Death by design
Tighter regulations cannot eliminate the element of danger intrinsic to jallikattu

In situations involving humans and animals, Murphy’s law takes a strong hold: if things can go wrong, they most likely will. Jallikattu may have drawn the attention of animal rights activists for the innumerable accounts of cruelty to bulls, but the deaths fall mostly on the human side of the ledger. The animals suffer but generally survive the ordeal, while a few youth lose their lives. A tragedy as in Viralimalai in Pudukottai district of Tamil Nadu, where two men were gored to death by bulls, was waiting to happen. Whatever the precautions taken, and there were many, one cannot prepare for the behaviour of a rampaging bull. Viralimalai jallikattu may not be as famed as the Alanganallur or Palamedu events, but this year it had the full weight of the government behind it. The event was organised by Health Minister C. Vijaya Baskar, a bull-owner himself, in an attempt to create a ‘record’ for the largest number of bulls in a single arena. The event got a bigger profile with Chief Minister Edappadi K. Palaniswami in attendance. Multi-tier metal galleries were erected on either side of the arena to accommodate the thousands who had turned up to watch the contest. Double barricades were in place at the vaadivasal, the entry point for the bulls, but the tragedy happened at the exit point, the open area for collection of the bulls after the event. The contest was over, and the bull-tamers were no longer chasing the bulls. But how were the bulls to know? An owner trying to rein in his bull was gored to death by another behind him, and a spectator who wandered out of the protective cover at the scene of action bled to death on being pierced in the abdomen.

Could anything have been done differently? In keeping with the guidelines set by the Supreme Court to regulate the sport, the Health Department had also deployed teams of doctors from Pudukottai. Medical experts from Tiruchi and Thanjavur Medical Colleges were deployed to attend to emergency cases. A makeshift operation theatre was also set up at the venue. After Sunday’s tragedy, jallikattu events of the future might have barricades at the collection points too. But danger is in the very nature of the blood sport that is jallikattu. Unpredictability is intrinsic to the sport. Attempts to ban the sport have been opposed on the ground that it is an inseparable part of Tamil Nadu’s culture. The Tamil Nadu government in 2017 took the ordinance route to allow for the holding of jallikattu following a ban
Summit 2.0

A second Trump-Kim meeting could do with a Chinese nudge and a South Korean whisper

Even though there was little progress in achieving the goals set in the historic meeting between U.S. President Donald Trump and Chairman Kim Jong-un of North Korea in June 2018, the announcement of a second summit next month is a step in the right direction. The fact that Pyongyang has ceased its nuclear muscle-flexing, and has not tested any nuclear-capable device or launched any missile for more than a year, is reason for continued patience and confidence in the dialogue. The Singapore meeting generated mutual goodwill and hopes of a breakthrough. But in the declaration the leaders had promised a denuclearisation of the Korean Peninsula without indicating a timetable or the modalities of reaching that far-sighted end-goal. In the months since the meeting, Pyongyang’s anticipation of an easing of U.S. sanctions have not materialised, while information about the inventory of North Korean nuclear stockpiles that Washington had sought as a first step towards a verifiable dismantling of the North Korean arsenal, has not been forthcoming. Underscoring the stalemate, U.S. Vice President Mike Pence stated days before the announcement of the coming bilateral summit that Pyongyang had made little headway on its commitments. Similarly, Secretary of State Mike Pompeo’s persistent efforts since the Singapore meeting have come to nought. The concept of “complete denuclearisation” of the Korean Peninsula that formed the crux of the Singapore declaration has become a subject of conflicting interpretations. Pyongyang insists that the expression must have a wider meaning and include the U.S. military umbrella that extends across South Korea and Japan. It contends that North Korea will be the first target in the event of a pre-emptive U.S. strike. For nuclear hawks in Washington, the stalemate is at best a case of Mr. Trump’s diplomatic gambit having gone awry and at worst, an impasse that allows Pyongyang to prevaricate and give nothing away.

Against this backdrop, the prospects for any meaningful progress appear to hinge on mediation by Beijing and Seoul. Moon Jae-in, South Korea’s President, favours rapprochement with the neighbour, and a lasting resolution of the Washington-Pyongyang nuclear imbroglio, advocating dialogue. After his recent meeting with the Chinese leader Xi Jinping, Mr. Kim reinforced his pledge to rid the region of nuclear arms and expressed a willingness for another summit with Mr. Trump. But he emphasised Pyongyang’s need for security guarantees, replacing the decades-long armistice with a formal peace treaty to mark the end of the 1950-1953 Korean War. Toning down his rhetoric, President Trump has displayed a readiness to wait and watch. It is not certain if the sober mood will translate into tangible outcomes. But that would be a credible offer that can lure Mr. Kim to reciprocate on the nuclear front.
The ambiguity of reservations for the poor

While the constitutional amendment may survive the ‘basic structure’ test, the hardest test will be its implementation

The 103rd Constitution Amendment Act introducing special measures and reservations for ‘economically weaker sections’ (EWS) has been perceived as being obviously unconstitutional. This article is sceptical of such a reading and takes the view that a constitutional challenge to the amendment will take us into unclear constitutional territories. The strongest constitutional challenge might not be to the amendment itself but to the manner in which governments implement it. There is no foregone conclusion to a potential challenge and we would do well to start identifying the core constitutional questions that arise. To be clear, I am here concerned only with questions that arise within constitutional law.

Special measures

Article 15 stands amended enabling the state to take special measures (not limited to reservations) in favour of EWS generally with an explicit sub-article on admissions to educational institutions with maximum 10% reservations. The amendment to Article 16 allows 10% reservations (and not special measures) for EWS in public employment and does so in a manner that is different from reservations for Scheduled Caste/Scheduled Tribes and Other Backward Classes. The amendment leaves the definition of ‘economically weaker sections’ to be determined by the state on the basis of ‘family income’ and other economic indicators. Also critical to this amendment is the exclusion of SC/STs, OBCs and other beneficiary groups under Articles 15(4), 15(5) and 16(4) as beneficiaries of the 10% EWS reservation.

A good point to start the constitutional examination is the Supreme Court’s view on reservations based purely on economic criteria. Eight of the nine judges in Indra Sawhney (November 1992) held that the Narasimha Rao government’s executive order (and not a constitutional amendment) providing for 10% reservations based purely on economic criteria was unconstitutional. Their reasons included the position that income/property holdings cannot be the basis for exclusion from government jobs, and that the Constitution was primarily concerned with addressing social backwardness.

Basic structure doctrine

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However, the decision in Indra Sawhney involved testing an executive order against existing constitutional provisions. In the current situation, we are concerned with a constitutional amendment brought into force using the constituent power of Parliament. The fact that we are not concerned with legislative or executive power means that the amendment will be tested against the ‘basic structure’ and not the constitutional provisions existing before the amendment. The pointed question is whether measures based purely on economic criteria violate the ‘basic structure’ of the Constitution? I do not think it is a sufficient answer to say that ‘backwardness’ in the Constitution can only mean ‘social and educational backwardness’. Citing the Constituent Assembly debates is not going to take the discussion much further either. It is difficult to see an argument that measures purely on economic criteria are per se violative of the ‘basic structure’. We can have our views on whether such EWS reservations will alleviate poverty (and they most certainly will not), but that is not really the nature of ‘basic structure’ enquiry. Providing a justification for these measures as furthering the spirit of substantive equality within the Indian Constitution is not very difficult.

Economic criteria (if seen as poverty) forms the basis for differential treatment by the state in many ways and it would be a stretch to suddenly see it as constitutionally suspect when it comes to ‘special measures’ and reservations in education and public employment. Poverty inflicts serious disadvantages and the prerogative of the state to use special measures/reservations as one of the means to address it (however misplaced it might be as a policy) is unlikely to fall foul of the ‘basic structure’ doctrine.

A challenge to the amendment may lie in the context of Article 16 by virtue of shifting the manner in which reservations can be provided in public employment. Under Article 16(4), reservations for backward classes (SC/STs, OBCs) are dependent on beneficiary groups not being ‘adequately represented’ but that has been omitted in the newly inserted Article 16(6) for EWS. The amendment through Article 16(6) ends up making it easier for the state to provide reservations in public employment for EWS than the requirements to provide reservations for ‘backward classes’ under Article 16(4). In a sense that is potentially a normative minefield for the Supreme Court. On the one hand, it is confronted with the reality that ‘backward classes’ like SC/STs and OBCs are disadvantaged along multiple axes and on the other, it is now far more difficult for the state to provide reservations to these groups compared to the EWS. The response might well be that ‘representation’ is not the aim of EWS reservation and questions of ‘adequacy’ are relevant only in the context of representation claims like those of the backward classes under Article 16(4).

Questions and challenges

In many of the responses to the amendment, breaching the 50% ceiling on reservations has been cited as its greatest weakness. It is hard to see the merit of that argument because the amendment by itself does not push the reservations beyond 50%. While it might be a ground to challenge the subsequent legislative/executive actions, the amendment itself is secure from this challenge. But even beyond this narrow technical response, the 50% ceiling argument is far from clear. In Indra Sawhney, the majority of judges held that the 50% ceiling must be the general rule and a higher proportion may be possible in ‘extraordinary situations’. Fundamentally this argument stems from an unresolved normative tension in Indra Sawhney. While committing to the constitutional position that reservations are not an ‘exception’ but a ‘facet’ of equality, the majority in Indra Sawhney also invokes the idea of balancing the equality of opportunity of backward classes ‘against’ the right to equality of everyone else. When governments implement the EWS reservations and push quotas beyond 50%, the Supreme Court will be forced to confront this normative tension. If reservations further equality, what then are the justifications to limit it to 50% when the identified beneficiaries constitute significantly more than 50%? The answer to that question might lie in Indra Sawhney’s position that
the constitutional imagination is not one of ‘proportional representation’ but one of ‘adequate representation’. However, as discussed above, if abandoning the ‘adequacy’ requirement per se is upheld for EWS reservations, the basis for a 50% ceiling becomes unclear.

While the constitutional amendment by itself might survive the ‘basic structure’ test, the hardest test for governments will be the manner in which they give effect to the amendment. The definition of ‘economically weaker sections’ will be a major hurdle because the political temptation will be to go as broad as possible and include large sections of citizens. But broader the definition, greater will be the constitutional risk. For example, if beneficiaries are defined as all those with family income of less than ₹8 lakh per annum, it must necessarily fail constitutional scrutiny. To justify that an individual ‘below poverty line’ and another with a family income of ₹8 lakh per annum belong to the same group for purposes of affirmative action will involve constitutional jugglery at an unprecedented level. But then, the history of our constitutional jurisprudence has prepared us well for such surprises.

The fault lines of diplomatic recrimination

The Huawei episode raises serious concerns over issues that are germane to international business and trade

One of the world’s largest telecom companies, Huawei, is at war with a few powerful western nations led by the United States. This is not a new spat. The conflict, which has been simmering for quite a few years, reached its crescendo on December 1, 2018 with the detention and arrest of Sabrina Meng Wanzhou, its Chief Financial Officer, in Vancouver, Canada, for allegedly breaking U.S. sanctions on Iran by way of bank frauds. The U.S had asked Canada to detain her.

Ms. Meng, a tech heiress, is the daughter of Huawei's founder Ren Zhengfei and was arrested while in transit at the airport. A Canadian court has granted her bail, but she could face extradition to the U.S. The incident, which has led to an uproar in China, has left Canada embarrassed, as any decision will have a bearing on its ties with Beijing.

The more recent conviction (January 14) of a Canadian national Robert Lloyd Schellenberg to death by a court in China for drug trafficking has only aggravated the controversy. Significantly, this conviction was based on a retrial that took place after the arrest of Ms. Meng. The fact that Canada
does not have a death sentence on its statute books complicates relations between the two countries. The Canadian Prime Minister, Justin Trudeau, has assailed this as a political move. Additionally the recent detention in China of two other Canadian citizens (one, a diplomat on leave) on national security grounds has muddied the waters further.

The Chinese assessment is that the U.S. is exercised over the growing stature of Huawei and the resultant threat to U.S. technology companies and links this to the action against Ms. Meng. It must be remembered that Huawei has overtaken Apple to become the second largest maker of smartphones, and its investments in research and development are growing at a frenetic pace.

Need for protocol

The conflict between China and the West, especially the U.S., raises serious concerns over issues that are germane to international business and trade. The first is its impact on the troubled state of international relations and international law that operates in such cases. There is also the issue of the apparent ease and arbitrariness with which a nation determined to outwit a rival can hit the latter hard. There does not seem to be an ethical set of rules.

No one suggests that Ms. Meng did not transgress U.S. law. She may have acted surreptitiously to counter U.S. sanctions against Iran. The point, however, is whether such drastic action against a top executive was warranted, especially in the context of the fragile relationship between the two nations. The implications of the incident, in terms of the need for a protocol between nations in the area of criminal justice must be pondered over. Some experts cite the concept of ‘long-arm jurisdiction’ in support of the U.S. action — such jurisdiction empowers a nation to enforce its laws and rules over foreign entities, generally through courts.

The concept has a political colour to it and, therefore, questionable in cases such as Ms. Meng’s arrest. The Chinese criminal action against three Canadian nationals also smacks of vindictive conduct.

On the other side, the detention of Ms. Meng was obviously meant to send out a signal not only to China but also to prospective violators of U.S. sanctions. If this was the objective, this was achieved, with the rider that a nation acting so peremptorily may have to brace itself to meet retaliatory action by the targeted nation, as borne out by the Chinese action against the three Canadians, one of whom now faces execution. This collateral damage to Canada should set alarm bells ringing, especially in the West.

Issue of cybersecurity

A second important issue relates to cybersecurity. China, along with Russia, has long been suspect in the eyes of the West for spying, the basis for this being proven instances of online attacks and unestablished cases of breaches in western computer systems. In the case of Huawei, the western line is that as it is a corporation close to the Chinese establishment, its activities cannot be purely technological and commercial. Ren Zhengfei had links with the People’s Liberation Army (PLA). The specific charge against Huawei is that in every piece of hardware sold by it, there are microchips and devices that provide substantial information to the Chinese authorities. The irony is that there has been no major irrefutable evidence communicated to the rest of the world to substantiate this charge. Western agencies say that Huawei is so smart and skilful that it is impossible to ferret out such evidence. On its part, the latter has dismissed the charges against it as fanciful and motivated, only in order to keep it at bay after its successful forays into American hardware bastions.
Third is the issue of the continued fragility of cybersecurity as far as the average computer user is concerned. Breaches even in highly protected environments across the globe hardly instil confidence in ordinary customers who have bought devices and follow procedures, often at great expense, to plugging security loopholes in their systems. There is, therefore, a growing reluctance on the part of many large corporations to invest more in cybersecurity. From this perspective, an emerging philosophy is that security can never be 100%, and that one should not be unduly agitated over inevitable cyberattacks, as long as they do as they do not cause major loss, economic or reputational.

There is no means to guess the impact of the U.S. action on to-be-released and game-changing 5G technology, and in which Huawei has great stakes. China maybe expected to up the ante if any Western nation actually goes to the extent of banning Huawei from a role in the upgradation. China suspects that the anti-Huawei campaign is only at the instance of its competitors to cut it down to size on the eve of the launch of a valuable product. But this again is in the realm of speculation.