Interpretations that impede a just social order

In May 2021, the Supreme Court of India declared as unconstitutional a Maharashtra law that provided for reservation to the Maratha community in education and public employment in the State. Four judges of the five-judge Bench wrote separate opinions, from which three primary findings emanated.

Three Primary Findings:

1. First, the Court held that the Maratha community did not constitute a socially and educationally backward class.
2. Second, the judges discovered that the law was in breach of a rule previously set by the Court disallowing reservations made in excess of 50% of the total available positions.
3. Third — and on this finding, two judges on the Bench dissented — the Court held that state governments had no independent power to declare a group as a backward class.

The latter two findings run sharply athwart values of equality and federalism, which the Court has long regarded — in rhetoric if nothing else — as integral to India's democracy.

Not from the Constitution

1. The idea that reservations ought to be restricted to 50% does not stem from the Constitution. The text of Articles 16(4) and 15(4) which confer power on the government to make reservations contains no such limitation.
2. Originally, however, these clauses were seen by the Supreme Court as exceptions to a broad rule of formal equality that was thought to be envisioned by the Constitution. To that end, the Court held that allowing reservation in excess of 50% would lead to an exception overriding a rule.
3. But a seven-judge Bench, in State of Kerala vs N.M. Thomas (1975), laid this theory to rest. There, the Court held that a programme of reservation was inherent in the Constitution's basic guarantee of equal treatment and that affirmative action by the state was compelled by an objective of attaining substantive equality.

4. With that, the rule requiring that reservations stay under 50% ought to have been deemed incongruous. But when the Court sat as a nine-judge Bench in Indra Sawhney vs Union of India (1992) it sustained a paradox.
5. The majority on the Bench ruled, on the one hand, that N.M. Thomas was correct in seeing reservations as embedded in a constitutional vision of substantive equality, and, on the other hand, that reservation made in excess of 50%, barring exceptional circumstances, was harmful to that very vision.
6. As the lawyer Gautam Bhatia has pointed out, this is an incompatible position. Yet, efforts to have the verdict in Indra Sawhney reconsidered have failed.
7. The upshot: a mathematical formula with no basis in the Constitution's text is retained, even as the Court pays symbolic obeisance to the ideals of substantive equality.

Court stand on listings

1. These limitations are made worse by the Court's present ruling on the power of State governments to declare groups as backward. Until now, the central government and each of the State governments produced separate lists declaring communities as socially and educationally backwards.
2. Following the Supreme Court's judgment in Indra Sawhney, the determination of backward classes was made by the National Commission for the Backward Classes, at the level of the Centre, and by regional commissions at the level of the State governments.
3. As a result, backward communities that were kept out of the central list were entitled to the reservation at least for those posts and seats under the control of the State government.
4. For example, 25 different groups categorised as backward in Tamil Nadu do not find a place in the central list.
5. This division in power, which gave States autonomy to classify groups as backward, stood in contrast to the lists of Scheduled Castes and Scheduled Tribes.
6. In the case of those lists, right from the Constitution's inception, the power to prepare them vested solely with the Union government. But the Supreme Court has now held that this distinction no longer holds good.

7. The 102nd Amendment (2018), which forms the basis for the Court's ruling, granted constitutional status to the National Commission for Backward Classes. In addition, it introduced Article 342A, through which it stipulated that the President of India may, after consultation with the State government, notify groups of persons within such a State who are deemed to be socially and educationally backwards. Any such "Central List", the clause clarified, could only be altered by Parliament.
8. Article 366(26C) was also added, and "socially and educationally backward classes" was defined as "such backward classes as are so deemed under Article 342A for the purposes of this Constitution".

Term and interpretations

1. In interpreting these changes, a majority on the Bench concluded that the Constitution had now created a structure for the determination of other backward classes identical to that in place for the preparation of the lists of Scheduled Castes and Scheduled Tribes.
2. But it overlooked, at least, two essential factors: first, the term "Central List" — which is used in Article 342A — has always been understood in contradistinction to the term "state list", in that it refers to the categorisation of groups as backward for the purposes of the reservation to posts and seats under the Union government's control.
3. Any other interpretation of the term "Central List" would only impinge on the plain meaning of the term. State governments objected to the 102nd Amendment on the ground that their power was being divested.
4. If the majority's interpretation of the 102nd Amendment is correct, then the changes altogether dispossess States from exercising a time-honoured authority.

The Union government has already filed a petition to review the judgment insofar as it limits the power of State governments. Should the Court refuse the plea, it is imperative that Parliament amends the Constitution and grants to States an express power to determine backwardness. Any other result will offend the delicate balance at the heart of Indian federalism.

A collage of laws that leaves the worker out in the cold

Crux: The universalisation of social security remains an unfulfilled aspiration in the new code on social security.

COVID context:

As COVID-19 destroys lives and livelihoods, an unprepared government has rendered low-paid, informal workers, who constitute 91% of the workforce, totally hapless, pushing them further into poverty.

1. Imagine if these same informal workers had social security (including free basic curative care in public clinics and hospitals, the elderly had old-age pensions, the dying had death/disability insurance or life insurance).
2. Imagine also that they had at least a minimum income guarantee, which prevented them from falling into debt; debt is currently exploding among the poor as their incomes collapsed.

New Code

1. India's Parliament in September 2020 passed a Social Security Code.
2. The SS Code 2020 merges existing social security laws and attempts to include informal workers within the ambit of social security administration. However, an examination of the code reveals that the universalisation of social security remains an unfulfilled aspiration.
3. The SS Code 2020 amalgamates and rationalises the provisions of eight existing central labour laws. Of these acts, employees provident fund, employees state insurance (ESI), maternity benefit, gratuity are entirely for organised sector workers. This has remained so even in the new scheme of things.
4. For employees' state insurance, the existing employee threshold has been withdrawn and now the central government can extend ESI benefits to any organisation irrespective of the number of workers employed therein.

Hurdles for informal workers

1. It proposes that both the central and state governments will formulate schemes for unorganised workers.

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2. The legal framework as proposed in the Code and Rules implies that the basic onus lies on informal workers registering as beneficiaries. Registration is a prerequisite for universal coverage. To avail of social security, an informal worker must register herself on the specified online portal to be developed by the central government.
3. Similar provisions are already there in existing social security schemes run by State governments under the Unorganized Workers' Social Security Act, 2008.
4. Still, a large number of informal workers are outside the ambit of any social security even after 13 years. The absence of definite and unambiguous provisions in the present code would further complicate the achievement of universal registration.
5. Also, experience shows that there is an awful lack of awareness among informal workers regarding social security schemes. Online registration places a further challenge as most informal workers lack digital literacy and connectivity.
6. Informal workers also find it difficult to furnish all documentary papers required as part of the registration process. Most informal workers are footloose casual workers (26% of all workers) and self-employed (46% of all). They move from one place to another in search of livelihoods.
7. Furnishing proof of livelihood and income details in the absence of tangible employer-employee relations is very difficult. Such requirements deter informal workers from completing the registration and they continue to remain outside the social security ambit.

Inter-State cooperation must

1. Further, as unorganised workers are spread across the length and breadth of India, inter-State arrangement and cooperation become imperative. The code does not provide for such eventualities.
2. Ideally, the central government should conceptualise a basic structure, which if successful, should be adopted by States after necessary customisation. Without such a basic structure, the implications of this code would be too varied across States to be administered.

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3. Providing holistic social security cover for the unorganised workforce in a simple and effective manner is something lost in the Centre-State labyrinth and jurisdictional or institutional overlap.

Key benefits

1. Maternity benefit: Under the SS Code, the provision of maternity benefit has not been made universal. Maternity benefit is presently applicable for establishments employing 10 workers or more. The definition of 'Establishment' in the proposed code did not include the unorganised sector.
2. Employees Provident Fund: The SS Code maintains that the Employees' Provident Fund Scheme will remain applicable, as before, to every establishment in which 20 or more employees are employed. Thus, for informal sector workers, access to employees' provident fund remains unfulfilled too in the new code.
3. Payment of gratuity: Gratuity shall be payable to eligible employees by every shop or establishment in which 10 or more employees are employed, or were employed, on any day of the preceding 12 months.
4. But although payment of gratuity was expanded in the new Code, it still remains inaccessible for a vast majority of informal workers.

Lost opportunity

1. The provision of social security could be used to formalise the workforce to a certain extent. Employers could have been made to own up to the responsibility of providing social security to their workers.
2. The state has a responsibility but the primary responsibility still lies with employers since they are taking advantage of workers' productivity.

India is ageing without social security, and the demographic dividend of the young workforce that could support the ageing ends in 15 years. This is a dreadful failure on the part of the state in a time of dire crisis for the nation.