in the process, and the outcome of the mediation agreement. When seen in the context of a deliberate and well-considered law, mediation as a process would be more credible to disputants, as has happened in the case of arbitration.

Chitra Narayan is a Chennai-based advocate and mediator

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.

Probing charges

The decision of the board of ICICI Bank is welcome but there will always be questions about the credibility of the inquiry panel that is being constituted by the audit committee of the very company whose CEO has charges levelled against her ("ICICI Bank to inquire into allegations against Kochhar", May 31). The bank has to do much more to regain trust. It would only be fair if a representative from either SEBI or the RBI is co-opted, so that there are no reservations on the findings of the committee. Meanwhile, Chanda Kochhar should consider relinquishing the post of CEO until the inquiry panel publishes its findings, so that charges of influencing

the inquiry panel can be nipped in the bud.

V. SUBRAMANIAN,
Chennai

Rajinikanth's comments

To show displeasure against the government in a peaceful manner is a constitutional right ("Continuous protests will turn T.N. into a graveyard: Rajini", May 31). The fact that people in Tamil Nadu have been continuously protesting against the government means that their voice has not been properly heard. Instead of blaming the people, Rajinikanth should advise the government to listen to people's concerns.

T. ANAND RAJ,
Chennai

Rajinikanth's assertion is the truth. There are videos

of the mob chasing the police, pelting stones at the Collectorate, and burning vehicles. These are the anti-social elements who turned a peaceful protest into a violent one.

R. VISWANATHAN,
Chennai

Is Rajinikanth implying that people should not protest at all? In a democracy, protests are an acceptable way of bringing to the government's notice the problems in its proposals. If society remains mute, this will lead to a totalitarian regime.

C. G. SIVAKUMARAN,
New Delhi

Debate in the Chandra Congress leader P.

Chidambaram's advice for former President Pranab Mukherjee is reasonable

("Tell RSS what is wrong with its ideology", May 31). But I think Mr. Chidambaram is wrong in saying that if he were in Mr. Mukherjee's place, he would not have accepted the invitation. Those opposed to the RSS's ideology should participate in such programmes. Mere antagonism and hatred will not help; debating will.

C.G. KURIAKOSE,
Kothamangalam

One paisa cut

With the fuel price cut of one paisa a litre, oil companies and the government have elevated the stature and value of the long-forgotten paisa and made it a showpiece ("After 16 days of hikes, fuel prices cut — by 1 paisa", May 31). Imagine, if I filled my car tank with 25 litres of petrol,

I will save a princely sum of ₹0.25! What a cruel joke on the people of India.

I.P.P. PRABHAKARA RAO,
Secunderabad

We need to think of fuel conservation measures. Footpaths are either broken or have been taken over by hawkers and bicycles; we have failed to augment city buses or improve their condition; passenger trains

do not connect most places, thus forcing people to take out their vehicles; mass transport systems are still in the planning stage; and cars are still seen as a status symbol. While we wait for the prices to come down, we can take some steps to conserve fuel too.

M.V. NAGAVENDER RAO,
Hyderabad

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www.hindu.com/opinion/letters/

CORRECTIONS & CLARIFICATIONS:

>>The Business page report headlined "RCom offers Rs. 500 cr. to Ericsson in NCLAT" (May 30, 2018) erroneously referred to Ericsson as a Swiss telecom equipment maker. Ericsson is a Swedish telecom equipment maker.

>>The Sports page article, "I didn't want to punish my body any more" (May 31, 2018), erroneously stated that discus thrower Vikas Gowda's last competitive outing was Asian Championship in December 2017. The Asian Championship was held in July 2017.

It is the policy of The Hindu to correct significant errors as soon as possible. Please specify the edition (place of publication), date and page. The Readers' Editor's office can be contacted by Telephone: +91-44-28418297/28576300 (11 a.m. to 5 p.m., Monday to Friday); Fax: +91-44-28552963; E-mail: readerseditor@thehindu.co.in; Mail: Readers' Editor, The Hindu, Kasturi Buildings, 859 & 860 Anna Salai, Chennai 600 002, India. All communication must carry the full postal address and telephone number. No personal visits. The Terms of Reference for the Readers' Editor are on www.thehindu.com